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Union Citizenship, the Marshallian Model and the Protection of Social Rights

Ph.D Thesis

by

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Law School
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March 2011

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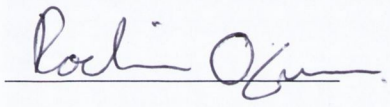

Roderic O'Gorman

Summary

This thesis seeks to examine whether Union citizenship protects social rights to the extent necessary for it to be legitimately be described as 'citizenship'. The research methodology is primarily a doctrinal one and places a strong emphasis on the analysis of primary materials such as case law, the Union treaties and secondary legislation, as well as relevant white papers, reports and policy documents.

The thesis begins describing the Marshallian concept of citizenship, which is the basis for the definition of citizenship employed, and then outlines the role that social rights play within this model. Social rights are defined as covering two distinct areas: individual social entitlements protected in legislation and social rights values, which are protected within constitutions. It is argued that both are necessary for a legitimate model of citizenship.

Having outlined the status of social rights in Community law prior to the Lisbon Treaty, the thesis then examines the introduction of Union citizenship into EU law and its subsequent treatment by the Court of Justice. It will be show that while both the case law of the Court and the legislative response through the Citizenship Directive gave significant protection to individual social entitlements, the gaps in social rights protection at Union constitutional level mean that prior to the Lisbon Treaty, EU citizenship could not be described as a genuine form of citizenship within the Marshallian model. However, the changes resulting from the Lisbon Treaty, in terms of the Treaties and the legal effect granted to the Charter, mean that there is now an opportunity to resolve this lack of protection and create a genuine form of European Union citizenship.

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Chapter 1 – Introduction

1.2 Introduction

The establishment of European Union citizenship through the Treaty on European Union in 1992 has given rise to intense debate about its implications.[1] Some of this discussion has focused on the appropriateness of the term 'citizenship' for the new status created at Maastricht. However, barring some notable exceptions, the literature has not significantly addressed whether the nature of Union citizenship is such that it can be legitimately described as a genuine form of citizenship, when compared to traditional models. Taking the Marshallian model as its basis, this thesis seeks to address certain aspects of this discursive deficit.

The Marshallian model of citizenship proposes a status based on the protection of three sets of rights: civil rights, political rights and social rights.[2] As will be demonstrated in Chapter 2, the protection of social rights has always been of a weaker level compared to civil and political rights, within the general theory of citizenship. For this reason, social rights form the key basis of this thesis. It examines whether Union citizenship adequately protects social rights and thereby creates a European social citizenship which sufficiently meets the requirements of the Marshallian model to justify the term 'citizenship' being applied to the new status created by the Maastricht Treaty.

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[1] See generally La Torre M., (ed.) *'European Citizenship: An Institutional Challenge'*, (Kluwer Law International, 1998); Reich N., 'Union Citizenship – Metaphor or Source of Rights?', (2001) 7 *European Law Journal* 4, Jacobs F., 'Citizenship of the European Union – A Legal Analysis', (2007) 13 *European Law Journal* 591; O'Leary S., 'Developing an ever closer Union between the people of Europe', Edinburgh Mitchell Working Papers Series, 6/2008 (Europa Institute, University of Edinburgh).

[2] Marshall TH., 'Citizenship and Social Class', in Marshall & Bottomore (eds.), *Citizenship and Social Class*, (Pluto Press, London, 1992), at 8; Lister M., 'Marshall-ing Social and Political Citizenship: Towards a Unified Conception of Citizenship', *Government and Opposition*, 471 at 471; Dwyer P., *Understanding Social Citizenship*, (The Policy Press, 2004), at 4.

This issue of the legal status of social rights is one that is a source of controversy in many jurisdictions.[3] Despite this, all European countries and indeed, most western industrialised nations, accept a degree of legislative protection of basic social entitlements for individuals, which are often described as 'welfare rights'.[4] The majority of European countries go further than the protection of basic individual welfare entitlements and also include references to social rights within their national constitutions.[5] These may be in the form of a constitutional protection of individual social rights, or they may consist of guarantees of wider social values within the constitutional framework of that country.[6] Due to the constitutional protection of these social values, such European nations are described as 'social states', where the state has an obligation to attenuate the force of the free market.[7] Therefore citizens of most European countries derive two sorts of protection of social rights. First, an individual's right to avail of social entitlements through the provision of certain public goods and services. Second, protection is provided through the very fact of living in a society that mandates a constitutionalised recognition of social rights and social values through the social state. It will be argued that these two elements constitute vital elements of 'social citizenship' within the Marshallian model.

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[3] See De Burca G., 'The Future of Social Rights Protection in Europe', in De Burca G. & De Witte B (eds), *Social Rights in Europe*, (OUP, 2005), at 4; Ewing KD., 'Social Rights and Constitutional Law', (1999) *Public Law* 104, at 121; Fabre C., *Social Rights Under the Constitution: Government and the Decent Life*, (OUP, 2004); Arango R., 'Basic Constitutional Rights, Social Justice and Democracy', (2003) 16 *Ratio Juris* 141; Gori G., 'Domestic Enforcement of the European Social Charter: The Way Forward', in De Burca G. & De Witte B (eds), *Social Rights in Europe*, (OUP, 2005), at 71.

[4] See Forsythe D., 'The US and International Welfare Rights: Law, Social Reality and Political Choice', in Hertel S. & Minkler L. (eds) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge, 2007); Dell'Olio F., 'Supranational undertakings and the determination of social rights', (2002) 9 *Journal of European Public Policy* 292, at 298; Geddes, A. (2000) *Immigration and European Integration: Towards Fortress Europe?*, (Manchester: Manchester University Press, 2000), at 154.

[5] Joerges C., 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', EUI Working Papers, LAW No.2007/25, (European University Institute), at 3.

[6] For example see Articles 42.4 and 45, Irish Constitution; Article 20, German Constitution; Article 64, Portuguese Constitution; Article 47, Spanish Constitution.

[7] See Katrougalos G.S., 'European 'Social States' and the USA: An Ocean Apart?', (2008) 4 *European Constitutional Law Review* 225; Scharpf F., 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies* 645; Katrougalos G., 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07; Joerges C. & Rodl F., '"Social Market Economy" as Europe's Social Model', EUI Working Paper LAW No. 2004/8 (European University Institute)

Taking this as the general model followed in the majority of Member States, attention turns to Union citizenship and the extent to which it guarantees a social rights aspect. Two immediate problems, inherently related to the European Union, arise.

First, the European Union does not have the competence to create a single social welfare system, but operates with each of the Member States continuing to run their own independent entitlement structures. This results in the difficulty of attempting to assess whether Union citizenship adequately protects the individual element of social citizenship, across a transnational entity of 27 separate systems. It will be argued that the individual social entitlement element will be adequately protected according to a theory of social citizenship, if a Union citizen in a host Member State is fully entitled to avail of the social entitlements which that state provides to its own nationals. This is described in this thesis as 'full social integration'.

The second difficulty springs from the fact that the European Union has at its very heart the concept of economic integration.[8] It will be demonstrated how this fact, and the resulting elevation of free market principles to the status of constitutional rights, is something at odds with the nature of the social state. In particular, this is due to the fact that the Union is lacking a concurrent constitutionalised protection of social rights. This emphasis placed on the fundamental freedoms creates difficulties for the social state systems of Member States on two separate fronts. First, individual Union citizens or companies can mount actions against a Member State claiming that elements of national law inhibit their enjoyment of the fundamental freedoms. The result of such litigation can have significant implications for the social policy of the Member State, particularly in view of the supremacy of Union law over all elements of national law.[9] Second, in light of Article 4(3) TEU, the Member States are at

[8] Katrougalos G.S., (2007), above note 7, at 243; *see* Ball C., 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order', 37 *Harvard International Law Journal* 307.
[9] Ball, above note 1, at 333-4.

all times under an obligation to ensure the fulfilment of the Union's objectives. Accordingly, any actions that they take which in some way threaten the fundamental freedoms risks a Commission enforcement action under Article 258 TFEU or a reference to the Court of Justice under Article 267 TFEU, even if such actions are in furtherance of national constitutionally mandated social objectives.[10] Therefore, Member States not only have to contend with challenges brought in national courts by individuals or companies, but also the 'top-down' scrutiny of the Union institutions. As such, the application of EU law in certain contexts can represent an entirely new challenge to the manner in which Member States run their social services, and one which is based on a constitutionalised ideology, completely at variance with that of the social state.

In light of these concerns, this thesis asks whether the protection of social rights, which are an essential component of citizenship, has been sufficiently replicated at the EU level to justify the use of the word 'citizenship'. It must be determined whether a 'European Social Citizenship' actually exists. It will be argued that while a genuine European social citizenship has not yet been created; two developments in EU law have created the conditions which could enable it to be brought about. This thesis will show that the introduction of Union citizenship and its subsequent development through case law and secondary legislation provides guarantees surrounding the individualised elements of social citizenship, thus providing a path towards full social integration for a Union citizen into another Member State. Coupled with this, the granting of legal effect to the Charter of Fundamental Rights and changes made to the objectives of the European Union, both brought about through the Lisbon Treaty, have provided the Member States with new opportunities to protect the social rights that are guaranteed in their own legal systems against interference from the Union institutions.

[10] Scharpf F., above note 7, at 657.

In the context of the transnational status that Union citizenship is, it will be argued that this combination of the possibility of full social integration in a host Member State combined with a new "constitutional parity"[11] between social rights and the fundamental economic freedoms, equates to a sufficient protection of the social rights element of citizenship to meet the requirements of the Marshallian model.

1.2 Chapter Outlines

Chapter 2 examines the concept of citizenship and how it has developed. It places emphasis on the work of Thomas Marshall as the key proponent of the argument that social rights are a prerequisite for citizenship. Having considered some of the critiques of Marshall's work, the Chapter advocates the Marshallian model of citizenship – that is Marshall's work as clarified by subsequent authors – as the template for this thesis. The difficulties created by having to apply the Marshallian model to a citizenship that is transnational are then considered. The Chapter concludes by identifying that the ability to avail of individual social entitlements in another Member State on the same basis as its citizens and benefiting from European constitutional protection of social rights and values, when similar rights and values in national constitutions are threatened by the application of Union law, are the two key determining factors when ascertaining whether Union citizenship is indeed a valid form of citizenship.

Chapter 3 begins by explaining what constitutes 'social rights' and 'social values' for the purposes of this thesis. The chapter then describes the constitutionalised protection of social rights in Union law up to the Treaty of Lisbon. This is done through an analysis of the

[11] *Ibid.*, at 665-6.

Treaties themselves, but also by looking at the position of the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. The role of fundamental rights as part of the general principles of Community law is also examined. The chapter concludes with a detailed analysis of the circumstances in which an individual was historically able to obtain social entitlements in a host Member State, prior to the introduction of Union citizenship. This involves a detailed analysis of the position of the 'worker' in Union law, but also the gradual expansion of rights to non-economically active persons.

Chapter 4 charts the response of the Court of Justice to the introduction of Union citizenship and the manner in which it used this event to significantly enhance the protection of social rights for Union citizens in a host Member State. The extent to which economic activity is required in order to gain the benefit of Union rights will be examined, along with economic risk criteria which the Court implemented to give national governments some control over the benefits being claimed by Union citizens. Particular focus will be placed on the concept of 'financial solidarity between Member States', which has been developed by Advocates General and the Court into a tool which can result in the undermining of Union secondary legislation.

The response of the Union Legislature to the extensive jurisprudence of the Court is examined in Chapter 5, as manifested through the Citizenship Directive. The key provisions of this, such as the permanent right of residence and the exceptions to the right of non-discrimination, are examined for their impact on Union citizens moving to another Member State. Particular attention is paid to the aspects of the Court's jurisprudence that the Directive confirms or implicitly rejects.

Chapter 6 outlines the major flaw in the protection of social rights and values in Union law, this being the failure to grant constitutional status to these rights and values. This gap is demonstrated firstly by showing how, despite judgments suggesting that fundamental

rights can trump fundamental freedoms when the two come into conflict, social rights can not benefit from such protection because, as the case law demonstrates, these rights are not embedded within any of the sources of law from which the Court draws the general principles of Community law. Having illustrated this, the chapter then reviews conflicts between social right values and the fundamental freedoms in three specific areas: health, education and employment rights; and reveals how the lack of constitutionalised social rights has impacted on decisions in these areas.

Having illustrated the legal position of social rights in Union law in the preceding chapters, Chapter 7 then applies the Marshallian model to European Union citizenship. The chapter begins by addressing a number of preliminary points; such as whether the pre-Maastricht status of Community nationals was akin to a form of citizenship and whether there was a link between citizenship and economic activity. The chapter also seeks to refute some arguments that the Marshallian model should not be applied to Union citizenship. It then examines the reality of Union citizenship, as experienced both in a host and home Member State, under the headings established by the Marshallian model: unified concept, equality of status and the ideal version of citizenship. The conclusion of this analysis is that while the right of permanent residence provides for full social integration within the host Member State, the failure of Union citizenship to adequately protect an individual's social rights in a home State when these conflict with the fundamental freedoms means that Union citizenship does not sufficiently mirror the Marshallian model.

Having demonstrated the major gap in the protection of social rights, Chapter 8 argues that changes made to European Union law through the Lisbon Treaty, specifically the introduction of new social values in Article 3 TEU and the granting of legal effect to the Charter of Fundamental Rights, offer the potential to solve this problem. The chapter addresses the concept of the 'social market economy' and the potential weaknesses of this

term. It then looks, in some depth, at those provisions of the Charter that will impact on social rights, the possible limitations of the document, and undertakes an analysis of some of the initial decisions of the Court of Justice where it has been considered.

Chapter 9 makes some concluding comments regarding how the Court of Justice should deal with the Lisbon Treaty changes and highlights the need to clarify the status of the term 'solidarity' in Union law.

1.3 Research Methodology

The methodology used throughout the research period was primarily doctrinal and placed a strong emphasis on the analysis of primary materials such as case law, the Union treaties and secondary legislation, as well as relevant white papers, reports and policy documents. The extensive range of available online sources has greatly assisted research on these primary documents. Websites such as *Curia*, *Eur-Lex* and *Pre-Lex* allow access to Court decisions, current legislation and early drafts of legislation respectively. The Court of Justice website has a 'Press Release' section where recent decisions or opinions are highlighted, allowing the researcher to keep up to date with any changes or clarifications of the law. Some difficulty was encountered in locating older editions of the Official Journal, containing draft legislative proposals. However, the Trinity College library has a complete collection of the Official Journal and this allowed for hard copies of the legislation to be found.

Books, journal articles and other academic papers formed the basis of the secondary material used. A large range of books were consulted throughout the research process including broad textbooks on EU law such as Craig & De Burca (4th Ed) and Chalmers (2nd Ed) and then much more specialised texts such as Fahrmeir - *Citizenship: The Rise and Fall of a Modern Concept* and Maduro - *We the Court: The ECJ and the European Economic*

Constitution. Themed editions of books containing essays on a particular topic proved highly useful by giving a variety of different and often contrasting insights on a particular topic: for example *European Citizenship and Social Exclusion* (Roche & van Berkel R eds.), *Social Rights in Europe* (De Burca & De Witte eds.) and *European Citizenship: An Institutional Challenge* (La Torre ed.).

All of the major EU law journals are available online through databases such as Kluwer, Heinonline, Westlaw and Business Source Premier. Key journals that have been consulted throughout include the *Common Market Law Review*, the *European Law Review*, the *Modern Law Review* and the *Yearbook of European Law*. Journals with a more specialised focus that were relevant included *Legal Issues in Economic Integration*, the *Industrial Law Review* and the *Journal of Common Market Studies*. Recent editions of all relevant journals were regularly checked for new, germane articles. The internet also provides access to useful online collections of academic papers or working papers. Those frequently used include the Jean Monnet Working Papers and the Mitchell Working Papers Series.

Publication lists for academics on university websites allowed for swift identification of other publications by authors whose work was found to be particularly relevant or well researched. As the research period went on, the author became more confident in distinguishing between good research and research of a lesser quality. Examples of the latter point included situations where statements were not adequately backed up, references were not correct or sufficient, or indeed factual inaccuracies were identified in some texts.

During the research period, the author had two academic articles published. The peer review process for these was very useful and the chapters based on these two publications have benefited significantly from the process. Comments on a conference paper delivered during the period were also constructive and prompted re-thinking of some sections. The author attended a pair of seminars under the title of *Empowerment and Disempowerment of*

the European Citizen in the United Kingdom towards the end of the research period. These exposed the researcher to the views of key academics and gave both clarification and inspiration on some final points.

The author was engaged in undergraduate and postgraduate level lecturing throughout a substantial period of the research on a range of courses, including EU law. This required that the author had to be up to date with current developments across all aspects of Union law. This was beneficial in that the author was generally familiar with emerging trends in areas of Union law outside the immediate focus of the thesis. Further, engagement with students during lectures sometimes facilitated the uncovering of new perspectives on certain issues. The author was also involved as a legal advisor to a campaign group advocating a 'Yes' vote in the second Lisbon Treaty referendum in Ireland, and this necessitated extensive research into the implications of the incorporation of the Charter of Fundamental Rights and the wider Treaty changes.

1.4. Scope of the Thesis

As with any thesis, it is important to clarify the extent of the scope of the research. In the current context, a number of issues are deliberately omitted from the span of the research question.

An area of significance for the purposes of the exercise of free movement concerns the application of social security systems across the Member States. However, the extensive case law on the relevant legislation, Regulation 1408/71 and the amending Regulation 883/2004 will not be considered.[12] This is primarily because it "[...] is neither, in itself, a

[12] Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L 149/2; Regulation (EC) No 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security schemes [2004] OJ L 166/1.

source of European social rights, nor does it safeguard the social rights granted by a particular Member State. It merely co-ordinates national social security systems [...]".[13] As such, the Regulation is primarily about overseeing the payment of social security entitlements already earned in a home Member State, rather than the creation of new sets of rights. While this is in itself significant, it is submitted that it does not have direct relevance to the focus of this thesis and is therefore omitted.[14]

As will be described in Chapter 2, this thesis proceeds on the basis that a valid form of citizenship is made up of three rights components; civil, political and social. The focus of this thesis is on the protection of social rights within the European Union. To that extent, civil and political rights are not covered in any great depth, other than some references in Chapter 7.3.

Recent years have seen extensive discussion about the concept of the 'European Social Model'. The Commission has defined this as "[...] a combination of economic performance and social solidarity, based on the social consensus and the tripartite negotiations [...]".[15] Undoubtedly this is an important element of the Union's policy in the social sphere, particularly in light of the Union's Lisbon Agenda. However, it is submitted that in light of its soft law and negotiated focus, it should not be considered in the context of this thesis.

Finally, this thesis does not set out to examine the position of third country nationals (TCNs) in any specific detail. It was felt that the focus of the work should be on what Union citizenship should protect, rather than on the separate, though equally important question of who should it protect.

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[13] Lenaerts K. & Foubert P., 'Social Rights in the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing', (2001) 28 *Legal Issues of Economic Integration* 267, at 273.

[14] See further Pennings F., *Introduction to European Social Security Law*, (Social Europe Series, 8) (Antwerpen, Intersentia, 2003); Verschueren H., 'European (Internal) Migration Law as in Instrument for Defining the Boundaries of National Solidarity Systems', (2007) *European Journal of Migration and Law* 307.

[15] CEC (1994) European Social Policy, COM(94) final, Brussels 7.7.94.

Chapter 2 – Concepts of Citizenship and European Social Citizenship

2.1 Introduction

Citizenship is a concept whose roots, in Europe at least, stretch back as far as the City States of the Greek Hellenic Period.[1] However, as the status of citizenship developed over subsequent centuries, there was never a fixed view of the rights and duties that it encompassed. As such, there were substantial differences between what the Greeks valued in their citizenship and what the Romans valued in theirs.[2] Today, practically all commentators recognise citizenship as protecting three broad elements – political, civil and social rights.[3] However, what individual jurisdictions have regarded as worthy of protection within each of these three elements has varied extensively.

Social rights and the role that they play within the context of European Union citizenship form the basis of this thesis. In order to properly evaluate this, it is first necessary to assess the role played by social rights in the concept of citizenship generally. The purpose of this chapter is twofold. Firstly, it seeks to briefly outline how social rights eventually evolved to be regarded as an essential element of a properly functioning version of citizenship. In undertaking this, some common themes regarding the progression of citizenship will be highlighted; in particular its relationship with the nation state and nationality. The chapter then focuses on the theoretical framework for citizenship outlined by Marshall and on the role social rights play within this. In doing so, the concept of 'social

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[1] Turner B, *Citizenship and Social Theory*, (Sage Publications, 1993), at vii; Heater D., *Citizenship: The Civic Ideal in World History, Politics and Education*, (Manchester University Press, Manchester and New York, 2004), at 3-6.

[2] Heater D., above note 1, at 5, 17.

[3] Marshall TH., 'Citizenship and Social Class', in Marshall & Bottomore (eds.), *Citizenship and Social Class*, (Pluto Press, London, 1992), at 8; Lister M., 'Marshall-ing Social and Political Citizenship: Towards a Unified Conception of Citizenship', *Government and Opposition*, 471 at 471; Dwyer P., *Understanding Social Citizenship*, (The Policy Press, 2004), at 4.

citizenship' will be illustrated. The work of Marshall and subsequent authors will be analysed and the key principles devised in this work; citizenship as a unified concept, equality of status and the ideal concept of citizenship will each be portrayed.

Having examined Marshall's theory, the chapter then outlines how this model can be applied in the context of the European Union. What is being considered is whether Union citizenship protects a version of European social citizenship. This requires transposing the Marshallian model of citizenship onto a polity that is spread across 27 separate countries. It is therefore necessary to defend the legitimacy of a transnational version of citizenship. This is followed by explaining how in the context of Union citizenship, both an individual and a constitutional protection of social rights is required. This requirement for two forms of protection is based on differences between the concepts of the 'welfare state' and the 'social state' and how social rights are protected in these respective systems.

2.2 Development of citizenship

2.2.1 Evolutionary Development

While versions of citizenship could be seen in Greece and Rome during the Classical Period, its modern form began to evolve in the period following the revolutions in America and France at the end of the Eighteenth Century. Since then, the various elements of civil, political and social rights within citizenship have been protected to different degrees. This development has been described as an "evolution", with civil rights being recognised in the Eighteenth Century, political rights in the Nineteenth Century and social rights in the

Twentieth Century.[4] While this 'evolutionary theory' has been legitimately critiqued on a range of grounds, it is accurate to say that civil rights were broadly the first category of rights to gain widespread protection, followed by political rights with social rights only getting meaningful recognition in the mid-Twentieth Century.[5]

2.2.2 Citizenship, Authority and the Nation State

Throughout much of the medieval period that followed the decline of the Roman Empire, the embryonic forms of citizenship that had existed in the Classical Period were set in abeyance.[6] They were replaced with a relationship of ruler and subject; one based on direct loyalty to king, prince, local noble or indeed, Pope.[7] One of the primary reasons for the absence of citizenship during this time was the weakness of the nation state. This began to change with the Treaty of Westphalia 1648, which saw the creation of the doctrine of state sovereignty.[8] This would become essential for the construction of a state to which the individual could relate and which would serve as the source of citizenship rights.

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[4] Marshall, above note 3, at 8. Marshall defines the civil element as being made up of those "rights necessary for individual freedom – liberty of the person, freedom of speech, though and faith, the right to own property ... and the right to justice". The courts are the defenders of this set of rights. The political facet of citizenship is comprised of "the right to participate in the exercise of political power", either as a member of a body exercising political authority or simply as a voter. The institutions associated with these rights are national parliaments and local authorities. The social aspect of citizenship is described as being "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being, according to the standards prevailing in society". This set of rights is protected by the educational system and the social services, Marshall, above note 1, at 8.

[5] For a description of Marshall's account as "evolutionary", *see* Lister, above note 3, at 471. For criticisms of Marshall on various grounds, *see* Rees M., 'T. H. Marshall and the Progress of Citizenship', in M. Balmer and A. Rees (eds), *Citizenship Today: The Contemporary Relevance of T. H. Marshall*, (London, UCL Press, 1996); Dahrendorf R., 'Citizenship and Social Class', in M. Balmer and A. Rees (eds), *Citizenship Today: The Contemporary Relevance of T. H. Marshall*, (London, UCL Press, 1996); Bottomore T., 'Citizenship and Social Class, Forty Years On', in Marshall & Bottomore (eds.), *Citizenship and Social Class*, (Pluto Press, London, 1992), at 65 – 70; Ewing KD., 'Social Rights and Constitutional Law', (1999) *Public Law* 104, at 114; Katrougalos G., 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07, at 21-1.

[6] Heater., above note 1, at 21.

[7] *Ibid*,, at 22.

[8] *Ibid*., at 29.

During the *Ancien Regime* period, prior to the revolutions, societies were divided into 'estates' which were "dedicated to specific occupations and social roles".[9] Political rights were limited in the extreme, both as regards the narrow nature of the franchise and the limited powers of those elected by it, though the United Kingdom was somewhat of an exception regarding the latter point.[10]

The impact that the revolutions of the late Eighteenth Century had on the concept of citizenship is best typified by the declaration of the French National Assembly, 26 August 1789 which "... defined the relationship between states and their residents in terms of rights, not authority".[11] Both France and the United States saw an evolution from societies based on estates to ones comprised of people or citizens, with constitutional documents defining who the people were.[12] The 'people' owed their loyalty to the state, rather than to any specific ruler. This firm conception of the state, combined with a relationship to that state based on rights rather than authority, form key prerequisites for a functioning model of citizenship.

2.2.3 Citizenship and Nationality

The relationship of nationalism to the state and citizenship was something that featured both in the revolutions of the late Eighteenth Century but also in those of the mid Nineteenth Century. With populations no longer rigidly attached to a divine right monarch as described above, nationality became the new means whereby peoples maintained an attachment to their nation state. The tricolour was the symbol of the French Revolution, but also of France itself.

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[9] Fahrmeir A., *Citizenship: The Rise and Fall of a Modern Concept*, (Yale University Press, New Haven and London, 2007), at 18.
[10] Heater, above note 1, at 31-2.
[11] Fahrmeir, above note, at 1.
[12] Fahrmeir, above note 9, at 27.

In this way citizenship became defined by nationality as well as the categories of legal, political and social rights attaching to it.[13]

However, the correlation between nationality, citizenship and the three classes of citizenship rights has not always been the same for every country. It has been noted how the 1803 French Civil Code made a distinction between nationality and citizenship; the former comprised the population of France with the latter being respectable and independent adult males drawn from this and entitled to vote.[14] As such, the purpose of citizenship regulation was originally similar to its purpose in the United States: to define the boundaries of the French political community by drawing a line between citizens entitled to vote and aliens.[15] This French approach to nationalism, which emphasised the political citizenship role of the members of the French nation, contrasted with the German approach, which stressed the sense of belonging to the 'Volk' deriving from common blood and soil. This version of nationalism was described as a spiritual rather than a political concept.[16] Both Germany and the United Kingdom took a similar approach to the right to vote in having formal citizenship as a distinct concept to political rights. Citizens or subjects in these countries were not automatically entitled to exercise the franchise, in contrast to France and the United States, where citizenship was more closely linked to political rights.[17]

2.2.4 Recognition of Social Rights

The recognition that social rights form an element of citizenship and should be supplied by the state was the slowest aspect of citizenship to develop. With some exceptions, it was not

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[13] Heater, above note 1, at 58.
[14] Fahrmeir, above note 9, at 41.
[15] *Ibid.*, at 42.
[16] Heater, above note 1, at 59. For more on the philosophical basis of individual national citizenships, *see* Brubaker W.R., (ed) *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, New York, London: University Press of America, 1989).
[17] Fahrmeir, above note 9, at 66-7.

properly recognised until the Twentieth Century. Prior to this, existing supports were supplied through an uncoordinated range of sources, which were provided on a local basis, rather than through any national scheme. While the Church acted as the primary donor of charitable assistance, it was supplemented by poor relief, private charity and friendly societies.[18] Other providers included the medieval guild system which sometimes provided an embryonic form of social rights through aid or sinecures for members during hard times.[19] The change in the status of the Church in post revolutionary France reduced its role in providing relief for the poor in that country. Interestingly, the French Constitution of 1791 envisaged the State having a role in making provision for abandoned children and the infirm, but also in finding work for the poor who were unable to obtain it for themselves.[20]

While the Nineteenth Century saw the extension of the franchise to a significantly wider percentage of the adult (male) population in many countries, the development of social rights was still in its infancy. Those available measures which would now be considered as manifestations of social rights were then seen as an economic substitute for persons who were unable to exercise their citizenship. For example, in the United Kingdom the Poor Law "treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met only if the claimants ceased to be citizens in any true sense of the word".[21] Through needing to rely on the very meagre assistance provided in the poor house, an individual was considered to have left the general community and to have lost entitlement to basic civil rights as well. This was particularly applicable to that section of the poor regarded as 'undeserving'.[22]

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[18] Fahrmeir, above note 9, at 82-3.
[19] Fahrmeir, above note 9, at 22.
[20] Constitution of 1791, Title I, Fundamental Provisions Guaranteed by the Constitution.
[21] Marshall, above note 3, at 24. *See* also Katrougalos G.S., 'European 'Social States' and the USA: An Ocean Apart?', (2008) 4 *European Constitutional Law Review* 225, at 229.
[22] Fahrmeir, above note 9, at 85. *See* Deakin S., 'The 'Capability' Concept and the Evolution of European Social Policy', in Dougan & Spaventa (eds) *Social Welfare and EU Law* (Hart Publishing, 2005).

This negative perception of social rights is demonstrated through early legislation dealing with working hours and safety in industry, such as the Factory Acts.[23] These laws only applied to women and children and not to adult males. This was "out of respect for his status as a citizen, on the grounds that enforced protective measures curtailed the civil right to conclude a free contract of employment".[24] As women were not fully regarded as citizens, taking away their absolute freedom to agree to work in unsafe conditions was not regarded as the same diminution of status as it would have been had it also applied to men. Such attitudes were beginning to change however and by the end of the Nineteenth Century, the factory code could be described as "one of the pillars in the edifice of social rights".[25]

This period at the end of the Nineteenth and the beginning of the Twentieth Centuries saw the final consolidation of political rights and the introduction of meaningful social rights. Indeed, it has been argued that much of the pressure from the working class to obtain civil and particularly political rights was in order to achieve social reform.[26] Social insurance schemes began in Germany in the 1880s with the passage of compulsory sickness insurance legislation for certain categories of workers. Similar legislation, along with insurance on the grounds of old age, disability and in some cases, unemployment, could be seen in a number of European states by 1914.[27] Women were entitled to vote on the same terms as men by 1932 in Germany, the United States and the United Kingdom, whereas in France, they would have to await the end of World War II. The two World Wars resulted in dramatic state involvement in national economies, and a subsequent role in the provision of welfare for serving soldiers' families, veterans and the relatives of the deceased. The aftermath of World War II, the legacies of the Depression and the need to undermine support for Communist

[23] Factories Act 1802, 42 Geo III c.73; Factory and Workshop Act 1878, 41 & 42 Vic. c. 16.
[24] Marshall, above note 3, at 24.
[25] *Ibid.*, at 25.
[26] Heater, above note 1, at 72. This can be contrasted with the approach in the United States, *see* Katrougalos (2008) above note 21, at 233.
[27] Fahrmeir, above note 9, at p 107.

parties led Western democracies to develop to varying degrees, welfare states to complement the extensive range of civil and political rights that they maintained at this stage.

2.2.5 Some Themes in the Evolution of Citizenship

This necessarily brief overview of the development of the institution of citizenship allows a number of key themes to be highlighted which are of relevance to Union citizenship. Firstly, the relationship between the protection of rights and the nation state is significant, particularly considering that the European Union itself has not reached such a point of integration. Linked to this is the issue of nationality. This has significance regarding the exercise of political and social rights, in a Union comprised of a wide range of nationalities. The extent to which nationals of one Member State will accept the legitimacy of nationals from another Member State voting in their elections and more particularly, making claims on their welfare system, under the umbrella of Union citizenship, has yet to be ascertained.

Another important issue concerns the drivers of change regarding the degree of rights protection. Taking the American and French Revolutions as the starting points for the development of modern citizenship, it can be seen that the concept has developed in an irregular fashion. The circumstances which have brought about its most significant expansions include internal conflict (French Revolution), external conflict (women getting the vote in the UK after World War I, the growth of the welfare state in the UK after World War II), economic crisis (the growth of the welfare state in the United States after the Depression) and political conflict (Bismarck's pension reforms in the German Empire as a means of limiting support for the Social Democratic Party). This does not automatically lead to the conclusion that citizenship only evolves in times of crisis. It must be acknowledged that in some of these circumstances, the extension of rights would probably have occurred

anyway; for example, women's suffrage in the United Kingdom. However, there seems to be a link between significant challenges to the existing political and social order in a country and subsequent changes in the nature and extent of what citizenship is regarded as protecting.

2.3 The Role of Social Rights in Citizenship

As referenced above, it is Marshall's work that is considered to be the definitive argument for including social rights as an essential element of citizenship. Notwithstanding the extensive criticisms that have been made of his account of the development of citizenship, his theory remains hugely significant for what its underlying themes tell about the nature of citizenship and the role social rights play within it.[28] Most academics addressing the issue of social rights within citizenship take Marshall's work as a starting point, while adding their own clarifications.[29] Indeed, it is submitted that Marshall's work becomes clearer and more applicable when understood in light of the writings of later authors. Therefore, this thesis adopts the Marshallian model of citizenship – that is Marshall's theory as refined by certain subsequent authors – as the basis for its analysis of Union citizenship. Three specific facets of the Marshallian model form the points of investigation: citizenship as a unified concept,

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[28] For criticisms of Marshall on various grounds, *see* M. Rees, 'T. H. Marshall and the Progress of Citizenship', in M. Balmer and A. Rees (eds), *Citizenship Today: The Contemporary Relevance of T. H. Marshall*, (London, UCL Press, 1996); R. Dahrendorf, 'Citizenship and Social Class', in Balmer and Rees, *Citizenship Today*; Bottomore T, Citizenship and Social Class, Forty Years On', in *Citizenship and Social Class*, Marshall & Bottomore Eds., (1992, Pluto Press, London), at 65-70; Lister, above note 3, at 471.

[29] For acknowledgements of Marshall's leading role in the development of modern theories of citizenship and social rights, *see* Lister, above note 3, at 471; Dwyer P., Understanding Social Citizenship, (2004, The Policy Press), at 38; Closa C., 'Citizenship of the Union and Nationality of Member States', (1995) 32 *Common Market Law Review* 487, at 490; Kymlicka W. & Norman W., 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory', 104 *Ethics* 352, at 354; Everson M., 'The Legacy of the Market Citizen', in Shaw and More (eds.), *New Legal Dynamics of the European Union* (Oxford, Oxford University Press, 1995); Revi B., 'Social Citizenship at the Crunch: T.H. Marshall and the Global Financial Crisis', at 1; Ewing, above note 5,, at 114.

equality of status within citizenship and the need for social rights in an 'ideal' form of citizenship.

2.3.1 Citizenship as a Unified Concept

Endeavouring to re-appraise Marshall in light of criticism, Lister proposes that the principal value of *Citizenship and Social Rights* is as a normative argument about how citizenship should be developed.[30] Central to this is the view that sees citizenship as a "*unified* concept, with civil, political and social rights".[31] As such, he submits that, "... to speak of citizenship is to speak of a complex relationship of rights; a unified concept. To claim that citizenship is a unified concept is not to claim that citizenship is an entirely harmonious concept".[32]

This unified theory of citizenship is said to be buttressed by both a practical and a theoretical argument. The practical argument made is straightforward – "the exercise of one element of citizenship rights requires other citizenship rights".[33] As such, the right to freedom of speech would have little real substance to it if, due to lack of education, a person has nothing to say that is worth saying. It has been argued elsewhere that this practical argument is often deployed by national courts in decisions forcing governments to protect social rights.[34]

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[30] Lister, above note 3, at 473.
[31] *Ibid.*, at 473 (emphasis added).
[32] *Ibid.*, at 477. Turner also argues that citizenship should not be considered as a unitary concept, above note 1, at 10-11.
[33] *Ibid.*, at 473. Breiner makes a similar argument in a separate article defending the normative value of Marshall's work, stating "... political equality could not be realized unless social equality—equal dignity of roles and functions--and economic equality--equalizing of income and control over wealth--were realized. Political equality, the political rights claimed by all citizens, had to be the model for social justice as well", Breiner P., 'Is Social Citizenship Really Outdated? T.H. Marshall Revisited', *Paper presented at the annual meeting of the Western Political Science Association, Hyatt Regency Albuquerque, Albuquerque, New Mexico*, (17 March, 2006), at 1.
[34] Fabre C., *Social Rights Under the Constitution: Government and the Decent Life*, (OUP, 2004), at 1.

2.3.2 Equality of Status

The practical argument in favour of a unified concept of citizenship is accompanied by a theoretical argument. This is based on the importance that is given in *Citizenship and Social Class* to the concept of 'equality of status'. This aspect of Lister's work in relation to Marshall is worth setting out in detail. He states that:

> [o]nce the principle [of equality of status] is grounded in one area, such as the civil sphere, it 'spills over' into other spheres". This does not mean that this principle takes the same form in each sphere. Rather, the principle of equality of status takes on different forms in different spheres, producing in some instances rights that may be in tension. This means that citizenship should not be seen as a unitary concept, but as a unified one. In other words, citizenship is not a simple, one-size-fits-all category, but is rather a contingent set of accommodations of the underlying principle of equality of status. This means that citizenship is a contested concept, where different spheres ground the idea of equality of status differently and where different facets of citizenship are prioritized over others. Hence, citizenship takes different forms at different places at different times, but is nevertheless, unified.[35]

Two points of importance can be drawn from this. Firstly, the idea of equality of status 'spilling over' from one rights aspect to another is an interesting correlation to the practical argument discussed above for unified citizenship. Not only does each set of rights require the other for its full realisation, but the achievement by citizens of equality in one set of rights will influence their eventual achievement of equality in the others.

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[35] Lister, above note 3, at 474.

Secondly, the notion that equality of status may be applied in the different sets of rights comprising citizenship, but not necessarily in complete harmony and without tensions. Lister argues that Marshall highlights in particular one such tension existing within citizenship. This is the conflict created by the fact that the concept of citizenship acts against the principle of the market economy. The problem is that civil rights (the right to contract) form one of the key pillars of the market economy, while also forming one of the elements of citizenship. At the same time there are tensions internal to citizenship; civil rights relating to the market (the right to private property) may often come into conflict with social rights (the right to social housing).[36] If such a tension exists between the elements of citizenship, it complicates the argument that the elements unite around the principle of equality of status.

Lister addresses this by arguing that equality of status acts not as "a universal principle determining rights and duties", but rather "an ideal image which guides development".[37] Thus he argues the exact meaning of equality of status is "open". When equality of status is applied in any of the three elements of citizenship, it may arrive at different or indeed contradictory positions. Lister suggests that this is acceptable, stating that "[t]he principle remains the same and hence produces a notion of unification between the different elements of citizenship. Yet, the social settings in which the principle is located are different and so are liable to produce tensions".[38] As such, citizenship is a unified concept both in terms of the manner in which each of the constituent elements require each other for their full enjoyment, but also in the way that the application of equality of status to each of these elements may result in contradictions that require negotiation to bridge those differences.[39]

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[36] *Ibid.*, at p 481-2.
[37] *Ibid.*, at p 482.
[38] *Ibid.*, at p 482
[39] *Ibid.* For a further discussion of Marshall's treatment of equality of status, see Revi B, above note 29, at 2-4.

2.3.3 An 'Ideal' Concept of Citizenship and Social Citizenship

The final relevant aspect of the Marshallian theory of citizenship relates to the possibility of an 'ideal' concept of citizenship. This is linked to the point raised above that Marshall uses citizenship as a normative argument about what society 'should' look like.[40] As a consequence of the relative flexibility permitted regarding the content of what a particular citizenship protects, there is the prospect of an 'ideal citizenship' which societies can aspire to and measure their own achievements against, but one which has as its core the concept of equality of status.

Examining the relationship of social rights to such an ideal citizenship, King and Waldron argue that:

> [i]n saying that welfare provision was part and parcel of citizenship in the modern state, Marshall was describing how it had evolved and how it was viewed by the people who enjoyed it. But we think he was also doing more than this: we think he was talking about the way in which welfare provision ought to be viewed, and intimating an argument about how it might be defended.[41]

Lister understands this as an argument that Marshall was suggesting that an ideal concept of citizenship "demands" social rights as an aspect of citizenship. Such an approach, he argues, would reaffirm the notion of a unified citizenship concept, where full membership of the community would require civil, political and social rights.[42] This thesis adopts this view that

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[40] *See* also Everson, above note 29; Riesenberg P., *Citizenship in the Western Tradition: Plato to Rou*sseau (Chapel Hill, University of Carolina Press, 1992).

[41] King D. and Waldron J., 'Citizenship, Social Citizenship and the Defence of Welfare Provision', (1988) 18 *British Journal of Political Science* 415, at p 423; Lister, above note 3, at p 476.

[42] Lister, above note 3, at p 476. Revi proposes "[w]hat Lister appears to suggest is that Marshall invented a means by which to study citizenship; however, the meaning of citizenship and the application of these categories

a valid form of citizenship requires the protection of social rights, or as it will be described, 'social citizenship'.

2.4 Applying the Marshallian Model to the Peculiarities of Union citizenship

Having illustrated the Marshallian model of citizenship and the role social citizenship plays within it, attention turns towards applying this model to Union citizenship. Before this is done, focus must be placed on two problems outlined in the introduction that arise inherently from the nature of the European Union; the transnational nature of Union citizenship and the conflict between the social aims of national constitutions and the economic integration aim which is central to the EU. In investigating these two problems, a clearer picture of what European social citizenship must protect in order to match the Marshallian model will emerge.

2.4.1 Transnational Citizenship

Before Union citizenship can be examined for the degree to which is protects social rights, it must be asked whether in light of its application across 27 different countries, the EU is actually "citizenship capable".[43] It is submitted here that despite not being based on the traditional nation state model, Union citizenship as a transnational citizenship, is defensible under the Marshallian Theory. On its introduction, it was suggested that one of the consequences of the introduction of Union citizenship would be the decoupling of citizenship

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can and will change over time. Citizenship, and particularly social citizenship, is offered as some sort of ideal, a lens through which to assess public policy", Revi, above note 29, at 6.

[43] Nic Shuibhne N., 'The Resilience of EU Market Citizenship', (2010) 47 *Common Market Law Review* 1597, at 1598.

from nationality.[44] As will be demonstrated in Chapter 4, this was achieved by applying the concept of equality of status, already identified above as an element of citizenship, specifically against any discrimination based on nationality, through the means of Article 18 TFEU. The outcome of this is that Member States were forced to recognise and give rights to nationals from other Member States within their borders.

In light of this, Union citizenship creates a status, the particular form of which has not been seen before. It is a citizenship separate to national citizenship. It is stated to be complementary to national citizenship, in order to assure that it will not attempt to replace individual nationalities.[45] It is not, however, a form of dual citizenship.[46] This is demonstrated by the fact that it can only be enjoyed on the basis of having citizenship of one of the Member States. As such, it could probably be best described as a joint citizenship. In light of the continued application of the wholly internal rule, issues addressed by Union citizenship cannot be considered in circumstances which fall outside the material scope of the Union Treaties.[47] This crucial boundary suggests Union citizenship is a limited form of citizenship.[48]

It is submitted that this shared and limited concept is justified, both under the theoretical framework set out by Marshall and the Treaties and also under a practical understanding of what Union citizenship can achieve. This latter point is particularly

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[44] Weiler J., 'Introduction: European Citizenship – Identity and Differentity', in La Torre (ed.), '*European Citizenship: An Institutional Challenge'*, (Kulwer Law International, 1998), at 16.

[45] Article 20(1) TFEU. "[...] Citizenship shall be additional to and not replace national citizenship".

[46] Hofmann R., 'German Citizenship law and European Citizenship: Towards a special kind of dual nationality?', in La Torre (ed.), '*European Citizenship: An Institutional Challenge'*, (Kulwer Law International, 1998).

[47] *See* Cases C-64/96 and 65/96 *Uecker and Janquet v. Land Nordrhein-Westfalen* [1997] ECR I-371; Case C-299/95 *Kremzow v. Austria* [1997] ECR I-2629; Case C148/02 *Garcia Avello v. Belgium* [2003] ECR I-11613. For a defence of the continued use of the wholly internal rule, *see* O'Leary S., 'The past, present and future of the purely internal rule in EU law', *Empowerment and Disempowerment of the European Citizen*, Liverpool University, 21 October 2010. For a criticism of its continued use, *see* Nic Shuibhne N., 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', (2002) 39 *Common Market Law Review* 731.

[48] Everson speaks of a "... common but limited European society ...", Everson, above note 29, at 76.

significant as it relates to the deliberately modest interpretation of citizenship upon which this thesis is based.

The theoretical justification relies on Marshall's statement about the principle of equality of status that "[a]ll who possess the status are equal *with respect to the rights and duties with which the status is endowed* [...]".[49] It is submitted that in this statement, Marshall accepted that the equality of status that is so fundamental to a concept of citizenship only applies within the boundaries of that citizenship. Therefore, it is legitimate to place limits on what a particular version of citizenship encapsulates, without undermining its status as citizenship. The boundaries of Union citizenship have been set to encompass all issues touching on Union law, but not on those which fall outside. As long as equality of status and the other markers of citizenship apply within these limits, its position as a version of citizenship is not undermined. Hence a limited citizenship is viable.

The preambles and text of the Union Treaties provide theoretical justification for the notions of a shared citizenship. Article 1 TEU speaks of an ever closer union of the "peoples" of Europe. The plural here suggests an acknowledgment of the continued national differences that exist. The term 'peoples' is repeated in Article 3(1) TEU and in Recitals 5, 8, 11 and 12 of the TEU and Recitals 1, 3, 10 and 11 of the TFEU. This regard for national difference is further emphasised in Recital 10 TEU where, in addressing the creation of Union citizenship, it again acknowledges that this will be common to the "nationals of their countries". Again, the regard for national difference is made clear. Union citizenship is not seen to be attempting to replace national citizenship. This point was further stressed in the Declaration on Nationality secured by the Danish Government after the first rejection of the Maastricht Treaty in 1992. This reaffirmed that the question of whether an individual possesses the

[49] Marshall, above note 3, at 18, (emphasis added).

nationality of a Member State was to be settled solely by reference to the national law of the Member State concerned.

The practical argument supporting a limited citizenship relates to what Union citizenship is trying to achieve. If the goal was a fully federal citizenship, then clearly the exclusion of so many areas from its application would indicate its failure. However, this has never been the objective of Union citizenship, nor should it be.[50] This is clear from the fact that the only method by which to obtain Union citizenship has to be through national citizenship, and the power to obtain national citizenship remains with the Member States and is exercised at their own discretion. It is also demonstrated by the Treaty provisions mentioned above.

2.4.2 Differentiating the Welfare State and the Social State

Any attempt to analyse Union citizenship as a form of citizenship has to take account of the explicit values that are reflected across European legal culture, both in EU Member States and third countries.[51] Achieving social justice goals has been described as a "[...] a sensitive legacy of Europe's constitutionalism [...]".[52] Commentators have argued that for the European Union to ignore this heritage would cause a crisis of legitimacy.[53] It is submitted that in this specifically European context, any argument for a version of Union citizenship

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[50] For the argument that a common Union citizenship will eventually replace national citizenships, *see* De Groot R., 'The relationship between the nationality legislation of the Member States of the EU and European Citizenship', in La Torre (ed), '*European Citizenship: An Institutional Challenge',* (Kluwer Law International, 1998), at 119-120.

[51] *See* Scharpf F., 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market* Studies 645.

[52] Joerges C., 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', EUI Working Papers, LAW No.2007/25, (European University Institute), at 3.

[53] Joerges C. & Rodl F., '"Social Market Economy" as Europe's Social Model', EUI Working Paper LAW No. 2004/8 (European University Institute), at 2. *See* Fabre C., 'Social Rights in European Constitutions', in De Burca & De Witte (eds), *Social Rights in Europe*, (OUP, 2005) for a discussion for a detailed discussion of social rights in European constitutions.

must address two separate but complementary elements of social rights protection; access to individual social entitlements traditionally protected in a welfare state and the heightened protection accorded to social rights in many European countries through the form of the social state.[54]

Katrougalos explains the distinction between welfare states and social states. He describes the 'social state' as "...a normative, prescriptive principle, which defines a specific polity, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres".[55] He suggests that most European countries, excluding the United Kingdom, can be understood as following the social state system. This can be contrasted with the 'welfare state', which he defines as a " [...] descriptive concept, which denotes the universal type of state which emerged in all developed countries in the 20th Century, as a response to functional necessities of the modern capitalist economy".[56] Lamping provides a divergent definition of welfare states, describing them as something that "[...] incorporate certain values into their institutions; to the extent that these values correspond to the moral orientations and expectations of citizens, welfare state institutions can be expected to receive considerable public support".[57] However, he makes no mention of a competing social state system and it is submitted that what he describes is actually much closer to Katrougalos's definition of the social state.

Katrougalos lists four functions that are associated with the concept of the social state and which are at variance with the 'liberal' model followed in certain welfare states such as

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[54] For further discussion of the nature of the social state in Europe, see Ferrera M., 'The European Welfare State: Golden Achievements, Silver Prospects', URGE Working Paper 4/2007 (University of Milan & URGE).

[55] Katrougalos (2008), above note 21, at 238. The term 'social state' has been described elsewhere as having "[...] institutionalised individual social rights as universal rights", Bercussion B., Deakin S., Koistinen P., Kravaritou Y., Muckenburger U., Supiot A., Veneziani B., 'A Manifesto for Social Europe', (1997) 3 *European Law Journal* 189, at 189.

[56] Katrougalos (2008), above note 21, at 238.

[57] Lamping W., 'Mission Impossible? Limits and Perils of Institutionalizing Post-National Social Policy', in Ross & Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, (OUP, 2010), at 48.

the United States and the United Kingdom.[58] Firstly, the social state acts as an interpretive meta-rule, controlling both constitutional interpretation and the creation of new constitutional rules. Secondly, it creates an objective system of values that forms the constitutional ethos of the state. Thirdly, it provides a minimum level of protection beyond which the status of rights cannot be decreased further. Finally, it offers constitutional justification for limitations to economic freedom, such as restrictions on property rights.[59]

The enshrinement of a social state system within a country's constitution thus leads to a number of results. Constitutional rights are not only binding vertically, on manifestations of public power, but also horizontally, upon individuals. The rights coming from the constitutional provisions not only impact on individuals but also generate an "objective system of values", mandating state authorities to act accordingly in all aspects of their operation. The state now has an obligation to achieve positive measures. In light of these points, social states do not merely have the typical state obligation not to interfere with the fundamental rights of individuals, but actually have to ensure their protection against attack from third parties.[60]

So, whereas social policy has been described as 'market correcting',[61] the social state model raises this to the status of a constitutional obligation. This is not to say that each social right or entitlement becomes automatically justiciable in the courts of a social state.[62] However, it ensures that social values with a constitutional status must at least be considered by the courts in all decisions that they take.

2.4.3 Individual and Constitutionalised Protection

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[58] Katrougalos (2007), above note 5, at 18.
[59] Katrougalos (2007), above note 5, at 11-13.
[60] *Ibid.*, at 13-14.
[61] Hatsopoulos V., 'Current Problems of Social Europe', European Legal Studies, Research Papers in Law 7/2007 (College of Europe), at 2.
[62] Katrougalos (2007), above note 5, at 11-13.

The distinction outlined above between the welfare state and the social state hinges on the extent to which the protection of social rights is constitutionalised or not. The non-constitutional aspect covers the individual social entitlements that citizens of a welfare state enjoy, for example unemployment assistance, social housing provision etc. Such benefits are traditionally protected through legislation. The constitutional aspect of social citizenship can be further divided into two elements; constitutionalised social rights and social values. The former involve situations where a social entitlement of the welfare state is protected within the constitution itself, for example a constitutional right to free primary education in Article 42.4 of the Irish Constitution. The latter cover the enshrinement of social values within a constitution in situations where this does not create a direct right, but nevertheless has legal implications for the interpretation of other rights, for example Article 20 of the German Basic Law characterizes the country as a "social federal state".[63] Countries that enjoy this constitutionalised protection of social rights are described as 'social states'. This combination of the welfare state and the social state is the model followed across most European States. Therefore, it is a key argument of this thesis that in order for Union citizenship to be seen to protect social citizenship, it must be in a position to guarantee both individual social entitlements and social rights and values enshrined in a constitutional manner.

Bearing in mind that it was accepted above that a transnational form of citizenship is legitimate, it must be determined how best to assess whether Union citizenship meets these two standards. It was acknowledged in Chapter 1 that the Union does not have the competence to create a common social welfare system. The 'wholly internal rule' restricts the application of Union law to situations which involve a cross border element.[64] In light of these two points, it is submitted that the most appropriate place to measure how Union

[63] Joerges C. & Rodl F., above note 53, at 10.
[64] *See* Chapter 7.3.2.

citizenship protects individual social entitlements is when Union citizens are making claims on the welfare systems of another Member State. If it is found that they are entitled to do so on the same basis as citizens of that State, this element of social citizenship will have been achieved.

However social citizenship also requires that citizens enjoy the protection of constitutionalised social rights and social values. These are currently protected in their home Member States, and obviously if a citizen leaves her state and goes to another, she cannot transport such constitutional protections with her. But if an application of Union law threatens a social right belonging to a citizen of a Member State while she is still residing in her home state, and social protections in that state's constitution cannot be used due to the principle of supremacy, then that Union citizen can no longer be said to be enjoying full social citizenship under the Marshallian model. Therefore, Union citizenship must also offer the Union citizen a degree of constitutionalised protection for social rights and values at European level to compensate for the potential undermining by Union law of similar values protected in the national constitution.

2.5 Conclusion

Despite being marginalised for centuries, social rights are now regarded as an essential element in any legitimate version of citizenship. As the first proponent of this view, Marshall's conception of citizenship, despite its flaws, remains a touchstone for research in this area. His work, combined with subsequent clarifications and conceived as the Marshallian model, provides a useful template for analysis of the status given to social rights within any specific version of citizenship.

The difficulties inherent in any attempt to measure a form of citizenship against the Marshallian model are magnified in the case of Union citizenship, in light of its transnational character. This, combined with the particular European requirements regarding social citizenship, require two distinct elements to be met in order for Union citizenship to be branded a genuine form of citizenship. First, that Union citizens can avail of individual social entitlements in another Member State on the same basis as its citizens. Second, that Union citizens can avail of EU level constitutional protection of social rights and values, when similar rights and values in national constitutions are threatened by the application of Union law.

The following chapter examines both the individual and constitutional social protections provided by Community law prior to the Maastricht Treaty and the subsequent introduction of the status of 'citizenship'. It also sets out definitions of the terms 'social rights' and 'social values', using these to ascertain what level of protection, if any, existed for these prior to the formalised introduction of 'citizenship' into EU law.

Chapter 3 - Social Rights and their Protection under EU Law

3.1 Introduction

Chapter 2 explained the Marshallian model of citizenship, which forms the basis for this thesis, and the role that social rights play within it. It also sought to illustrate how the Marshallian model of social citizenship, originally conceptualised for individual nation states, can be applied in the context of a transnational entity like the European Union. In order to fully assess the degree to which Union citizenship now protects social rights, it is first necessary to examine their treatment by Community law prior to the introduction of Union citizenship through the Maastricht Treaty. In undertaking this review, the constitutional elements and the individual entitlement elements will be studied separately.

Section A examines the constitutional status of social rights and social values. These are examined across the period stretching from the Treaty of Rome to the Nice Treaty. The initial focus is on the primary law of the Union, the Treaties. These are examined regarding the extent to which they protect specific social rights, but also exhibit the promotion of broader social values. Having covered the evolution of the Treaty based protection of social rights, the impact or lack thereof of two other social rights documents, the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers is analysed. Finally, the treatment of social rights within the concept of the general principles of Union law is studied.

In Section B, attention turns to the protection of individual social entitlements through Union law. These are examined in the context of how they can be accessed by a national of

one Member State living in another Member State. The primary focus is on the category of 'workers' and 'established persons', as these were the groups who gained the widest range of social entitlements in a host Member State. The broad interpretive approach of the Court of Justice to the term 'worker' will be analysed, along with its less generous treatment of groups such as job-seekers. The gradual extension of the right to access individual social entitlements will then be examined, considering both legislative developments and the treatment of the issue by the Court. This section concludes its assessment of the protection of individual social entitlements in the period preceding the Treaty on European Union, as the introduction of Union citizenship at that stage brought about significant changes which will be addressed in Chapter 4.

Before commencing, a brief explanation is undertaken clarifying what is meant by the terms 'social rights' and 'social values' as used in this thesis.

3.1.1 Defining Social Rights

As was noted above, Marshall defined social rights as ranging from "... the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society".[1] Such rights were said to be protected by state institutions such as the education system and by social services.[2] Obviously, this definition is extremely wide and provides little conclusive guidance as to what is actually encapsulated in the term.

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[1] Marshall TH., 'Citizenship and Social Class', in Marshall & Bottomore (eds.), *Citizenship and Social Class*, (Pluto Press, London, 1992), at 8. *See* Chapter 2, note 2.
[2] Marshall, above note 1, at 8.

It is argued here that social rights entail individual or collective claims off the state.[3] These are supplied in the form of "public goods and services".[4] These are related to "social status"[5] and ensure that citizens do not fall below a certain material standard of living.[6] Such rights may be guaranteed as individual social entitlements through legislation, or within national constitutions. Fabre identifies four key claims that require protection as social rights; that individuals should have rights to a minimum income, housing, health care and education.[7] These four categories have been similarly identified by other authors as forming a core element of social rights, though not always framed in exactly the same manner.[8]

Alongside these four headings, Hatzopoulos suggests that certain guarantees surrounding employment must also be understood within the concept of social rights.[9] As will be examined subsequently, Union law now contains extensive provisions surrounding the position of the worker in employment under Title X on Social Policy encompassing Articles 151 – 161 TFEU. Some of the articles included in this section pertain to the sub-category of rights described as 'labour rights'.[10] These would include rights such as the right to strike. It is submitted here that, contrary to some authors, the right to strike is not a social right but rather a civil right, though one that is often used in furtherance of social policy goals.[11] Therefore, the term 'labour right' cannot be synonymous with 'social right'. At the same

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[3] Katrougalos G.S., 'European 'Social States' and the USA: An Ocean Apart?', (2008) 4 *European Constitutional Law Review* 225, at 230; Dell'Olio F., 'Supranational undertakings and the determination of social rights', (2002) 9 *Journal of European Public Policy* 292, at 304.

[4] Frankenberg G., 'Why Care? The Trouble with Social Rights', (1995) 17 *Cardozo Law Review* 1365, at 1365.

[5] Sajo A., 'Social Rights: A Wide Agenda', (2005) 1 *European Constitutional Law Review* 38, at 38

[6] Ewing KD., 'Social Rights and Constitutional Law', (1999) *Public Law* 104, at 105.

[7] Fabre C., *Social Rights Under the Constitution: Government and the Decent Life*, (OUP, 2004), at 4.

[8] Hatzopoulos V., 'Current Problems of Social Europe', European Legal Studies, Research Papers in Law 7/2007 (College of Europe), at 2; Arango R., 'Basic Constitutional Rights, Social Justice and Democracy', (2003) 16 *Ratio Juris* 141, at 141; Frankenberg, above note 4, at 1386; Ewing, above note 6, at 106. Ewing substitutes the heading "availability of a broad range of cultural, recreational and leisure facilities" for education.

[9] Hatsopoulos, above note 8, at 2.

[10] De Burca G., 'The Future of Social Rights Protection in Europe', in *Social Rights in Europe*, De Burca & De Witte (eds), (OUP, 2005), at 4.

[11] Pech L., 'France: Rethinking 'Droits-Creances', in *Socio-Economic Rights Jurisprudence – Emerging Trends in Comparative and International Law*, Malcolm Langford (ed), (Cambridge University Press, 2009), at 264.

time, Title X does include certain labour rights that are clearly social rights such as the right to vocational training (Article 166 TFEU).

De Burca suggests that the term 'social right' should refer to rights concerning economic and social well-being.[12] While this definition is attractive, in the context of discussing social rights in the European Union, 'economic rights', such as the right to work are being purposefully excluded from the definition.[13] This is because as previously discussed, the right to work, included in Article 45 TFEU on free movement of workers already has constitutionalised protection within the scope of EU law along with other economic rights through the concept of the fundamental freedoms.[14]

The categorisation of the principle of equal pay between men and woman under Article 157 TFEU is one which creates considerable divergences of opinion. Certain authors point to it being traditionally regarded as a civil right within the European legal tradition.[15] Undoubtedly, the principle has the potential to provide significant social benefits for (primarily) women, in the form of increased pay.[16] However, it is submitted that irrespective of its potential outcomes, the right itself functions as a guarantee of procedure rather than of outcome and as such, is more appropriately categorised as a civil right.[17] In light of this, Article 157 TFEU will not feature within the definition of social rights for the purposes of this thesis.

3.1.2 Defining Social Values

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[12] De Burca, above note 10, at 4.
[13] Sajo, above note 5, at 38. *See* Ashiagbor D., 'The Right to Work', in De Burca & De Witte (eds) *Social Rights in Europe*, (OUP, 2005), at 241,
[14] For a contrary view, predicating the protection of social rights on the protection of economic rights, *see* Dell'Olio, above note 3, at 304.
[15] Katrougalos G., 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07, at 27, note 161.
[16] Sajo, above note 5, at 39.
[17] For the opposite view, see Poiares Maduro M., 'Europe's Social Self: "The Sickness unto Death"', in Shaw (ed), *Social Law and Policy in and evolving European Union* (Hart Publishing, Oxford-Portland, 2000), at 337.

The need to distinguish social values from social rights springs from the fact that in many countries, social rights have not been directly enshrined in the constitution, where they would give individuals justiciable rights and form the basis for legal challenges to governmental actions.[18] Nevertheless, countries will often have social goals or values referenced within their constitution. For example, Article 45 of the Irish Constitution mandates that the State shall promote the welfare of the people by securing and protecting a social order in which justice and charity shall inform all the institutions of the national life[19] and pledges to safeguard with especial care the economic interests of the weaker sections of the community.[20] However, the provisions of the entire article are stated as being for the guidance of the national parliament and are not cognisable by the national courts.

While obviously a specific exclusion of such social values from the remit of national courts as in the example above is limiting, the existence of such values can be used as a guide by courts in adjudicating between different rights claims. In these situations they form a constitutional "meta-rule", with resulting implications for other constitutional values.[21] As such, Article 20 of the German Basic Law refers to Germany as a "social federal state". As such, many constitutions will have "fundamental [social] principles" applying throughout the document and influencing its interpretation.[22]

Therefore, in considering the protection of social rights within national constitutions, it is not sufficient to look at individual rights that have been enshrined, but also at wider normative statements which guarantee some consideration of social values in the law making and law adjudication processes that take place. It will be argued that these must also be protected at Union level in order for European social citizenship to exist.

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[18] Fabre, above note 7, at 1.
[19] Article 45.1.
[20] Article 45. 4.1.
[21] Katrougalos, above note 3, at 239.
[22] Fabre C., 'Social Rights in European Constitutions', in De Burca G. & De Witte B (eds), *Social Rights in Europe*, (OUP, 2005), at 23.

Section A: Constitutionalised Protection of Social Rights

3.2. Evolving Protection of Social Rights in the Union Treaties

The lack of extensive protection afforded to social rights within the original EEC Treaty is unsurprising. The document enshrined an economically liberal approach as the foundation of the Community. Combined with this, the Community lacked any extensive individual redistributive powers. The omission of social rights was driven by the recommendations of the Ohlin Report. [23] This was compiled by an International Labour Organisation Group of Experts who were tasked with reporting on the social aspects of the issues stemming from European economic co-operation. Their investigation took place concurrently with the process that resulted in the Spaak Report which formed the basis for the EEC and Euratom Treaties.[24]

The overall tone of the Ohlin Report was sceptical about the benefits of widespread integration of social measures, both as regards their effectiveness and necessity.[25] It therefore recommended against extensive engagement with social rights in the new Treaties. Indeed the need for harmonisation was only accepted in two primary areas; the difference in pay between men and women, in particular in those industries where women made up a large proportion of the work force, and also in the area of weekly hours of work and paid holiday

[23] International Labour Office, *Social Aspects of European Economic Co-operation. Report by a Group of Experts*, Studies and Reports, New Series, No. 46(1956).
[24] *Report of the Heads of Delegation to the Ministers of Foreign Affairs*, Secretariat (Brussels, 21 April 1956).
[25] International Labour Office, 'Social Aspects of European Economic Co-operation', (1956) 74 *International Labour Review* 109.

entitlements.[26] Despite the efforts of the French Government at the negotiations leading up to the Treaty of Rome,[27] the overall impact of the Ohlin Report was significant in the initial stages of European integration in ensuring the prioritization of economic freedoms over social rights.[28]

However, the pressure resisted in the lead up to the Treaty of Rome regarding social rights never completely abated. As will be illustrated below, various amendments to the primary Treaties have each brought about a progressive improvement of the status of social rights. These changes will be examined in the case of the EC Treaty, looking at its Preamble, Aims & Objectives and the Title of Social Policy.[29] While social issues were less prevalent in the EU Treaty, those references that did occur will also be studied.

3.2.1 Preamble, Aims and Objectives

The Preamble to the EEC Treaty included references to economic and social progress,[30] the improvement of the living and working conditions of the peoples of the Member States[31] and harmonious development between economically successful regions and those less so.[32] The tasks of the Community include promoting "a harmonious development of economic

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[26] De Schutter O., 'Anchoring the European Union to the European Social Charter: The Case for Accession', De Burca G. & De Witte B (Eds), *Social Rights in Europe*, (OUP, 2005), at 112.

[27] Scharpf F., 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies* 645, at 645-6.

[28] *Ibid.*,

[29] As the original EEC Treaty was the widest ranging of the three Community Treaties, its provisions regarding social rights were the most significant. However, is should be noted that the Treaty establishing the European Coal and Steel Community referenced the raising of the standard of living in Recital 2 of its Preamble and in Article 2 ECSC, where it also mentioned "safeguarding continuity of employment" as one of its tasks. Improved working conditions and standards of living for workers in the two relevant industries is referenced in Article 3(e). The High Authority could take part in studies into the re-employment of workers made redundant by market changes – Article 46(4) ECSC. Article 68 ECSC deals with the payment of abnormally low wages to workers and the consequences of this.
Article 1 of the Treaty establishing the European Atomic Energy Community (Euratom) refers to the raising of standards of living in the Member States. Chapter III of the Treaty addresses measures related to the health and safety of workers in the nuclear industry.

[30] Recital 2.

[31] Recital 3.

[32] Recital 5.

activities [and] an accelerated raising of the standard of living [...]".[33] In this regard, one of the activities of the Community was to be the creation of a European Social Fund to improve employment opportunities for workers and to contribute to the raising of their standard of living.[34]

The Maastricht Treaty amended the Community tasks including the addition of the phrase "a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States". While for the most part this looked like an enhancement of the previous provision, the stipulation for an "accelerated" raising of the standard of living was dropped. Regarding the activities of the Community, the primary change was the addition of the new points on achieving a high level of health protection and on contributing to education and training.[35] Notably, the provisions on Union citizenship were added through the Maastricht Treaty. These and their implications for individual social rights will be examined in detail in Chapter 4.

The Treaty of Amsterdam amended the Preamble to the EC Treaty again, this time by inserting reference to promoting the development of the highest possible level of knowledge through a wide access to education. A new point was also inserted regarding the coordination of employment policies between the Member States.[36]

These references to social rights aims and objectives at the start of the EC Treaty were not without significance. In cases such as *Albany*, the Court invoked the aims of creating a policy in the social sphere, promoting harmonious and balanced development and achieving a high level of employment and social protection, in ruling that collective agreements between

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[33] Article 3(3) TEU (ex Article 2 EC). The article has been altered in subsequent Treaty amendments to include a wider range of social tasks.
[34] Ex Article 3 EC. This article has been altered in subsequent Treaty amendments and its provisions have been rearranged to a number of different articles.
[35] Ex Article 3 (o) EC and Article 3(p) EC respectively.
[36] Article 3(i) EC.

employers and unions fell outside of the remit of Union competition law.[37] However, the limitations of these provisions were demonstrated in *Zaera*. Here the Court determined that the aims of the Treaty to promote an accelerated raising of the standard of living was dependent on the establishment of the common market and the progressive approximation of economic policies. As such, it could not confer legal rights on individuals or legal obligations on Member States.[38]

3.2.2 Title on Social Policy

Title III of the original EEC Treaty contained a chapter on Social Policy. The articles here were all closely associated with workers' rights. As such, the former Article 117 EEC highlighted "the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained",[39] while the former Article 118 EEC entrusted the Commission with the task of achieving "close cooperation in the social field" in a range of areas.[40] This chapter also contained provisions on the principle of equal pay for equal work between men and women[41] and holiday entitlements.[42] Though covering extensive and important subject matter, the provisions did not provide the Community with any significant powers in these areas, prompting their description as textually broad but legally shallow.[43]

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[37] Case C-67/96 *Albany* [1999] ECR I-5751, at para. 54.
[38] Case 128/86 *Zaera* [1987] ECR 3697, at paras. 10-11.
[39] Now Article 151 TFEU. There are significant differences in the texts of the two versions of the article, including a reference to the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers in the current draft.
[40] Employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; right of association, and collective bargaining between employers and workers. This article is now Article 153 TFEU and there are significant textual changes between the two versions.
[41] Ex Article 119 EC. Now Article 157 TFEU. There are some textual differences and additions in the current draft.
[42] Article 158 TFEU (ex Article 119a EEC).
[43] Barnard C., 'EC 'Social Policy'', in Craig & De Burca (eds.) *The Evolution of EU Law* (OUP, 1999), at 481.

Chapter 2 of Title III dealt with the European Social Fund.[44] There the former Article 127 EEC required the creation of a "common vocational training policy capable of contributing to the harmonious development of both the national economic and of the common market".[45]

The Single European Act saw the addition of two new provisions to the Social Policy chapter; those on health and safety at work and creating dialogue at a Community level between management and labour.[46] The first of these, the former Article 118a EC was significant as it gave the Community the power to pass directives setting out minimum requirements for technical rules in this area. This was the first specific legislative competence passed to the Community on the area of social policy.

The Maastricht Treaty saw significant changes being wrought to this area. The resulting increase in the competence of the Community for social rights issues was presaged by the debate on and the adoption of the Community Charter of the Fundamental Social Rights of Workers (Community Charter), addressed in further detail below.

The Title on Social Policy was renamed 'Social Policy, Education, Vocational Training and Youth'. Decision making under the former Article 118a EC was changed to the co-operation procedure from consultation. Some minor changes were made to the European Social Fund. Most significantly, a new Chapter on 'Education, Vocational Training and Youth' was introduced. This mandated the Community to contribute to the development of quality education by encouraging co-operation between the Member States, and supporting and supplementing their activities.[47] Similarly, the Community was to "implement" a

[44] Article 162 TFEU (ex Article 123 EEC).

[45] Now Article 166 TFEU. There are significant textual changes between the two versions.

[46] Ex Article 118a EC (The section of this article on health and safety of workers has been incorporated into Article 153 TFEU) and ex Article 118b EC (The text of this article is now reflected within Articles 154 TFEU and 155 TFEU).

[47] Article 165 TFEU (ex Article 126 EEC).

vocational training policy to support and supplement Member State activity.[48] The Community was given weak powers to achieve these tasks, with the stipulation that harmonisation of national laws was not permitted.[49] Nevertheless, this development was interpreted as the creation of a new and distinct role for the Community in the area, over and above its previous role in vocational training.[50]

A new Title on Public Health was added, under which the Community was to contribute to a high level of human health protection by encouraging cooperation between the Member States and if necessary, supporting their actions.[51] Similarly to the chapter on Education, the powers the Community had were restricted to adopting 'incentive measures', again without permitting harmonisation of national laws.[52]

Protocol on Social Policy

The Maastricht Treaty was also significant for the creation of the Protocol on Social Policy. The fact that the most significant change wrought by the Treaty to social policy had to be contained in a protocol attached to it, demonstrated the continued controversial nature of Community involvement in the social field. The Protocol consisted of an agreement reached between eleven of the Member States; the United Kingdom having decided not to take part. The stated purpose of the Protocol was to "[...] continue along the path laid down in the 1989 Social Charter [...]". The Protocol laid out the procedure whereby the 11 Member States could use the institutions and the mechanisms of the Treaties to achieve these aims. A support and complementary role was granted to the Community in the areas of improving the

[48] Article 166 TFEU (ex Article 127 EEC).
[49] Ex Article 126(4) EEC and 127(4) EEC respectively.
[50] Freeland M., 'Vocational Training in EC Law and Policy – Education, Employment or Welfare', (1996) 25 *Industrial Law Journal* 110, at 113.
[51] Article 168 TFEU (ex Article 129 EEC).
[52] Ex Article 129(4) EEC.

working environment for workers, health and safety, working conditions, information and consultation of workers, the integration of persons excluded from the labour market and equal treatment between men and women as regards labour market opportunities and treatment at work. Legislation could be adopted on these points using co-decision, though on some more sensitive areas, there was a requirement for unanimity in the Council.[53] There was a specific exclusion of the areas of pay, the right of association, the right to strike and the right to impose lock-outs from its ambit. The Protocol also contained extensive new provisions regarding dialogue between workers and management.

During the Maastricht negotiations, efforts were made to dilute the content of the Protocol, in the hope of securing British support.[54] In light of the watered down nature of the provisions, commentators were sceptical of their ability to bring about any major change in legislation – the belief being that the Community would resort to 'soft law' techniques.[55] Significantly, as a consequence of the Labour Party victory in the 1997 General Election, the British opt-out from the Social Chapter was withdrawn.[56]

Further Treaty Amendments

This decision by the United Kingdom to sign up to the Protocol on Social Policy meant that there was now no need to address the issues in a separate manner. As such, the Amsterdam Treaty made extensive changes to the Title on Social Policy, Education, Vocational Training

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[53] Social security and social protection of workers, protection of workers where their contract of employment is terminated, representation and collective defence of the interests of workers and employers, conditions of employment for third country nationals legally residing in Community territory, financial contributions for promotion of employment and job-creation.

[54] Whiteford E., 'W(h)ither Social Policy?', in Shaw J. and More G. (eds.), *New Legal Dynamics of the European Union* (Oxford, Oxford University Press, 1995), at 112.

[55] *Ibid.* Barnard notes that only two pieces of legislation were adopted between the signing of the Social Charter and the ending of the British opt out. *See* Barnard C., 'The United Kingdom, the "Social Chapter" and the Amsterdam Treaty', (1997) 26 *Industrial Law Journal* 275, at 279.

[56] *See* Barnard, above note 55.

and Youth. Much of the additions resulted from the incorporation of what had previously been the Protocol on Social Policy into the Treaty proper.[57]

References to the fundamental social rights set out in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers were added to the former Article 136 EC. An objective calling for the promotion of employment was inserted, as were "[...] proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion". Consequently, the newly renumbered Articles 137 EC and 138 EC were restructured significantly by giving the Community extensive new supporting and complementary roles in those areas highlighted in the Social Protocol above, along with the identical legislative powers to implement these.[58] The exclusion of the right of association, the right to strike and the right to impose lock-outs that had been present in the Social Protocol was repeated in Article 137(6) EC, leading one commentator to highlight the inconsistencies between the Treaty title and both the Social Charter and Community Charter, as the latter two documents included these rights.[59]

In the chapter on 'Education, Vocational Training and Youth', the decision making process for adopting legislation under Article 150 EC was changed from co-operation to co-decision.[60] The Title on Public Health was also restructured to an extent. The most significant amendment was the addition of Article 152(5) EC which stated that "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care".[61]

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[57] Langrish S., 'The Treaty of Amsterdam: Selected Highlights', (1998) 23 *European Law Review* 3, at 16.
[58] Formerly Article 118 EC and 118a EC.
[59] Barnard, above note 55, at 276.
[60] Barnard notes the potential for the area of vocational training to serve as an easy point for Community integration. Barnard, above note 43, at 487. See Freedland M., 'Vocational Training in EC Law and Policy – Education, Employment or Welfare', (1996) 25 *Industrial Law Journal* 110, at 118-9.
[61] Now Article 168(7) TFEU.

A new title on Employment was introduced, allowing for the development of a coordinated strategy for employment. This was to include a yearly report on the employment situation in the EU from the Council of Ministers and the Commission to the European Council.[62] There was a legislative power provided to pass incentive measures to encourage cooperation between the Member States, through the co-decision procedure, but this excluded harmonisation measures.

At Nice, the EC Treaty was amended in a number of areas. The former Article 137 EC was amended to include two new supporting and complementary areas for the Community; the combating of social exclusion and the modernisation of social protection systems. The Treaty saw the addition of a new article providing for a Social Protection Committee to be established.[63] The function of this body was to monitor social protection in the Member States and the Community, promote the exchange of information and good practice between the Member States and the Commission and to prepare reports on this area at the request of the Council, the Commission or on its own initiative.

3.2.3 EU Treaty

The Preamble to the Treaty on European Union created at Maastricht referenced solidarity between peoples in Recital 4.[64] The promotion of economic and social progress within the internal market with reinforced cohesion was outlined in Recital 7. In Article B TEU, the objectives of the EU were stated to include economic and social progress, and the strengthening of economic and social cohesion. The introduction of Union citizenship was described as a means of protecting the rights and interests of nationals of the Member States.

[62] Article 148 TFEU (ex Article 109q(1) EEC).
[63] Article 160 TFEU (Ex Article 144 EC).
[64] For an extremely optimistic view of the implications of the TEU for social rights protection, *see* Sciarra S., 'Social Values and the Multiple Sources of European Social Law', (1995) 1 *European Law Journal* 60.

Article F(2) TEU stated that the EU would respect human rights as listed in the ECHR and the common constitutional traditions of the Member States.

At Amsterdam, a number of amendments were made to the EU Treaty. A new Recital 4 was added, confirming the attachment of the Member States to the fundamental social rights set out in the Social Charter and the Community Charter. Article B was amended to insert the goal of promoting a high level of employment. It is significant to note that the Member States did not take the opportunity to reference either the Social Charter or the Community Charter as one of the sources of fundamental rights listed in the former Article 6(F), alongside the ECHR and common constitutional traditions, even though the Social Charter was mentioned in an earlier draft of the article.[65]

No significant alterations were made to the EU Treaty at Nice in the context of social rights.

Having illustrated the extent to which the Treaties protected social rights, it is now necessary to examine other sources of potential protection.

3.3 European Social Charter

The European Social Charter (Social Charter) is a Council of Europe treaty dealing with the protection of social and economic rights. The Social Charter was first adopted in 1961 with a revised document being adopted in 1996. It is currently ratified by 43 countries.

The Social Charter as amended is now made up of 31 substantive guarantees covering diverse areas such as the right to work, the right to social welfare services, the right to dignity

[65] De Witte B., 'The Trajectory of Fundamental Social Rights in the European Union', in De Burca G. & De Witte B (Eds), *Social Rights in Europe*, (OUP, 2005), at 158.

at work and the right to housing.[66] Three general categories of rights can be recognised: those surrounding individual labour laws, collective labour laws and social security laws.[67] The rights are granted to different groups. Some are said to apply to everyone,[68] while others apply to workers,[69] children,[70] the elderly,[71] migrant workers[72] or those with disabilities.[73] While some commentators have highlighted the degree to which the rights protected are closely associated with work, there is also inclusion of social rights falling outside the employment sphere.[74]

Adherence to the Social Charter is based on an annual reporting system whereby State Parties to it submit a report to the European Committee on Social Rights (ECSR). The ECSR examines each state's report and publishes 'conclusions' regarding their compliance with the obligations. The 1996 revised document provided for a new system of complaints procedure whereby a number of recognised trans-European unions, employers' organisations or NGOs could lodge complaints. The new procedure also allowed states to go further and permit national NGOs to make complaints about that state. However, despite this new regime resulting from the amendments in 1996, the weakness of this system from the point of social rights protection, especially when compared with the approach taken by the Council of Europe to the enforcement of civil and political rights under the ECHR, has been commented upon.[75]

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[66] Articles 1, 14, 26 and 31.
[67] Swiatkowski SM., *Charter of Social Rights of the Council of Europe*, (Kluwer Law International, 2007), at xvi-xvii.
[68] Articles 1, 9, 10, 14, 30 and 31.
[69] Articles 2, 3, 4, 5 and 6.
[70] Articles 7 and 17.
[71] Article 23.
[72] Article 19.
[73] Article 15.
[74] Dell'Olio, above note 3, at 298; Ewing, above note 6, at 109.
[75] Alston P., 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System', in De Burca & De Witte (eds.) *Social Rights in Europe*, (OUP, 2005), at 47.

3.3.1 Social Charter and Union Law

The first reference to the Social Charter in the Community Treaties was contained in the Preamble to the Single European Act, though this was not carried into the EEC Treaty proper. At the time this reference combined with the fact that the Social Charter was equated with the ECHR, which had already been found to be a source of the general principles of the Community by the Court of Justice, was argued by some to mean that the Social Charter should be considered part of Community law.[76] However, the general consensus was that while it was possible for the Court to use the Social Charter as a source of general principles, the document could have no stronger legal status than that.[77] As will be discussed in Chapter 6, the failure by the Court of Justice to use the Social Charter as a potential source of social rights is one of the prime reasons why they fail to be protected in Union law.

A possible explanation for this failure could be the inconsistency of the Member States' adherence to it. The ratification of the Social Charter took a long time in many Member States, with some only completing the process for the original 1961 Charter in the 1990s.[78] Compounding this was the fact that Article 20(1) of the original Charter gave signatory states flexibility in the number of provisions of the document to which they signed up. In this way, two EU Member States could both be signed up to the Social Charter, but actually have committed themselves to protecting different ranges of rights.[79] The result is that there is a lack of a clear *acquis* on the status of the Social Charter and the social rights contained within.[80] This obviously stands in marked contrast to the ECHR, which had no

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[76] Reilly A., 'The Social Charter and Community Law', (1989) 14 *European Law Review*, at 80-86.
[77] Gould M., 'The European Social Charter and Community Law – A Comment', (1989) 14 *European Law Review*, 223, at 225-6.
[78] Belgium (1990), Portugal (1991), Luxembourg (1991); *see* http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatifications_en.pdf.
[79] *See* http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRev_en.pdf for a list of the provisions which each Member State has signed up.
[80] De Schutter, above note 26, at 113.

element of choice in its primary provisions and therefore stood as evidence of widespread acceptance of these rights across the Member States.

The idea of the European Community officially recognising the Social Charter as its standard of social rights protection has been mooted on a number of occasions. It was proposed that the Social Charter would at least be recognised as "... an unquestioned source of fundamental rights and principles in the European Community".[81] Alternatively, it was suggested that the Social Charter should be preferred over the drawing up of the Community Charter of the Fundamental Social Rights of Workers.[82] However, as illustrated below, the Community proceeded with the creation of this similar, if more narrow social rights document. This treatment of the Social Charter is thrown into sharp relief when contrasted with how the Community has treated the other major Council of Europe treaty, the ECHR, which has consistently been elevated to a special status by the Court of Justice.[83]

As will be discussed in Chapter 8.3, the Charter of Fundamental Rights could be said to give the Social Charter its most significant route of access to Union law. The Social Charter is referenced in the Preamble to the Charter, but more significantly, its provisions are cited in the Explanatory Note as being the source for many of the rights protected by the Charter.[84]

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[81] Resolution 915(1989) on the future role of the European Social Charter, adopted on 9 May 1989 on the report prepared within the Social, Health and Family Affairs Committee (Doc.6031, rapporteur Mr. Foschi).

[82] De Schutter, above note 26, at 116-7. *See* Hepple B., 'The Implementation of the Community Charter of Fundamental Social Rights', (1990) 53 *Modern Law Review* 643, at 653-4, for proposals on how this would work.

[83] De Schutter, above note 26, at 120, 122.

[84] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17. The relevant articles are Art 14(1), Art 15, Art 23, Art 25 and Arts 26 – 35.

3.4 Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers (Community Charter) was adopted in 1989 by all the then Member States of the European Community, with the exception of the United Kingdom.[85] It contained 26 substantive rights. The document was clearly linked to the Community Treaties, with Recital 1 in its Preamble referencing the former Art 117 EEC requirement to promote improved working conditions for workers.[86] At the time of its adoption there were a number of driving forces behind the document. These diverse factors included pressure from the trade union movement,[87] concerns that the drive towards the Single Market by 1992 would cause significant social disturbance[88] and recognition by the Commission and in particular, President Delors that a 'European social dimension' was required.[89]

The Community Charter was seen as an expression of the conclusions of the Hanover and Rhodes summits of the European Council that within the single market the same importance must be attached to social aspects as to economic aspects.[90] These were followed by a request from the Commission to the Economic and Social Rights Committee, along with a resolution from the European Parliament.[91] Concurrent with the Charter itself, the Commission developed an Action Programme, setting out legislative objectives for achieving the goals contained within the Charter.[92]

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[85] Commission of the European Communities, Charter of the Fundamental Social Rights of Workers (Luxembourg: Office of Official Publications of the European Communities, 1990).
[86] Now Article 151 TFEU.
[87] Silvia SJ, 'The Social Charter of the European Community: A Defeat for European Labour', (1991) 44 *Industrial and Labour Relations Review* 626, at 626.
[88] Bercusson B., 'The European Community's Charter of Fundamental Social Rights of Workers', (1990) 53 *Modern Law Review* 624, at 624.
[89] Silvia, above note 87, at 630, 632.
[90] Conclusions of the Presidency, European Council, Hanover, 27-28 June 1988; Conclusions of the Presidency, European Council, Rhodes, 2-3 December 1988.
[91] Resolution of 15 March [1989] OJ C 96/61.
[92] Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM (89) 568 final (Brussels: Commission of the

Without engaging in an analysis of each of the individual rights provisions addressed in the document, it is relevant to highlight the broad criticisms made, both in terms of the weakness of the language used and also its limited applicability.

3.4.1 Textual Weaknesses

A comparison between the phraseology used in the Community Charter and in the Social Charter indicates that the former document is much more focused on the specific rights of workers.[93] Almost all of the provisions make reference to workers directly or are related to the area of employment. This is made particularly clear by the fact that even the four vulnerable groups outside of workers who are listed; the old, the young, the disabled and the unemployed;[94] are all mentioned in the context of barriers to their ability to work.

It is relevant to note that up until the final draft of the document, the word 'citizen' was to be used instead of 'worker' and it was only at a late stage that this was changed.[95] Comparisons with early drafts have also revealed that the final language of the document was watered down in other areas such as the importance of combating unemployment.[96]

At the same time, Recital 2 in the Preamble states clearly that in the creation of the Single Market, the same importance must be attached to social aspects as to economic ones. As a principle in itself, this was an important statement to make. Its significance was even greater considering it had been added late in the drafting process by the Commission.[97] The fact that throughout the text, both individual and collective rights were being regarded as

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European Communities, 29 November, 1989). For disappointment with the contents of the Action Programme, *see* Silvia, above note 87, at 638.

[93] Dell'Olio, above note 3, at 298.

[94] Watson, 'The Community Social Charter', (1991) 28 *Common Market Law Review* 37 at 63.

[95] Bercusson, above note 88, at 627. Bercussion B., Deakin S., Koistinen P., Kravaritou Y., Muckenburger U., Supiot A., Veneziani B., 'A Manifesto for Social Europe', (1997) 3 *European Law Journal* 189, at 204.

[96] Bercusson, above note 88, at 627.

[97] Recital 2. Silvia, above note 87, at 635.

essential to the proper functioning of a market economy was a development welcomed by commentators.[98] Recital 8 of the Charter emphasised the importance of eliminating all types of discrimination, but also to combat social exclusion "in a spirit of solidarity"; an early reference to this concept in Community documents.

3.4.2 Weakness of Applicability

The limitations of the Community Charter are evident from the text of the document itself. Recital 11 makes clear that the document does not entail an extension of the powers of the Communities. Article 27 accepts that it is the responsibility of the Member States to implement the various rights in the Community Charter through national practices. This dominance of the role of the Member States is reaffirmed by the reference to 'subsidiarity' in Recital 15. However, the significance of this reference has been questioned, with regard to whether it possesses more of a political than a legal significance.[99] It has been argued elsewhere that including this range of limiting provisions is an indication that the Community Charter is purely political and rhetorical and provides no binding objective for the Member States.[100]

The larger problem with the document is due to the fact that at the time of its adoption, the competence of the Community in the area of social rights was extremely limited and hinged on the provisions of the Social Policy Chapter introduced by the SEA (former Articles 117 – 122 EEC). Its power to actually legislate was even more restricted, focusing on the area of health and safety of workers (former Article 118A EEC).[101]

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[98] Sciarra, above note 64, at 66.
[99] Hepple, above note 82, at 647.
[100] Ball C., 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order', 37 *Harvard International Law Journal* 307, at 329.
[101] Watson, above note 94, at 39.

The soft law nature of the Community Charter combined with the fact that it did not have universal recognition amongst the Member States, meant that its impact on case law before the Court of Justice was minimal. However, it has been argued that references to it in the preambles to various pieces of secondary legislation adopted in the early 1990s indicate it had a significance in shaping the development of Community law at the time.[102] While this is undoubtedly welcome, it is argued that the degree of protection of social rights required by a 'social state' requires rights which are fully justiciable by the courts.

3.5 General Principles of Community Law

3.5.1 No Social Rights as General Principles

The last of the constitutional sources of Union law with relevance to social rights are the general principles of Union law. Vigorous judicial activism on the part of the Court of Justice since the late Sixties has seen the development of a fundamental rights jurisprudence for the EU.[103] Despite a complete absence of reference to fundamental rights in the Treaties before the TEU in 1992, the Court was able to determine that "[r]espect for fundamental rights forms an integral part of the general principles of European Community law [...]".[104] However, while the Court has never enunciated a clear distinction between its conceptual treatment of civil and political rights on one hand, and social rights on the other, the case law

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[102] De Witte, above note 65, at 157. Originally, the the Economic and Social Committee called for a framework directive, which would make the social rights, as established in the ILO Conventions and the European Social Charter, "immune to competitive pressures". Doc CES 1069/87, 19 November 1987, para 1.6 see. Katrougalos, above note 15, at 30, note 180.

[103] See Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold v. Commission* [1974] ECR 491; Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

[104] *Internationale*, above note 103, at para. 4.

demonstrates that the Court of Justice has never seriously attempted to use the general principles of Community law as a source for the discovery of social rights.[105] It is argued here that its failure to do this is both unusual and regrettable as social rights are clearly included in some of the sources from which the Court of Justice had declared that the general principles could be drawn.

Having proclaimed its own capacity to apply fundamental rights, the Court of Justice proceeded to identify a number of sources from which it could draw inspiration regarding the range of rights to be protected under Community law. These sources included international treaties that the Member States had signed or cooperated in the drafting of[106] and also national constitutional traditions that were common across the Member States.[107] The European Convention on Human Rights was identified as a specific source of inspiration.[108]

Obviously, the extent to which the ECHR could be used as a basis for identifying social rights protected in Community law was limited by the fact that other than the right to education, it only addresses civil and political rights. However, neither of the other two sources have been used to any significant extent. A large number of Member States protect social rights within their constitutions.[109] Despite this, the Court has never attempted to use these as a basis for the discovery of common constitutional principles related to social rights.

International treaty sources have fared little better. Admittedly in *Defrenne*, the provisions of the Social Charter were used to enshrine the prohibition of discrimination on the grounds of sex as one of the general principles.[110] Bearing in mind the argument put forward above that this right should actually be classified as a civil rather than a social right, the decision would appear to be the solitary instance in which the Court used international

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[105] De Witte, above note 65, at 155 and 153.
[106] Case 4/73 *Nold v. Commission* [1974] ECR 491, at para. 13.
[107] Case 44/79 *Hauer v. Land Rheinland-Pflaz* [1979] ECR 3727, at para. 15.
[108] Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219, at para. 32.
[109] Fabre, above note 22, at 15. Fabre determined that of twenty nine EU Member States or accession applicants, twenty five of those States protect social rights within their constitutions to some degree.
[110] Case 149/77 *Defrene II* [1978] ECR 1365, at paras. 26-28.

treaties pertaining to social rights to justify its discovery of a general principle.[111] This reluctance to use international treaties is arguably unusual, particularly in light of the existence of explicitly 'European' documents such as the Social Charter which enumerated extensive social rights and which almost all Member States had helped author.[112] The Social Charter was of a similar status to the ECHR and as mentioned above, had been specifically referenced in the Preamble to the Single European Act.[113] Similarly, the Community Charter was a document exhibiting cross Member State support – albeit originally excluding the UK. Indeed, compared to the Social Charter, it was an explicitly Community orientated creation.

The Court's approach to international sources can be contrasted with the far more willing attitude exhibited by AG Tizzano in *BECTU*.[114] In assessing whether national conditions on paid annual leave entitlements were in compliance with the Working Time Directive, the Advocate General spent a considerable portion of his Opinion discussing what he described as "fundamental social rights" in Union law and their sources. It is submitted that the tone of the Opinion is one that almost assumes that fundamental social rights were common place within Union law.[115] In finding that annual paid leave was a fundamental social right, the Advocate General cited the Universal Declaration of Human Rights and the UN Charter on Economic, Social and Cultural Rights.[116] Significantly, AG Tizzano also located the right in both the Social Charter and the Community Charter, before copper-fastening its position as a fundamental social right by referring to the Charter of Fundamental Rights.[117]

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[111] De Witte, above note 65, at 153. The Social Charter was referred to in *Blaziot*, but this was in the context of it being used to assist with the interpretation of the term 'vocational' in what is now Article 167 TFEU. Case 24/86 *Blaziot v. Belgium* [1988] ECR 379, at para. 17.

[112] De Schutter, above note 26, at 122.

[113] Gould, above note 77, at 225-6.

[114] Case C-173/99, *R. v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4811.

[115] *Ibid*, at para. 22 of the opinion.

[116] *Ibid.*, at para. 23 of the opinion.

[117] *Ibid.*, at paras. 23, 24 and 28 of the opinion. The Advocate General made further references to both the Social and Community Charters in paras. 26-27.

In its decision, the Court made one reference to the Community Charter, and this was merely to the extent of acknowledging that it was mentioned in the preamble to the Working Time Directive.[118] The Court simply repeated the content of the relevant article of the Community Charter in the context of explaining the scope of the Directive.[119] At no stage was the right to annual paid leave declared to be a fundamental social right. Indeed, neither the terms 'fundamental' nor 'social right' appear in the text of the decision. This complete failure by the Court to deal with the treatment of social rights by the Advocate General, or indeed to reference them at all in the context of the judgment, is an indication of its implicit rejection of social rights as comprising part of the general principles of Union law.

3.5.2 References to Social Rights in other Contexts

The failure to recognise social rights as general principles does not mean that the Court has completely refused to address these in the context of all of its decisions. Some examples can be seen in the context of workers' rights. As such, in industrial relations cases such as *Maurissen* and *Dunnett*, the right to engage in trade union activities was understood as being among the "general principles of labour law".[120]

Perhaps of more significance are those cases where the Court of Justice has been prepared to allow social rights to be used in the context of overriding requirements relating to the public interest.[121] In *Decker*, the Court stated it would be prepared to allow the risk of a serious undermining of the financial balance of a national social security system to constitute

[118] *Ibid.*, at para. 39.
[119] *Ibid.*, at para. 36 – 39.
[120] Case C-193/87 *Maurissen* [1990] ECR I-114, at para. 21; Case T-192/99 *Roderick Dunnett* [2001] ECR II-813, at para. 89.
[121] Lenaerts K & Foubert P., 'Social Rights in the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing', (2001) 28(3) *Legal Issues of Economic Integration* 267, at 285. For an analysis of the situations where a Member State can use the protection of fundamental rights as a legitimate interest in the internal market, *see* Hos N., 'The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review', EUI Working Papers, Law 2009/06, at 7-8.

an overriding reason that would constitute a justification for a barrier to the free movement of goods.[122] An almost identical position was taken in *Kohll*, where the Court determined that it could not be excluded that the risk of seriously undermining the social security system of a Member State could justify a barrier to trade, this time in the context of free movement of services.[123] In *Arblade* the Court determined that national rules compelling employers to keep certain social and labour records relating to their workers could impinge on the freedom to provide services, but these could be justified if they were an appropriate and effective means of achieving the overriding public interest which the social protection of workers represented.[124]

Moving away from the fundamental freedoms, an entire area of public law agreements was removed from the ambit of Union competition law due to the application of social policy objectives in *Albany*.[125] The case hinged upon whether compulsory affiliation to a sectoral pension scheme was in breach of Article 101 TFEU. The Court accepted that certain collective agreements negotiated between employers and unions could have negative implications for competition. However, the Court determined that "[...] the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1) TFEU] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment".[126] A consistent interpretation of the Treaties required that collective agreements between management and unions in furtherance of such social policy objectives must be regarded as falling outside of Article 101 TFEU.[127]

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[122] Case C-120/95 *Decker* [1998] ECR I-1831, at para. 39.
[123] Case C-158/96 *Kohll* [1998] ECR I-1931, at para. 41. It will be demonstrated in Chapter 6.3.1 that this was not implemented seriously by the Court.
[124] Joined Cases C-369/96 and Case C-376/96 *Arblade* [1999] ECR I-8453, at para. 59.
[125] *Albany*, above note 37, at paras. 59-60.
[126] *Ibid.*, at 59.
[127] *Ibid.*, at 60.

These cases demonstrate that the Court of Justice was not completely opposed to the application of social rights, nor was it blind as to their importance. However, it is submitted here that neither recognising common labour law standards across the Member States, nor obtaining guidance in the application of overriding requirements of public interest, can be equated to the elevating of social rights to the position of fundamental principles of Community law. The refusal to do this indicates a real reluctance on the part of the Court to treat social rights in an equivalent fashion to the manner in which it deals with civil and political rights.[128]

This ambivalence towards social rights can be seen in the opinion of AG Jacobs in *Albany*, where in relation to the rights protected by the European Social Charter he stated:

> [...] the mere fact that a right is included in the Charter does not mean that it is generally recognised as a fundamental right. The structure of the Charter is such that the rights set out represent policy goals rather than enforceable rights, and the States parties to it are required only to select which of the rights specified they undertake to protect.[129]

A similar attitude is seen from AG Lenz in *Bergemann* where he suggests that the ratification of the European Social Charter merely expressed "[...] common political will and entailed the recognition of common values [...]" amongst the States who had signed it.[130]

Irrespective of the reason, it is submitted that the Court of Justice has been misguided in its failure to use the general principles of Community law as a means of anchoring the

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[128] Katrougalos, above note 15, at 27; Poiares Maduro, above note 17, at 12.
[129] *Albany*, above note 37, at para. 146 of the opinion. While this would seem to suggest that the Advocate General believed that some rights in the Social Charter could obtain the status of fundamental rights, he was talking in the context of the right to join a trade union and the right to strike. It has already been argued that both of these are in the nature of civil rights, rather than social rights.
[130] Case 236/87 *Bergemann* [1988] ECR 5125 at para. 28 of the opinion.

protection of social rights. This is particularly so due to the fact that such an opportunity was open to the Court in that two of the recognised source material for general principles; national constitutions and international agreements, included social rights. The Court has demonstrated no hesitation in using these sources to enshrine civil and political rights as general principles. This unwillingness to use these same sources indicates an entrenched resistance on the part of the Community judiciary to enshrining such rights in law. It is submitted that this is due to a philosophical stance regarding their position in the legal system, as vocalised by Advocates General Jacobs and Lunz. Therefore it is submitted that while recent cases such as *Schmidberger* (discussed at Chapter 6.2) have been represented as a significant elevation of the value of fundamental rights to an equivalent level as the fundamental freedoms,[131] the decision offers no reassurance to those concerned about the protection of social rights, as *Schmidberger* dealt with a traditional civil/political right – freedom of expression/assembly. As will be shown, the judgment has no substantive impact on social rights and the existing weakness in the protection of these remains.

Section B: Individual Social Entitlements

3.6 Personal Status under Community Law

[131] Case C-112/00 *Schmidberger* [2003] ECR I-5659. Young A., 'The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?', (2005) 11(2) *European Public Law* 219, at 230.

The formation of the EEC in 1957 brought about a new status for the citizens of the signatory Member States; that of Community national.[132] This new status gave Community nationals certain rights which they could enjoy if they travelled to another Member State and exercised one of their fundamental freedoms as provided for under the Treaties. The direct link between the Treaties and the Community nationals was a significant development in the context of international law, as acknowledged by the European Court of Justice in *Van Gend en Loos*.[133] This ability to enjoy a range of rights, including social benefits, in a host Member State, continues to be one of the defining characteristics of the European Union. It reflects the origin of the EEC as a community based on economic ideals. It is therefore not surprising that the focus at the time of its creation was on the protection of civil rights such as the right to move freely and to work.

Not all Community nationals immediately enjoyed the same bundle of rights as a result of Community law. The Treaties, supplemented by secondary legislation, created subsets of the category of Community national, whose members were included within the personal scope of Community law. Of these, perhaps the most significant category was that of the 'worker'. Section B examines the status of worker and identifies how it formed the basis for the rights granted to a national and her family members, in another Member State. It will be seen that, in its application of the Treaty provisions and secondary legislation, the Court of Justice has repeatedly ruled to widen the definition of the term worker using broad

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[132] "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaties which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament [...]". Case 26/62 *NV Algemene Trasporten Expedite Onderneming van Gend en Loos v. Nederlandse Administratie der Belgastingen* [1963] ECR 1, at 12.

[133] The Court stated that "[…] Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member Stations and the institutions of the Community [...]". *Ibid.*, at 12.

interpretations so as to bring more Community nationals within its scope. This demonstrates the ability of the Court to extend the personal scope of Community law.

The Court's broad interpretive power was not unlimited however and during this period there remained a requirement for some participation in economic activity by those Community nationals seeking to benefit from the personal scope of the Treaties. Court decisions on this topic also reveal some contested views about what actually constituted economically valuable work. The decision of the Community Legislature to pass legislation in the late 1980s to circumvent this requirement for certain categories of non-economically active person was therefore of major significance and acted to appreciably widen the range of Community nationals who benefitted from the personal scope of Community law. As will be demonstrated in Chapter 4.5, the requirement for economic activity has changed into one of economic self-sufficiency for certain categories of persons. In other areas, the economic requirement has remained, continuing to act as a limitation on the availability of social rights.

Having looked at the position of workers, and also of established persons, as examples of the categories of persons who enjoyed enhanced protection as a result of the Treaties, attention then turns to the legislative intervention made in favour of certain non-economically active groups, as exemplified by the three Residency Directives; the General Residency Directive,[134] the Retirees Residency Directive[135] and the Student Residency Directive.[136] These are significant as they represent the most comprehensive legislative statement of what were the residence and associated rights of Community nationals within the varying degrees of personal scope of the Treaties, prior to the introduction of Union citizenship. While the provisions of these directives were significantly developed by the

[134] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26.
[135] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28.
[136] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59. This directive was drafted to replace the original Directive 90/366/EEC which was annulled by the Court of Justice in Case C-295/90 *Parliament v. Council* [1992] ECR I-4193.

Courts after the introduction of the Union citizenship provisions, they still provide a useful point of contrast, particularly with the post-citizenship legislative effort which is considered in Chapter 5.

3.7 Workers

3.7.1. Defining workers

The category of 'worker' was one of the subsets of Community national that the Treaties singled out for privileged treatment. While the provisions of Article 45 TFEU set out the rights accruing to workers, the article does not contain an actual definition of the term. This has resulted in extensive judicial discussion of the concept of worker and forms the basis for the understanding of the term in the Treaty and secondary legislation. The Court of Justice has jealously guarded its role in defining what the term means, stating in *Hoekstra*[137] that:

> [i]f the definition of this term were a matter for the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person.[138]

Decisions concerning the meaning of the provisions of Article 45 TFEU reveal a tension between the Court of Justice and the Member States. The Court endeavours to give a broad reading to the article in order that Community nationals may utilize their full economic

[137] Case 75/63 *Hoekstra (nee Unger) v. Bestuur der Bedrijfsverenigning voor Detailhandel en Ambachten* [1964] ECR 177.
[138] *Ibid.*, at para. 2.

potential, consistent with its understanding of the free movement of workers as one of the fundamental freedoms. The Member States argue for a more restrictive interpretation, thus narrowing the category of persons who can benefit from the extensive rights workers obtain. For example, Member States have regularly attempted to use the public service exemption under Article 45(4) TFEU as a means of preventing nationals from other Member States accessing jobs in certain sectors.[139] It will be demonstrated that the approach the Court of Justice has taken to the concept of economic activity is of particular relevance, as it gives an indication of the social preferences adopted by the Community judiciary.

3.7.2 Part-time workers

The *Levin* case illustrates this tension between the national authorities and the Court of Justice.[140] Here, the Dutch authorities refused an application for a residence permit from a British national, arguing that as the woman was supporting herself by part time work which did not allow her earn enough to meet the Dutch minimum income level, she could not be considered a worker and thus would not fall within the category of 'favoured EC citizen' under Dutch legislation. The Court of Justice rejected this approach, restating that it was not for the Member States to interpret the meaning of worker restrictively.[141] In finding that part-time employment was included within the concept of worker, the Court placed emphasis on the fact that secondary legislation like Regulation 1612/68[142] and Directive 68/360 EC[143] did

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[139] *See* for example Case 152/73 *Sotgiu* [1974] ECR 153, Case 149/79 *Commission v. Belgium* [1980] ECR 3881, Case 149/79 *Commission v. Belgium II* [1982] 1845, Case 307/84 *Commission v. France* [1986] ECR 1725. *See* O'Keeffe D., 'Judicial Interpretation of the Public Services Exception to the Free Movement of Workers', in Curtin and O'Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Butterworths, 1992).

[140] Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035.

[141] *Ibid.*, at para 12-13.

[142] Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L (English Special Edition) 2/475.

not put any restriction on the types of employment required or the income received for the beneficiary to be classed as a worker. Further, the Court looked at the large number of persons across the Community that were engaged in part-time work, and reasoned that if such persons were excluded from the benefit of free movement of workers by restricting the benefit solely to those in full-time employment and earning over the national minimum wage, the ability of such part-time workers to enjoy rights guaranteed under Articles 2 and 3 of the Treaty would be restricted.[144]

Within its judgment in *Levin* the Court set out a condition stating that for part-time workers to come under the scope of Article 45 TFEU, they must be engaged in "effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary".[145] The decision cements the importance of economic activity in the context of recognising a worker. Further clarification of the scope of this condition was provided in *Kempf*.[146] Here, a German national living in the Netherlands worked part time amounting to about twelve hours each week, but also claimed a supplementary benefit which was paid out of public funds. When he applied for a residence permit, he was refused on the grounds that he had had recourse to national social welfare funds and that he lacked sufficient resources to support himself. Overturning the decision, the Court of Justice held that in light of the broad interpretation that was to be given to the term 'worker', the notion of 'effective and genuine activities' could be extended to cover those whose income was below the minimum subsistence level and who sought to supplement this by lawful means, even when such means were "[...] obtained from financial assistance drawn from the public funds of the

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[143] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L 257/13.
[144] *Levin,* above note 140, at para 15.
[145] *Ibid.*, at para. 17.
[146] Case 139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741.

Member State in which he resides, provided that the effective and genuine nature of his work is established".[147]

Key to the Court's decision in these cases is the importance that part-time work plays in the lives of so many across the Community. The judgment focuses on the need to allow a worker to avail of part-time employment as a means of improving her standard of living, and how denying those in part time employment the status of worker would also deny them the range of protections flowing from that status.[148] As such, while the Court continues with a requirement of economic activity, its primary concern is with its quality rather than its quantity.

3.7.3 Workers and sheltered work

While the rulings discussed above show a desire on the part of the Court to capture a wide range of part time activities within the definition of work for the purposes of Article 45 TFEU, some limits to this have been demonstrated in the context of sheltered jobs or work undertaken for the purposes of social reintegration. This more restrictive approach can be seen in *Bettray*.[149] Here, the Court refused to consider a person working as part of a drugs rehabilitation programme mandated by Dutch law as a worker under Article 45 TFEU, despite the fact that he received a small payment. The Court held that the work "[...] cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned".[150] The Court placed particular focus on the nature of employment, noting how the persons involved were not chosen on the basis of their suitability for the jobs but rather the reverse, with the tasks being matched to the

[147] *Ibid.*, at para. 14.
[148] *Ibid.*, at para. 14.
[149] Case 344/87 *Bettray v. Staatssecretaris van Justitie* [1989] ECR 1621.
[150] *Ibid.*, at para. 17.

ability of the participants in the programme. Further, the jobs were undertaken in enterprises especially created for the purpose of facilitating such employment. It has been argued that the refusal to include rehabilitative work within Article 45 TFEU may mean that all sheltered employment falls outside the scope of the article, as much of this is carried out in specially designed units and also involves matching the work undertaken to the ability of the participants.[151] In his opinion on the case, AG Jacobs outwardly rejected such an approach, stating:

> [...] a disabled or handicapped worker who by reason of his disability cannot work under normal conditions but who is none the less engaged by way of employment in an effective and genuine activity must be regarded as a worker for the purposes of Community law.[152]

However, it is difficult to see how this stance can be reconciled with his eventual conclusion and subsequently, the judgment of the Court, particularly in light of the Advocate Generals' statement that:

> [w]hat is significant in the present case is the essentially social nature of the scheme provided by the social employment law. Although the working conditions in the undertakings follow as closely as possible working conditions on the open market, that is done for retraining purposes the goods produced and the work done are carefully circumscribed so as not to compete improperly with open market goods and work.[153]

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[151] Craig P. & De Burca G., *EU Law: Text, Cases and Materials*, (4th Edition, Oxford, 2007), at 753.
[152] *Bettray*, above note 149, at para. 23 of the opinion.
[153] *Ibid.*, at para. 33 of the opinion.

It is argued that the definition of what constitutes work given here accurately describes much of the sheltered work available to those with disabilities across the Community and that the Advocate General fails to justify how he distinguishes such programmes from the one on which the applicant was placed.

The refusal to categorise the applicant in *Bettray* as a worker can be contrasted with the decision of the Court of Justice in *Trojani*.[154] Here the applicant was seeking to be classified as a worker while undertaking a 'personal rehabilitation scheme' in a Salvation Army hostel in Belgium. The scheme involved doing odd-jobs around the hostel for about 30 hours per week in exchange for which the applicant received his bed, board and a small allowance. The applicant wished to be classified as a worker in order to claim a supplementary allowance from the Belgian authorities. Referring to its conclusion in *Bettray* about work not being effective and genuine if its sole purpose was rehabilitation, the Court distinguished the situation of the applicant in that case stating that the decision related to his particular characteristics whereby, due to the drug addiction, he had been unable to work in normal conditions.[155] The Court in *Trojani* determined that the bed, board and allowance constituted remuneration and as such the only remaining question was whether the work being undertaken was real and genuine.[156] The Court of Justice held that it was up to the national court to rule on this, taking account of whether:

> [...] the services actually performed by Mr Trojani are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.[157]

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[154] Case C-456/02 *Trojani v. CPAS* [2004] ECR I-7573.
[155] *Ibid.*, at para 19.
[156] *Ibid.*, at para 22-3.
[157] *Ibid.*, at para 24.

It is argued that this judgment is inconsistent with the decision in *Bettray*. An analysis of AG Geelhoed's opinion, where he applied *Bettray* and reached the opposite conclusion to that of the Court, reinforces this point. The Advocate General accepted that it was not always easy to classify the nature of a person's work status and that it often was "hybrid in nature".[158] Regarding the different types of work, he commented that:

> [i]n the case of the private non-profit sector, as represented by the Salvation Army, a clear distinction cannot always be made between voluntary work and paid employment. Even where certain work is subsidised from public funds, however, it is often not immediately obvious whether the subsidised activity is primarily economic. This has to do with the objectives which the subsidy is intended to achieve and with its effect on the market.[159]

The Advocate General appears to suggest a new element for determining if a person acquires classification as a worker. On top of the standard three requirements stemming from the case law regarding the length of the employment relationship, the existence of subordination and the receipt of remuneration, AG Geelhoed suggests that the Court also needs to ask "does Mr Trojani, in the special social context within which he does his work, qualify as a migrant worker".[160] On analysing the nature of the employment, the Advocate General concluded that there was no fully-fledged employment relationship between the applicant and the Salvation Army and that the relationship that did exist was "based essentially on the provision of shelter rather than work".[161] Referring specifically to *Bettray*, the Advocate General stated that in that case, "[...] the Court was already placing a certain limitation on the scope of the

[158] *Ibid.*, at para 28 of the opinion.
[159] *Ibid.*,
[160] *Ibid.*, at para 49 of the opinion.
[161] *Ibid.*, at para 56 of the opinion.

concept of worker in the case of non-economic activities. That judgment related to work done with a view to the integration of the person concerned".[162]

From the point of view of enhancing social inclusion across the Union, the Court's decision in *Trojani* to allow rehabilitation schemes to be considered under the traditional test for whether a worker relationship exists, rather than the more specialised test as proposed by AG Geelhoed, is a beneficial one. Nevertheless is it argued that the attempt by the Court to distinguish the situations in *Bettray* and *Trojani* is unconvincing and that the Court should have set out clearly how sheltered work was to be treated under Article 45 TFEU. As has been demonstrated above, the Court is not reticent about imposing its own view regarding the definition of the relevant terms. Since economic activity remains a key element for classification as a worker, the question of whether labour that is of a 'social nature' constitutes work, even if it meets the other criteria, is one that needs to be addressed. Here the Court missed the opportunity to definitively extend the protection of Community law to a group of vulnerable persons.[163]

3.7.4 Position of Job-Seekers

The privileged position of workers regarding the range of rights that Community law accords to them is highlighted when compared with another sub-category of Community nationals – job-seekers. These are regarded as persons moving to another Member State in search of work, but without currently classifying as a worker under Community law.[164]

This distinction between those in work and those looking for work can be seen in *Lebon*. Here the Court determined that the right to social and tax benefits as provided for under Article 7(2) of Regulation 1612/68 applied solely to workers.[165] Thus, job-seekers could

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[162] *Ibid.*, at para 55 of the opinion.
[163] It has been argued that there is a need to "[...] widen the concept of social contribution to encompass unpaid work as the legitimate basis of a claim to social rights", Ackers L. & Stalford H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (Ashgate, 2004), at 5.
[164] Case C-292/89 *R v. Immigration Appeal Tribunal ex parte Antonissen* [1991] ECR I-745, at para. 13.
[165] Case 316/85 *Centre public d'aide sociale de Courcelles v. Lebon* [1987] ECR 2811.

only rely on the equal treatment requirement of Article 45 TFEU in the context of access to employment generally. The Article 45 TFEU equal treatment requirement did not apply to pre-employment social benefits. This distinction between workers and job-seekers meant that in the instant case, the applicant was not entitled to a minimum subsistence allowance while she looked for a job in the host Member State. The Court based this differentiation on the provisions of Regulation 1612/68, where it drew a clear distinction between the term 'worker' in Article 7 of the Regulation as opposed to the term 'national of a Member State' contained in Articles 2 and 5. Job-seekers fell within the latter category and as such were only entitled to the lesser benefits available outside of Article 7.

The position of job-seekers was also examined in *Antonissen* in the context of whether a Member State had the right to deport a jobseeker if they failed in their attempts to obtain work.[166] The Court of Justice had to consider the position of a Belgian national who the British authorities were attempting to deport having served a prison sentence for drugs offences. The applicant had previously been in the UK seeking work and claimed that the deportation would breach his freedom to move as a worker. The Court of Justice rejected an attempt by the British authorities to argue that Community nationals only gained the right of free movement in order to accept offers of employment actually made (Article 45 (3)(a) & (b) TFEU) while the right to reside in the territory of the host Member State was singularly for the purpose of employment (Article 45 (3)(c) TFEU). The Court stated that "[...] such an interpretation would exclude the right of a national of a Member State to move freely and to stay in the territory of the other Member State in order to seek employment there, and cannot be upheld".[167]

The Court did acknowledge in *Antonissen* that it was acceptable to treat a Community national seeking work for the first time in the host Member State differently from a Community national who was previously employed in another Member State. Specifically the

[166] *Antonissen*, above note 164.
[167] *Ibid.*, at para. 10.

Court stated that a Member State could deport a Community national who had failed in his search for work after a specific time frame. The Court indicated that a six month period would be sufficient to allow the Community national ascertain the position in the job market in the Member State. However, the Court also introduced a further degree of flexibility in holding that after this period had elapsed, should the Community national be able to provide evidence that he had a genuine chance of obtaining employment, the host Member State could not require him to leave its territory.[168]

The weaker status of jobseekers can also be seen in areas outside the scope of Regulation 1612/68. In *Commission v. Belgium*, the Court was considering the status of a first employment scheme run by the Belgian Government for graduates of certain Belgian educational establishments and whether it was applied in a discriminatory fashion.[169] The Court held that such schemes did not fall within the field of access to employment, as protected under Regulation 1612/68 but rather were covered by rules on unemployment insurance. The Court stated that a person seeking to claim the benefit of free movement of workers as regards these provisions "[...] must have already participated in the employment market by exercising an effective and genuine occupational activity, which has conferred on him the status of worker within the Community meaning of that term".[170] This could not be the case in relation to former students searching for their first job.

Despite the more accommodating approach being demonstrated by the Court towards job-seekers in *Antonissen*, these judgments illustrate the extent to which the status of worker is privileged compared to other Community nationals. This difference is most significant and most detrimental to job-seekers in the manner in which their right of equal access to tax and social benefits is limited. The strict approach demonstrated by the Court is in contrast to its vigorous expansion of the meaning of the term 'worker' to include part time work as

[168] *Ibid.*, at para. 21.
[169] Case C-278/94 *Commission v. Belgium* [1996] ECR I-4307.
[170] *Ibid.*, at para. 40.

described above. While it could be argued that job-seekers are prospective economic actors and should be treated in an identical fashion to workers, it is understandable that the Member States focus on them more as prospective claimants on their welfare systems, and consequently wish to limit their access. In refusing to give them equivalent status to workers and as such deny them complete and immediate access to the benefits accruing to nationals in a host state, the Court of Justice accepts these concerns of the Member States. It would appear that the Court reached a limit regarding how far it could stretch the meaning of the term 'worker'. As shall be analysed in the next chapter, the creation of Union citizenship and perhaps more significantly the Citizenship Directive has allowed the Court to significantly alter its jurisprudence in this area.

3.8 Established Persons

Article 49 TFEU requires the removal of all barriers to the free establishment of Community nationals in another Member State. This applies to companies and undertakings, but also to individual Community nationals wishing to pursue activities as self-employed persons. Thus the provision extends Treaty protection to persons engaged in economic activities in another Member State but who are not classified as workers.

The concept of establishment is best explained in the *Gebhard* case, where the Court of Justice stated:

> [t]he concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to

profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.[171]

In the case law on establishment and the self-employed, the Court of Justice has demonstrated the same focus it showed in its decisions on workers regarding the need for some degree of economic activity to be taking place.[172] The *Jany* case gives a clear definition of self-employed, building on from previous cases.[173] The Court understood the term to mean "[...] economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility".[174] The Court has been prepared to find a wide range of persons economically active in another Member State outside of a worker relationship, as falling within the provisions of Article 49 TFEU. These have included professional sports persons,[175] persons working as part of a religious community[176] and even prostitutes.[177]

As with free movement of workers, the Community has adopted legislation to complement the Treaty provisions on establishment. Directive 73/148 made provision for the rights of Community nationals seeking to establish themselves in another Member State.[178] However, unlike Regulation 1612/68, the Directive did not set out in great detail the benefits that could accrue to established persons and their families in their host Member State. This gap was filled to some extent by case law.

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[171] Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [2001] ECR I-4165, at para. 25.
[172] Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 53 and 54.
[173] Case C-268/99 *Jany v. Staatssecretaris van Justitie* [2001] ECR I-8615.
[174] *Ibid.*, at para. 37.
[175] Case C-415/93 *Union Royal Belge de Societes de Football Association ASBL v. Bosman* [1995] ECR 4353 at para. 73.
[176] Case 196/87 *Steymann v. Staatssecretaris van Justice* [1988] ECR 6159, at para. 13.
[177] *Jany*, above note 173, at para. 48.
[178] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14.

The decisions of the Court all emphasized that the non-discrimination requirement in Article 49 TFEU applies to all areas that might constitute a barrier to freedom of establishment. These included a range of social benefits such as public aid for housing,[179] study benefit[180] and childbirth and maternity benefits.[181] Directive 73/148 has subsequently been replaced by Directive 2004/38 and its provisions, examined in detail in Chapter 5, now cover established persons to the same degree as workers.

3.9 Extending Protection to the economically inactive

The preceding sections have illustrated *inter alia* the role that economic activity has played in ensuring that certain categories of Community national avail of rights while in a host Member State. Obviously, the reverse of this was that those classified as 'economically inactive' did not fall within the personal scope of the Treaties. However, from the late 1970s on, moves were made to provide wider protection for some of those within this grouping.

3.9.1 Initial Commission proposal on a general right of residence

In 1979, the Commission brought forward a proposal to give free movement and residency rights to a wider category of persons than were at that pointed covered by Community law.[182] The primary goal of the draft directive was to extend these rights to persons "independently

[179] Case 63/86 *Commission v. Italy* [1988] ECR 29.
[180] Case C-337/97 *Meeusen v. IBG* [1999] ECR I-3289.
[181] Case C-111/91 *Commission v. Luxembourg* [1993] ECR I-187.
[182] Proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State (COM(79) 215 final), [1979] OJ C 207/14.

of the pursuit of an occupational activity".[183] The proposal reflected a belief that the goal of free movement of persons, one of the foundations of the Community, could not be achieved without extending a right of residence to Community nationals and their families who did not already benefit from such a right under other provisions.[184]

Significantly, the proposed directive described the right of residence for Community nationals and their families as "permanent".[185] In a technique that would be repeated in subsequent legislation, the Commission accepted that the exercise of the new right under the directive could be subject to "economic conditions".[186] Beneficiaries under the Directive would have been required to show "[...] proof of sufficient resources to provide for their own needs and the dependent members of their family [...]".[187] Limited guidance was provided as to what degree of resources would be regarded as sufficient; "Member States may not require such resources to be greater than the minimum subsistence level defined under their law".[188]

Proof of the permanent right of residence was to be provided by a "Residence Permit for a National of a Member State of the European Community".[189] The permit had to be valid for at least five years from its initial issue. Notably, the permit was to be automatically renewed except if, after the end of its initial period of validity, it was determined that the Community national no longer satisfied the economic conditions laid down under Article 4(2). The implication of this would appear to be that after successfully proving the existence of adequate resources when the first period of validity was at an end, a Community national could subsequently retain a right of permanent residence in a host Member State, even if sufficient resources were no longer present.

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[183] *Ibid.*, Recital 2.
[184] *Ibid.*, Recital 3.
[185] Article 4(1).
[186] Recital 4.
[187] Article 4(2).
[188] *Ibid.*
[189] Article 5(1).

The proposed directive was withdrawn by the Commission in 1989 but was subsequently replaced by a new set of proposals for three separate directives, which are addressed below.

3.9.2 Court of Justice widens the scope of Community law

The move towards extending protection to the non-economically active was not solely being undertaken on a legislative basis. The Court of Justice addressed the personal scope of Community law for students studying in another Member State in a pair of decisions. In *Gravier*, the applicant was challenging the levying of a registration fee on foreign students attending third level education in Belgium, when the same fee was not required of Belgian nationals.[190] The Court of Justice defined the issue at question as "[...] the establishment of a financial barrier to access to education for foreign students only".[191] In its judgment, the Court extended the scope of the Treaties to include the conditions of access to vocational training.[192] It did so by making reference to a number of factors but focusing its emphasis on the common vocational training policy which was to be developed under Article 166 TFEU.[193] The ability to access vocational training was seen as a positive step as it would enhance the free movement of workers by enabling them to gain qualifications in other Member States.[194]

While the decision resulted in a clear extension of the material scope of the Treaty, the Court in effect also determined an increase in its personal scope. The applicant in the case had no direct Community law basis for her residence in Belgium; the Court did not rule on the argument submitted by the Commission that she was there as a recipient of a service

[190] Case 293/83 *Gravier* [1985] ECR 593.
[191] *Ibid.*, at para. 18.
[192] *Ibid.*, at para. 25.
[193] *Ibid.*, at paras. 21 and 23.
[194] *Ibid.*, at para. 24.

under Article 55 TFEU.[195] Nevertheless, after finding that Community law now included conditions of access to vocational training, the Court determined that imposing a fee which discriminated against Community nationals from another Member State was a breach of Article 18 TFEU.[196] The judgment does not clearly set out any distinction regarding how it addresses material and personal scope. It is suggested that this can be accounted for in two ways. Firstly, the Court may have been determining that students undertaking specifically vocational education were a subgroup of persons exercising one of the four fundamental freedoms and as such, gain a special personal scope. Note the Court's view that the common vocational training policy constituted "[...] an indispensible element of the activities of the Community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers".[197] The second possibility is that the Court was endeavouring to be more generous towards students generally, when it comes to determining personal scope.

The question of the basis for the personal scope of students as determined by the Court of Justice would appear to be resolved in the *Raulin* case. [198] Here, in the context of vocational education in the Netherlands, the Court was asked to answer a number of questions including whether a Member State national admitted to a course of vocational training in a host state gained a right of residence there in order to be able to undertake the course and whether the exercise of that right was dependent on the host Member State issuing a residence permit. Obviously, in the event that no right of residence existed, this would have the effect of denying the individual personal scope under Community law.

Referring back to *Gravier*, both the Dutch and British Governments argued that that decision had not recognised a situation that admission to a vocational training course created an automatic right of residence in a Member State.

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[195] *Ibid.*, at para. 17.
[196] *Ibid.*, at para. 26.
[197] *Ibid.*, at para. 23.
[198] Case 357/89 *Raulin v. Minister for Education and Science* [1992] ECR I-1071.

The Court found against the national governments, determining that the requirement for equal treatment in access to vocational education applied not only to fees, but also to "any measure that may prevent the exercise of that right".[199] As a result of the principle of non-discrimination stemming from Articles 18 and 166 TFEU, the Court determined that "[...] a *national* of a Member State who has been *admitted to a vocational training course* in another Member State enjoys [...] a right of residence for the duration of the course".[200] Interestingly, in deciding on the issue of the need for a residence permit, the focus of the judgment is broadened to "the right of entry and residence which a *student* who is a national of a Member State derives from Community law cannot be made conditional on the granting of a residence permit".[201] The category of student is different and potentially larger than that of person undertaking a vocational training course. Thus, this change in language means that the decision regarding the personal scope is significantly broadened, particularly as at this time, there was no applicable secondary legislation providing rights of residence for students.[202]

The Court went on to say that the right of residence was confined to what was necessary to allow the student pursue the vocational training. As such, the host Member State was entitled to impose conditions on the right of residence; it listed the covering of maintenance costs and health insurance to which it stated that the principle of non-discriminatory access to vocational training did not apply.[203]

It is instructive to watch how the Court uses the non-discrimination clause of Article 18 TFEU in conjunction with the vocational training clause of Article 166 TFEU in a manner which granted personal scope to students. The joint use of the two provisions here presages to a limited extend the subsequent use of Article 18 TFEU in conjunction with the provisions on Union citizenship; Articles 20 and 21 TFEU, which will be examined in the next chapter. It

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[199] *Ibid.*, at para. 34.
[200] *Ibid.*, at para 34 (emphasis added).
[201] *Ibid.*, at para. 37 (emphasis added).
[202] The original draft of Directive 90/366 on the right of residence for students, subsequently replaced by Directive 90/93, would have been published at this stage but was not legally binding at the time of this case and was not referred to in the decision.
[203] *Ibid.*, at para. 39.

indicated the existing potential for the principle of non-discrimination on the basis of nationality to facilitate access to social rights, even before the introduction of Union citizenship.

3.9.3 Conditions relating to the Residency Directives

In 1989 the Commission renewed its legislative efforts to extend the right of residence and published three proposed directives on students, retirees and other non-economically active persons.[204] This set of proposals would eventually result in the General Residency Directive,[205] the Retirees Residency Directive[206] and the Student Residency Directive.[207] The directives had the effect of significantly increasing the range of persons who could derive a right of residence from Community law. By increasing the number of persons who fell within the personal scope of the Treaties, the directives increased the possibility of claims being made on the exchequers of host Member States by these new rights holders.

The recitals to the Commission's original proposals give us an indication of its thinking in bringing forward the draft legislation. In each of the three proposals there was a reference to the achievement of the internal market as an area "without internal frontiers in which the freedom of movement for persons is ensured".[208] The original proposals also display a concern that host Member States should not have their social welfare systems

[204] Proposal for a Council Directive on the right of residence for students [1989] OJ C 191/2, Proposal for a Council Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity [1989] OJ C191/3, Proposal for a Council Directive on the right of residence [1989] OJ C 191/5 . These original proposals were subsequently changed and amended proposals for each of the three directives were published [1990] OJ C 26.

[205] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26

[206] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28.

[207] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59. This directive was drafted to replace the original Directive 90/366 which was annulled by the Court of Justice in Case C-295/90 *Parliament v. Council* [1992] ECR I-4193.

[208] Proposal for a Council Directive on the right of residence for students [1989] OJ C 191/2, Recital 2; Proposal for a Council Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity [1989] OJ C 191/3, Recital 2; Proposal for a Council Directive on the right of residence [1989] OJ C 191/5, Recital 2.

burdened by those benefiting from the residency rights. As such, Recital 5 of the original Student Residency Directive stated:

> [...] the costs of social assistance granted in the host Member State to a student who has no legal connection with that Member State other than the mere fact that he or she has gone there to undergo vocational or professional training, should not be borne by that State but by the Member State from which he or she comes.

Similarly, Recital 4 of the original General Residency Directive stated:

> [...] it is vital to avoid migration flows resulting solely from financial considerations based on the fact that the social security and social assistance systems have not been harmonized; whereas a European citizen wishing to reside in a country other than his own should not constitute an unreasonable burden on the public finances of the host country; whereas, therefore, at the present state in the development of the Community, conditions should be laid down for the exercise of the right of residence.

This concern to avoid an 'unreasonable burden' on the host Member State resulted in a common set of 'economic risk conditions' being adopted in all three Residency Directives. The conditions broadly required that, prior to benefitting from the right of residence, the Community national needed in the first place to possess sufficient resources for themselves and any family members and also to have sickness insurance in respect of all risks. While the sickness insurance condition was identical under each piece of legislation, the manner in which the sufficient resources condition was drawn varied slightly. Both the General

Residency and the Retirees Residency Directives required the beneficiaries to actually possess the sufficient resources in question and laid down criteria on how the sufficiency of the resources would be ascertained.[209] In contrast, the Student Residency Directive simply required the beneficiary to declare or otherwise assure the host Member State that she possessed sufficient resources.[210] It contained no guidance as to what would constitute sufficient.

The goal of these conditions was to ensure that "the beneficiaries of the right of residence [did] not become an unreasonable burden on the public finances of the host Member State".[211] These provisions in each of the directives were tightly drawn and while their interpretation was considered by the Court in a small number of cases, they were not seriously challenged until the advent of Articles 20 and 21 TFEU created new avenues of attack for litigants.[212]

Sufficient Resources

In the case of *Commission v. Italy* the Court of Justice had the opportunity to discuss the sufficiency of resources condition and the degree of proof needed of the existence of these resources, in the context of all three of the Residency Directives.[213] The Commission took an infringement case against Italy alleging that the Italian Government a) required those nationals and their families benefiting from the General Residency Directive to have one third more resources than those benefiting from the Retirees Residency Directive b) had

[209] Article 1, General Residency Directive. Article 1, Retirees Residency Directive.
[210] Article 1, Student Residency Directive.
[211] Recital 4, General Residency Directive.
[212] Giubboni makes an interesting comparison between the rationale behind the economic risk conditions and that behind the 'poor laws' of Victorian era Britain. Giubboni S., 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice', in Ross & Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, (OUP, 2010), at 170, note 23.
[213] Case C-424/98 *Commission v. Italy* [2000] ECR I-4001.

wrongfully limited the range of documentation that could be used as proof of sufficient resources c) was requiring students and their families seeking to benefit from the Student Residency Directive to have a certain amount of resources and limiting the ability of students to make a declaration for themselves and their families of adequacy of resources.

Dealing with the first of these claims, the Court noted that in its submission the Commission itself admitted that Member States "have some latitude in the matter" and that "[...] even if the wording of the two directives is identical as regards the amount of the resources required, it does not follow that the Member States are required to fix the same amounts in both cases".[214] The difference in regimes between the two directives was not in of itself proof that the latitude that was afforded to the Member States has been exceeded.[215] This element of the decision has been criticised on the basis that "[i]t is impossible to see how the sufficiency of resources can vary as between different groups of people".[216]

The second of the Commissions' claims was upheld. The Court determined that in limiting the means of proof that could be used to evidence the adequacy of resources, the Italian Government had exceeded the limits imposed by Community law.[217]

On the final issue, the Court also found against Italy on all aspects. It noted the difference in wording between the relevant article on adequacy of resources in the directive compared to the similar provisions of the Retirees and General Residency Directives.[218] The Court agreed with the Commissions' submission setting out a range of arguments whereby the nature of a student's residence should be treated differently, thus justifying the different standards required by the directive.[219]

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[214] *Ibid.*, at para. 25.
[215] *Ibid.*, at para. 26.
[216] Rogers N. & Scannell R., 'Free Movement of Persons in the Enlarged European Union', (London, Sweet & Maxwell, 2005), at Ch 9-14.
[217] *Commission v. Italy,* above note 213, at para. 37.
[218] *Ibid.*, at para. 45.
[219] *Ibid.*, at para. 40. The Commission specified three reasons. Firstly, the student's stay in the host state would be temporary, since it is limited to the duration of her studies. This lessens the chance of her becoming a burden on social assistance compared to those claiming residency under the other two directives. Secondly, the

Despite the fact that the case was brought well after the Maastricht Treaty, the Court made its decision in *Commission v. Italy* without any recourse to the concept of Union citizenship. Indeed, the term is not mentioned at all in the judgment. Hence, it is a useful analysis of the Residency Directives outside of the prism of Articles 20 and 21 TFEU. This can be contrasted with a separate attempt to apply extra national requirements on top of the adequacy of resources condition which was addressed in the *Chen* case. There, as will be discussed in Chapter 4.5.5, Union citizenship played an important role in the Court rejecting the additional national conditions in question.

Sickness Insurance

The condition of sickness insurance, shared between all three Residency Directives, appears on the face of it to be drawn in an extremely wide fashion, with the necessary coverage being required for "all risks". There was no litigation on this point prior to the introduction of the provisions on Union citizenship. As such, it cannot be ascertained to what extent the new provisions have altered the interpretation of this condition. The sickness insurance condition is addressed in *Baumbast*, where a flexible interpretation was given to it within the General Residency Directive. Significantly Union citizenship had at this stage been introduced and the current Article 21 TFEU was mentioned in this aspect of the Court's judgement – see full discussion in Chapter 4.5.3.

3.10 Conclusion

Directive limited the validity of the residence permit to one year, making it easier for the national authorities to act quickly if a student became a burden on social assistance. Lastly, the Commission argued that it was easier for a student to supplement resources by income from work than it was for those claiming rights under the other two directives.

3.10.1 Constitutionalised Protection of Social Rights

Beginning from the proposition that a true form of social citizenship requires the constitutionalised protection of social rights and values akin to that provided in a 'social state', it is clear that prior to the Maastricht Treaty the then EC did not meet this standard. While this review does illustrate an incremental increase in the Community's competence in the area of social policy, it could not be argued that the Treaties reflected social values to an extent that they mirrored the constitution of a social state. What emerges clearly is a failure by the Member States to adequately provide the Community with the necessary language within the Treaties to either allow the development of a *sui generis* form of social rights protection, or permit reliance on existing sources of social rights. Their failure is particularly well illustrated in the process of the creation and implementation of the Community Charter. At the same time, the Court has also failed to provide a solution here, through its refusal to use the general principles of Community law to discover social rights. This reluctance is surprising, considering the activism the Court demonstrated in other fields. A further limitation on the capacity of the Community to facilitate social rights was the fact that the ability of individuals to avail of these rights depended on claimants falling within the personal scope of Community law, which was examined in Section B.

The full danger created by the weakness of the social rights protection within the Treaties will be illustrated in Chapter 6. What has resulted is a "constitutional asymmetry" regarding the extent to which Member States are entitled to protect social right values that form part of national law when these clash with the values promoted by the Community Treaties.[220] The concern is that, as a result of the failure to adequately protect social rights, if

[220] Scharpf, above note 27, at 647.

one was to assess the European Union according to a European 'social' model or the Anglo-American 'liberal' model, it is currently closer to the former than the latter.

3.10.2 Individual Social Entitlements

The Commission's proposed directive of 1979 was, for its time, a radical departure and represented the first legislative effort to broaden the personal scope of Community law to include the economically inactive. It is noteworthy that the proposal was published well before the Single European Act and the concurrent drive for increased integration that resulted from it.

It is illuminating to compare the scope of the Commission's 1979 proposal, with its single coverage of all categories of non-economically active persons, with the approach taken subsequently in the Residency Directives, which provided more limited rights of residence and separate provisions for different categories of persons. This initial unified approach to dealing with the various categories would eventually be re-adopted in the Citizenship Directive discussed in Chapter 5. Indeed, a further comparison can be made between the 1979 proposal and the Citizenship Directive regarding the concept of a permanent right of residence. As discussed above, the provisions of Article 4(1) in conjunction with Article 5(1) of the 1979 proposal indicate that the conditional permanent right of residence could develop into an unconditional permanent right of residence over time. The unconditional permanent right of residence is regarded as one of the most significant aspects of the Citizenship Directive and as such, it is highly relevant to observe that the Commission had tried to achieve this a full twenty five years earlier.

The ambition of the Commission can be contrasted with the approach of the Court of Justice during this period. While admittedly the Court was vigorous in developing the

definition of worker to encompass a wide range of persons, its adherence to the need for economic activity restricted the scope of its decisions in this area. While the *Gravier* case does show the Court demonstrating some flexibility as regards non-economically active persons, such movement was limited to the area of vocational education. This reluctance of the Court to extend protection to economically inactive persons will be thrown into sharp relief in the following chapter where the Court's activist approach to the expansion of Union citizenship will be examined. This radical alteration to its position demonstrates that one of the real significant aspects of the introduction of Union citizenship was the change in attitude of the Court of Justice.

Both the 1979 proposal and the eventual Residency Directives supplemented the traditional requirement for economic activity with that of economic self-sufficiency for limited categories of non-economically active persons. A qualifying Community national gained the benefit of the right of free movement and residence, so long as they did not become a financial burden on their host Member State. This step was important in that it conceptualised the right to reside in another Member State, provided for under Community law, as being something that applied to more than just economic actors. However, this extension is still clearly limited on the basis of financial assets. The new scope of the right will only apply to the reasonably well off. The sufficiency of resources criterion means that those without the means to support themselves in a host Member State will continue to be excluded from the scope of Community law. It is submitted that this introduces an even greater degree of inequality. At least when economic activity was the sole requirement, the assessment was of the current state of the Community national. On the face of it, this creates a level playing field as in theory persons can undertake economic activity and all types of economic activity gave rise to the same level of rights, irrespective of the monetary value of the work in question. As such, the chamber maid in the *Levin* case received exactly the same

right of residence, and subsequently rights to claim from national resources in the host Member State, as would the lawyer in *Gebhard*. The addition of the economic sufficiency requirement to the economic activity requirement allows the wealthy German retiree to enjoy residency rights in Latvia, but denies the poor Latvian retiree a reciprocal status in Germany due to the inadequacy of resources. The desire of the Member States to prevent their exchequers being opened up to major claims from nationals of other Member States is an understandable reason to fasten the distinction on the adequacy of resources. Nevertheless, the fact that the distinction between the two retirees is pinned on their degree of wealth raised uncomfortable questions about the equality of treatment that Community nationals as a whole enjoyed.

Chapter 4 – Introduction of Union Citizenship

4.1. Introduction

The fundamental weakness in the pre-Maastricht protection of the components necessary for a social citizenship to be said to exist were outlined in the previous chapter; an extremely limited range of social rights and values enshrined in the Treaties combined with a highly circumscribed ability to access individual social entitlements restricted to those engaged in economic activity or permitted by secondary legislation. It is now necessary to examine the impact of the introduction of Union citizenship through the original Treaty on European Union (EU Treaty) in 1992. This impact can be observed through both its substantive and rhetorical effect on the jurisprudence of the Court. While secondary legislation has followed the creation of Union citizenship (which will be addressed in the following chapter), much of the significance of the introduction of Articles 20 and 21 TFEU can be assessed by the manner in which the Court of Justice has applied and developed these provisions in its case law. Though the free movement and residence rights provided for under Article 21 TFEU are "subject to the limitations and conditions laid down in this Treaty [...]", nevertheless the Court has used these provisions to extend the range of rights available to the newly proclaimed European citizens, when they exercise their freedom of movement. In so doing, it has manifested an approach similar to its broad treatment of the term 'worker' outlined in the previous chapter, and significantly extended the rights granted to Union citizens past what had been previously provided for under secondary legislation.

This chapter focuses on the impact that the provisions on Union citizenship had on the individual social entitlement element of citizenship. It will demonstrate the manner in which

the new Articles 20 and 21 TFEU were applied in conjunction with the existing prohibition on discrimination on the grounds of nationality under Article 18 TFEU. The effect of this was to widen both the personal and material scope of the Treaties. Another key consequence of the adoption of Union citizenship has been the undermining of the economic activity requirement – a move that allows a wider category of people to enjoy the protection of the Treaties. Court decisions regarding Articles 20 and 21 TFEU reveal that Union citizenship has also impacted on the proportionality analysis applied by the Court to Union legislation, which may result in clashes between the Court and the Union Legislature in the future.

The activist nature of the Court's decisions on citizenship has the potential to increase the range and depth of tangible social benefits available to Union citizens in host Member States. The right of free movement, conceptually a civil right, has always been at the very core of the European project. Following the introduction of Union citizenship, a willingness by the Court of Justice to permit genuine free movement within the EU by extending it to those who are not economically active would point towards a broadened conception of the benefits Union citizens should receive. By going further and providing a means to access social entitlements within a host Member State, it will be shown that the Court of Justice has taken a meaningful step towards creating an institution that gives protection to the necessary elements of a genuine social citizenship.

4.2. Union citizenship – Extending the personal and material scope of the Treaties

4.2.1. Personal Scope

The Court of Justice had its first real opportunity to explore the impact of the introduction of the provisions on citizenship in *Martinez-Sala*.[1] The applicant, a Spanish citizen, had been living legally in Germany for a number of years and was challenging the refusal of the German authorities to grant her a child rearing allowance which was available to German nationals. The refusal was primarily based on the fact that the applicant was not a German national and that she had not been issued with the necessary residency papers.

The Court of Justice stated that the refusal to grant the benefit based on the lack of the residency papers, when the same standard was not applied to German nationals, amounted to discrimination as prohibited by Article 18 TFEU. The German authorities conceded that such a system did amount to unequal treatment, but argued that the applicant could not benefit from the protection of Article 18 TFEU as the facts of the case did not fall with the scope of the Treaty *ratione materiae* (material scope) or *ratione personae* (personal scope).[2] The Court rejected the first of these contentions, having already held that the child rearing allowance in question was a 'social advantage' falling within the scope of Community law.[3]

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[1] Case C-85/96 *Martínez-Sala* [1998] ECR I-2691. For further discussion of this case see Tomuschat C., *Maritnez Sala v. Freistaat Bayern* (2000) 37 *Common Market Law Review* 449.

[2] *Martínez-Sala*, above note 1, at para. 56.

[3] *Ibid.*, at para. 25.

Regarding the 'personal scope' of the applicant, the Court reviewed her position in the event that she did not qualify as a 'worker' under Article 45 TFEU and Regulation 1612/68.[4] The Court noted that as a result of the insertion of Article 20 TFEU into the Treaties, Union citizenship was a status that belonged to all nationals of Member States.[5] As a national of one Member State, lawfully resident in another, Martinez Sala now came within the scope *ratione personae* of the Treaty provisions on citizenship. The Court went on to hold that:

> [...] a citizen of the European Union ... lawfully resident in the territory of the host Member State, can rely on Article [18 TFEU] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have [...].[6]

As such, the German rules constituted discrimination on the grounds of nationality and, in the absence of any justification, were in breach of Community law.[7]

The significance of the judgment is not just the emphasis the Court places on the status of Union citizenship, but also the manner in which its very existence is used to extend Treaty rights to a wider section of migrants – citizens rather than merely workers. Union citizenship is key to this as it brings the applicant, who formerly would merely have been someone legally living in another Member State, within the protective scope of the Treaty provisions.

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[4] Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L (English Special Edition) 2/475.
[5] *Martínez-Sala*, above note 1, at para. 59.
[6] *Ibid.*, at para. 63.
[7] *Ibid.*, at para. 64.

This combined use of Articles 18 and 20 TFEU is also observed in *Grzelczyk*.[8] Here, the applicant, a French national, was commencing the final year of a four year degree in a Belgian university. Having supported himself for the first three years of the course, he was challenging the refusal of the national authorities to award him a 'minimum subsistence allowance' (minimex) on the grounds of his nationality. The principal question that the Court of Justice had to address was whether Articles 18 and 20 TFEU prohibited a Member State from making entitlement to a non-contributory social benefit, such as the minimex, conditional on the applicant being a worker within the scope of Regulation No 1612/68 in the case of non-Member State nationals, when the same condition did not apply to nationals of the host Member State.

In light of the fact that the only reason barring the applicant from obtaining the minimex was the fact that he was not a Belgian national, the Court held that this was a case of discrimination based solely on nationality. It made reference to the *Martinez-Sala* case, where as noted above, it had been held that a citizen could rely on Article 18 TFEU protection in all situations that fell with the scope *rationae materiae* of the Treaty. The importance of the addition of the provisions on citizenship was highlighted with the Court emphasising that:

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[9]

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[8] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193. For further discussion see Illiopoulou A. and Toner H., *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2002) 39 *Common Market Law Review* 609.

[9] *Grzelczyk*, above note 8, at para. 31.

Again referring to *Martinez-Sala*, the Court noted how a Union citizen could now rely on the non-discrimination provisions of Art 18 TFEU in all situations falling within the material scope of Community law, when he or she was lawfully living in another Member State. Such situations included the enjoyment of the rights of free movement and residence protected under Article 21 TFEU.

While noting that, in the *Brown* case, the Court had previously held that student support payments did not fall within the scope of the Treaties, the Court went on to state that since that judgment, the Treaty on European Union had amended the Title on education and vocational training and further, had added the concept of Union Citizenship. In light of these developments, the Court of Justice held that there was "[...] nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union".[10] This meant that a student studying in another Member State could still rely on the prohibition against discrimination contained within Article 18 TFEU. As such, the prohibition against a non-national student who was not a worker under Regulation 1612/68 from receiving a minimex when the same condition did not apply to Belgian nationals was found to be in breach of Articles 18 TFEU and 20 TFEU.

As in *Martinez-Sala*, the introduction of Union citizenship formed a key element in ensuring that the applicant could avail of the protection of Article 18 TFEU in claiming the minimex payment. The extension of the personal scope of the Treaty to include the applicant's situation allowed him demonstrate the discriminatory nature of his treatment when compared to that of a Belgian national in identical circumstances. However, it is argued here that the reasoning of the Court is somewhat confused when dealing with whether the payment fell within the material scope of the Treaty. While it mentions both the addition of

[10] *Grzelczyk*, above note 8, at para. 35.

citizenship and the amendment of the Treaty provisions on vocational education, the Court does not specify whether one of these developments actually had the result of drawing the payments being sought by the applicant within the scope of the Treaty.[11] This is further complicated by the fact that the Court of Justice noted that it had previously found that a minimex was a social advantage within the meaning of Regulation 1612/68.[12] As such, the relevance of the Court addressing the changes that had occurred since its previous ruling in *Brown*, where it had stated that maintenance payments did not fall within the scope of Community law, seems superfluous, considering the minimex was never a maintenance payment in the first place. It is submitted that, despite the attention paid by the Court to the position of the minimex within the material scope of the Treaty, the core *ratio* of the Court is undoubtedly the restatement of the new approach to the personal scope of the Treaties, as created by Union citizenship.

4.2.2. Material Scope

While both *Grzelczyk* and *Martinez-Sala* illustrate the use of the citizenship provisions to extend the personal scope of Community law, *Collins* demonstrates the impact of citizenship on the material scope of the Treaty.[13] The applicant, who possessed dual Irish/US nationality, sought to claim a job-seeker's allowance in the UK. Having held that the applicant was not a worker for the purposes of Regulation 1612/68, nor enjoyed a right to reside in the UK on the basis of Directive 68/360, the Court then had to determine whether there was any provision of

[11] *Ibid.*
[12] *Ibid.*, at para. 27.
[13] Case C-138/02 *Brian Francis Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703. For further discussion see Oosterom-Staples H., *Brian Francis Collins v. Secretary of State for Work and Pensions* (2005) 42 *Common Market Law Review* 205.

Community law under which he could, as someone genuinely seeking employment in another Member State, claim the relevant job-seeker's allowance.

The national legislation in question permitted EU citizens who did not qualify for the job-seeker's allowance under Regulation 1612/68 or Directive 68/360 to nevertheless claim it if they were habitually resident in the UK. As the applicant was a national of another Member State seeking employment, the Court proceeded to assess this residency requirement for compatibility with the prohibition contained within Article 45(2) TEFU regarding discrimination on the grounds of nationality among workers. Whereas nationals of other Member States enjoy the right to equal treatment under that provision when looking for a job in a host Member State, the Court noted that it had previously held in *Lebon* that such equal treatment only applied "[...] as regards access to employment in accordance with Article 45 TFEU of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation".[14]

While prior to the EU Treaty this would have ended the applicant's claim, in light of the status of citizenship of the Union as a 'fundamental status of nationals of the Member States', the Court felt obliged to assess the extent of the right of persons seeking employment to equal treatment under Article 18 TFEU. Referring to the fact that in *Grzelczyk*, the Belgian minimex had been held to fall within the scope of Article 18 TFEU, the Court went on to hold that:

> [i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [45(2)] of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article [18

[14] *Ibid.*, at para. 58.

> TFEU] of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[15]

In his opinion on the *Bidar* case, Advocate General Geelhoed stated that the method used by the Court of Justice in *Collins* differs to that used in *Martinez-Sala* and *Grzelczyk* in that in *Collins*, the Court does not "explicitly" bring the job seekers allowance within the scope *ratione materiae* of the Treaty but rather uses the citizenship provisions to bring it within the Treaty:

> [...] it would appear that citizenship itself may imply that certain benefits can be brought within the scope of the Treaty, if these allowances are provided for purposes which coincide with objectives pursued by the primary or secondary Community legislation.[16]

The principal distinction between *Collins* on the one hand and *Grzelczyk* and *Martinez-Sala* on the other is that while in the later cases the key issue was whether the applicants fell within the personal scope of the Treaty, in *Collins* the key issue was whether the job-seekers benefit was included within the material scope of the Treaty. Whereas in *Grzelczyk*, the initial question of whether the benefit being claimed fell within the material scope of the Treaties was answered by pointing to the changes wrought by the EU Treaty to the provisions on vocational education, in *Collins*, it is the articles on Union citizenship themselves which increase the Treatie's material scope. In reaching its conclusion that the job-seekers allowance fell within the material scope of the Treaties, the Court was reversing its previous

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[15] *Ibid.*, at para. 63.

[16] Case C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119, at para. 29 of the Opinion.

decisions on this point made in *Lebon* and *Commission v. Belgium*, discussed above in Chapter 3.

The *Collins* decision represents a further move towards a broader treatment of Community nationals by widening of the scope of the potential benefit of Union citizenship beyond that which had already been achieved in *Martinez-Sala* and *Grzelczyk*. In those cases, the applicants had a pre-existing independent right of residence within their host Member State, whereas Collins's right to reside in the UK was bestowed simply as a person exercising his right of free movement in search of employment under Article 45 TFEU. As discussed in Chapter 3, the nature of that right had been clarified in *Antonissen* where the Court of Justice held that a job-seeker had a six month period in which to search for and obtain a job or face deportation.[17] What *Collins* would appear to do is give to the job seeking citizen availing of the *Antonissen* 'window', the possibility of seeking assistance from the host Member State during that initial job seeking period. Arguably, the existence of such a safety net increases the options for indigent citizens considering a move in search of work to another Member State, but without the resources to support themselves for the initial period. *Collins* suggests that job-seeking benefits are available to all Union citizens, as long as they meet the criteria laid out in *Antonissen*. As will be discussed subsequently in Chapter 5, the potential for this judgment to significantly extend the protection of social rights to a section of Union citizenship - job-seekers - has subsequently been called into question by provisions of the 2004 Citizenship Directive.

4.3. Citizenship and the economic activity requirement

[17] Case C-292/89 *R. v. Immigration Appeal Tribunal ex p. Antonissen* [1991] ECR I- 745.

It has already been shown in Chapter 3 the importance that the Court of Justice placed on the need to be engaging in some sort of economic activity in order to benefit from Treaty provisions. While its significance was to some extent reduced through secondary legislation such as the Student Residency and the Retirees Residency Directives, nevertheless, it remained a key obstacle to the claims of non-economically active Community nationals in their host Member State. While in its judgments in *Martinez-Sala*, *Grzelczyk* and *Collins*, the Court of Justice demonstrated the practical benefits of Union citizenship for those citizens legally resident in another Member State, the common thread linking these three cases was the pre-existing legality of the applicant's residence in their host Member State, whether under national or Community law. As such, consideration of the economic activity requirement did not form a significant aspect of the judgments. Arguably, this common factor between the three cases could be used to limit the applicability of the decisions and confine the benefits of Union citizenship to persons who were already legally resident in the host Member State.

Such a narrow interpretation would appear to clash with the wording of Article 21(1) TFEU, declaring as it does that each Union citizen has the right to move and reside freely in other Member States, subject to the limitations contained within the Treaty and secondary legislation. Unsurprisingly, the Court of Justice has had to address this issue when faced with claims from Union citizens of a right of residence, based solely on Article 21(1) TFEU, in situations which were considerably more tenuous than the position of the applicants in *Collins*, *Grzelczyk* or *Martinez-Sala*. The decisions in the cases to be discussed show the Court using the citizenship provisions in a dynamic fashion to move away from the requirement for economic activity which had for so long acted as a barrier.

In *Baumbast*,[18] the applicant was a German national who had moved to the UK to work along with his wife and their children. The applicant pursued economic activity as a worker within the UK for a number of years, but was eventually forced to find employment outside of the Community for a period. As a result of this change in circumstance, the British authorities would not grant him indefinite leave to remain within the UK when he returned as he was considered neither a worker nor a person having a general right of residence under Directive 90/364/EEC.[19] In light of his inability to claim residency under Community legislation, the applicant sought to claim that, as a Union citizen he derived an independent right of residence solely through direct application of Article 21(1) TFEU.

After repeating the established *dicta* about Union citizenship as a 'fundamental status', the Court described how this new status was not linked to the exercise of economic activity, declaring that:

> [...] the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union.[20]

In light of this finding, the Court determined that the Treaty did not allow a situation to occur where a person who had undertaken an economic activity in another Member State would lose Community law rights when that economic activity came to an end. This applied particularly to the right of residency flowing from citizenship, as this right was "conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty" –

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[18] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.
[19] The applicant's wife (a Columbian national) and children were found to have independent rights of residence under Regulation 1612/68.
[20] *Baumbast,* above note 18, at para. 83.

namely Article 21(1) TFEU.[21] By virtue of being a Union citizen, the applicant had the right to rely on the provision and obtain a right of residence through direct application of Article 21(1) TFEU, though the Court accepted that the article itself contained provisions providing for the limitation of that right.

This aspect of the decision is deeply important in the context of citizenship. It is submitted that, through decoupling citizenship and the attendant right of residency from economic activity, the Court has enhanced the beneficial potential of Union citizenship for all Community nationals. The link between these two factors, discussed previously in the context of the *Royer* case in Chapter 3, acted as a block against citizens establishing themselves in another Member State.[22] Unsurprisingly, as in the initial cases addressing the scope of citizenship, the Court's conclusions were at odds with the submissions coming from the national governments and those of the Commission. Both the British and German Governments argued that the acknowledgement of limitations within Article 21 TFEU proves that the right was not a free standing one. The Commission also opposed granting the applicant a right of residence under Article 21(1) TFEU alone without ensuring he also satisfied other criteria. The basis of its argument was that either engagement in economic activity or the existence of adequate resources was a condition precedent to the enjoyment of citizenship rights:

> [...] the right to move and reside established by [Article 21 TFEU] is conditioned by the pre-existing rules, both primary and secondary, which define the categories of persons eligible for it. Those rights are still linked either to an economic activity or to sufficient resources.[23]

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[21] *Ibid.*, at para. 84.
[22] Case 48/75 *Royer* [1976] ECR 497.
[23] *Baumbast,* above note 18, at para. 79.

The Court had already rejected the former argument by decoupling the enjoyment of citizenship rights from economic activity. Undoubtedly, the adequacy of resources point was a legitimate issue for the Commission to raise. Article 21 TFEU does provide for limitations on right of residence and the Court engaged in a significant analysis of this point in the course of its judgment. However, it is submitted that the Court demonstrates a fundamentally different conceptual approach to the conditions on the enjoyment of the citizenship rights, than the position advocated by the German and British Governments and the Commission. Rather than investigating if a person has sufficient resources to be granted a right of residency as a Union citizen in the manner the Commission proposed, the Court made a broad declaration that a person automatically has a right of residency as a consequence of the citizenship provisions.[24] The structuring of the approach in this manner allows for an investigation to take place to ascertain if the person fails to meet any of the limitation criteria which are allowed for under Article 21(1) TFEU. However, the starting point for this investigation is the right of residence inherent in Union citizenship rather than the limitations on the right. This is significant as the nature of the proportionality analysis that the Court must undertake has changed, as will be demonstrated in Chapter 4.6 below.

In its conclusion that the applicant did indeed enjoy a free standing right under Article 21(1) TFEU, the Court stated that:

> [...] a citizen of the European Union who *no longer* enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article [21(1) TFEU].[25]

[24] *Ibid.*, at para 84.
[25] *Baumbast,* above note 18, at para. 94 (emphasis added).

By placing this emphasis on the fact that the applicant had previously enjoyed residency rights as a result of being a worker, the Court would seem to leave open the possibility of some restriction on the free standing nature of the right under Article 21(1) TFEU, particularly for those who had never enjoyed a right of residence as a worker. However, in the *Chen* case the Court went significantly further in clarifying Article 21(1) TFEU as an independent source of residency rights. [26] The first applicant, a Chinese national who accompanied her husband while he worked in the UK, had given birth to her daughter, the second applicant, in Northern Ireland. As a result of her birth in Northern Ireland, the second applicant had gained Irish citizenship. At issue was the refusal of the British authorities to grant long term residence permits to either party on the basis that the first applicant had no entitlement to such a permit and that the second applicant (her daughter), while a Union citizen, was not exercising any Community law rights. The national immigration authority submitted a range of questions to the Court, regarding the interpretation of the Treaty and provisions of secondary legislation.

Looking specifically at the position of the second applicant, the Court drew on its earlier decision in the *Avello* case in rejecting the contention of the British and Irish Governments that her situation should be treated as a solely internal situation.[27] The Court also stressed that age was not a condition precedent to the attainment of Community law rights.[28] As such, a young child such as the second applicant was entitled to free movement and residence rights. In coming to this conclusion, the Court reaffirmed the opinion of AG Tizzano on this point who stated that "the fact that a minor cannot exercise a right

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[26] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925. For further discussion see Carlier JY., *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* (2005) 42 *Common Market Law Review* 1121, Kunoy B., 'A Union of National Citizens: The origins of the Court's lack of avant-gardism in the Chen case', (2006) 43 *Common Market Law Review* 179.

[27] Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

[28] *Chen*, above note 26, at para. 20.

independently does not mean that he has no capacity to be an addressee of the legal provision on which that right is founded".[29]

Addressing the second applicant's rights as a citizen of the Union, the Court emphasised how Article 20(1) TFEU granted the status of Union citizen to everyone possessing the nationality of a Member State. It went on to declare that:

> [...] the right to reside in the territory of the Member States provided for in Article [21(1) TFEU] ... is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article [21(1) TFEU].[30]

As such, the Court determined the second applicant had a right to reside in the UK, subject to compliance with the limitations and conditions contained in Art 1(1) of Directive 90/364.

Chen represents a further strengthening of the potency of Article 21(1) TFEU as the position of the second applicant would seem to have been significantly weaker from the perspective of Community law than that of the applicant in *Baumbast*, as at least in the latter case the applicant had previously exercised a Treaty right and had been engaged in economic activity. The Court mirrors the conceptual approach that it initiated in *Baumbast* by first of all declaring a right of residency emerges from the status of Union citizen, and subsequently looking at any possible restrictions of this right. The outcome would appear to be further confirmation of the decoupling achieved in *Baumbast* between rights and the exercise of economic activity. The infant second applicant was clearly not economically active. While the Court did focus on her capacity as a child to hold legal rights, there was no suggestion that, once she had been held to be capable of possessing these rights, there was any chance

[29] *Ibid.*, at para 44 of the opinion.
[30] *Ibid.*, at para. 26.

that these could have been denied to her due to her lack of engagement in economic activity.[31]

Not only does the decision provide for protection of the Union law rights of young Union citizens resident in a host Member State, in circumstances which require no prior action by those children, it also holds significance for the parents of such children. The first applicant, despite lacking any legal residency rights, was permitted to remain within the UK in order to give the second applicant's own residency rights "useful effect". This was held to be necessary as the "[...] enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence".[32] This aspect of the decision sees the young Union citizen acting as a type of anchor, linking their non-Union citizen parent to the host Member State, for the duration of time that they require a carer. However, this aspect of the decision is one that caused concern for Member States, and featured prominently, if not always accurately, within the debate surrounding an amendment to the Irish Constitution in 2004 to limit the definition of Irish citizenship.[33]

The link between a Union citizen child and their non-Union citizen parent was strengthened further in the *Ruiz Zambrano* decision.[34] There the Court not only confirmed the *Chen* decision that a parent is entitled to a right of residence in the host Member State in order to give 'useful effect' to its child's Union citizenship rights, but also that a national rule prohibiting the parent from taking up work in the Member State is precluded.[35] The Court determined that national regulation whereby persons within the asylum process were not

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[31] *See* Hatsopoulos V., 'Current Problems of Social Europe', European Legal Studies, Research Papers in Law 7/2007 (College of Europe), at 10.
[32] *Chen*, above note 30, at para 45.
[33] See generally *The Citizenship Referendum: Implications for the Constitution and Human Rights*, (Trinity College, Dublin, 2004).
[34] Case C-34/09 *Ruiz Zambrano* (Judgment of 8 March 2011).
[35] *Ibid.*, at paras. 42-3.

granted a work permit would jeopardize the ability of the parent to have sufficient resources for his children, and thus put him at risk of breaching the economic risk criteria, discussed further below at Chapter 4.5.[36]

4.4. National conditions on the grant of entitlements

Having demonstrated the extent to which Union citizenship has opened up a range of entitlements to the Union citizen, it must be accepted that facilitating access to such entitlements entails a cost for the host Member State. The cases discussed in this chapter demonstrate that the development of Union citizenship has resulted in a new approach by the Court to social solidarity and a move away from the position whereby social membership of the EU "[...] has been defined by solidarity deficit at supra-national level".[37] As such, where Member States have put in place national regulations or conditions designed to make it more difficult for non-nationals to avail of entitlements, the Court becomes more vigorous in scrutinizing these for compatibility with the Treaty provisions, particularly Article 18 TFEU. This results in a limiting of the ability of Member States to exclude Union citizens from social protection through national legislative conditions. The Court of Justice has taken a strict approach to any attempts by a host Member State to use national provisions to reduce its obligations.

In *D'Hoop*, the applicant was challenging the refusal of the Belgian authorities to grant her a 'tideover allowance' which was granted to young people seeking their first job.[38]

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[36] *Ibid.*, at para. 44.

[37] Golynker O., 'Jobseekers rights in the European Union: Challenges of changing the paradigm of social solidarity', (2005) 30 *European Law Review* 111, at 114.

[38] Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191. For further discussion see Iliopoulou I. and Toner H., 'A new approach to discrimination against free movers? *D'Hoop*', (2003) 28 *European Law Review* 389.

The domestic court referred a question to the Court of Justice concerning whether Community law prohibited the Belgian legislation which denied Belgian nationals receipt of the tide-over allowance solely on the ground that they did not complete their education in a Belgian school (the applicant had completed her education in a French school).

As regards the unequal treatment being experienced by the applicant, the Court determined that a situation whereby a person who availed of the opportunities provided by free movement subsequently received less favourable treatment in her home Member State compared to others who had not availed of the freedom would itself be incompatible with the right of free movement.[39] By placing at a disadvantage those who had exercised their free movement rights, the Belgian condition regarding receipt of education was contrary to the principles underpinning citizenship. It could only be justified if "it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions".[40] The Court accepted that it was legitimate for the Belgian authorities to attempt to ensure a link between those seeking the benefit and the geographic labour market concerned. However, the condition itself was held to be:

> [...] too general and exclusive in nature [...] it unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market.[41]

The requirement set out in *D'Hoop* that national conditions on the receipt of benefits must be based on objective considerations which were proportionate to the legitimate aim was stressed again in *Collins*. Here, the Court of Justice had to determine whether domestic

[39] *Ibid.*, at para. 30.
[40] *Ibid.*, at para. 36.
[41] *Ibid.*, at para. 39.

regulations, which granted a job seekers allowance to persons 'habitually resident' in the UK, inherently discriminated in favour of UK nationals when contrasted with Union citizens who had exercised their freedom of movement to seek a job in the UK. The Court cited its *dicta* in *D'Hoop* that it was permissible for the national authorities to require a genuine link between the applicant and geographical employment market in question, when setting conditions for the receipt of social benefits. Such a requirement would also be permissible regarding the British job-seeker's allowance.[42] Proof of such a genuine link would be evidence that the applicant was seeking work in the Member State.

The Court outlined a number of criteria, which a residency requirement condition would have to meet to be regarded as proportionate – it could not go beyond what was necessary to achieve its aim, it must be subject to a degree of judicial scrutiny, it must have clear criteria for its application and it must not be for a period longer than that needed by the domestic authorities to ascertain whether claimants are genuinely seeking work in the host Member State.[43]

In its decision in *Bidar*, the Court of Justice undertook a more detailed analysis of the objectivity and proportionality of national restrictions.[44] In question were British regulations which confined access to student maintenance loans to persons who were settled within the United Kingdom and had been ordinarily resident there for the previous three years. Periods spent participating in full-time education during the three year period could not be included. The applicant, who had lived in the UK for a number of years with his grandmother and completed his secondary education there, appealed against the refusal of his local council to award him a maintenance grant, claiming *inter alia* that the British provisions were discriminatory in breach of Article 18 TFEU.

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[42] *Collins*, above note 13, at para. 69.
[43] *Ibid.*, at para. 72.
[44] *Bidar*, above note 16.

The Court recalled its previous case law that "[...] the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result".[45] It noted that the British regulations were drafted in such a way that placed nationals of other Member States at a disadvantage and held, as in *D'Hoop* and *Collins*, that such a difference in treatment could only be justified if they were based on objective considerations independent of nationality and they were proportionate to the legitimate aim of the national provisions.[46]

Arguing that the regulations were legitimate, the British authorities stated that it was reasonable for the Member States to require a link between the grant of a student loan and the payment of taxation, either past or future, by the student or the students' parents. Further, Britain argued that it was justifiable to require a genuine link between the student making the claim and the labour market of the Member State.

In answering this point, the Court of Justice accepted that there had to be a balance between competing interests. The need to show 'a degree of financial solidarity with the nationals of other Member States' (the concept which it had previously established in *Grzelczyk*) had to be weighed against the entitlement of each Member State to ensure that any student maintenance payment to nationals of other Member States did not become an 'unreasonable burden' which might undermine its overall capacity to make such payments.[47] Thus, the Member State is entitled to limit its support to those students "[...] who have demonstrated a certain degree of integration into the society of that State".[48] In the circumstances surrounding this case, the Court held that it was inappropriate for the Member State to require students to establish a link with the labour market of the host Member State

[45] *Ibid.*, at para. 51.
[46] *Ibid.*, at para. 54.
[47] *Ibid.*, at para. 56.
[48] *Ibid.*, at para. 57.

as the knowledge gained by a student during his university education would not assign him to a particular geographical employment market and thus the situation of such students would not be comparable to that of an applicant for a tide-over allowance granted to young persons seeking their first job or for a job-seeker's allowance as was the case in *D'Hoop*.

The Court held that the "[...] existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time".[49] The UK had attempted to do this by requiring that students seeking a maintenance grant must have been ordinarily resident in the UK for the previous three years. However, the condition that periods spent in full-time education could not count towards the three year period severely limited any chance for a national from another Member State to achieve the necessary status. As such, the regulations could not be objectively justified according to the legitimate aim which they were put in place to achieve.

A number of conclusions can be drawn from this set of cases. It is legitimate for a Member State to require some 'genuine link' between the claimant and the host Member State, demonstrated either by a connection to the geographical employment market (*D'Hoop*, *Collins*) or by integration in the host State (*Bidar*). National rules limiting the access of Union citizens to benefits in their host Member State will be closely scrutinized by the Court of Justice, both as regards their legitimacy and their proportionality – note the four conditions set out by the Court in *Collins*. Critical appraisal of national conditions is vital from the point of view of Community nationals, as it is clear that such conditions present a major barrier to establishment within a host Member State.[50]

A key aspect of the *Bidar* decision from the point of the extension of social rights was that the Court was not prepared to accept the argument made by the British Government attempting to link integration in the host Member State and contribution to the exchequer of

[49] *Ibid.*, at para. 59.
[50] *See* O'Leary S., 'Developing an ever closer Union between the people of Europe', Edinburgh Mitchell Working Papers 6/2008 (Europa Institute, University of Edinburgh).

that State via taxation. The Court was prepared to go no further than to say that claims by Union citizens on the host Member State cannot become an "unreasonable burden". Undoubtedly, such a test is one that creates a difficulty for Union citizens of limited means. At the same time, it has been noted elsewhere that in each individual situation where the issue is being assessed, it will seldom be possible to demonstrate the unreasonableness of a burden imposed by a Union citizen.[51] As will be outlined later in the chapter, the phrase unreasonable burden was also used in the *Grzelczyk* and *Bidar* decisions, not as a means to restrict claims, but as the basis for a more radical approach to granting citizens social entitlements in the host Member State.[52]

Undoubtedly the tenor of these judgments is one that is positive towards a notion of social solidarity beyond purely national lines. While the argument that what is happening is an adaptation of national solidarity, rather than the creation of a transnational solidarity is accepted,[53] the version of Union citizenship being constructed is one that justifies economic claims by citizens on foreign resources. This is primarily seen through the Court's emphasis on financial solidarity but also in light of its apparent acceptance that the prospect of future contribution via taxation is a sufficient linkage. Indeed, while all the decisions accept the necessity for some sort of 'genuine link', immediate financial contribution by the claimant to the exchequer of the host Member State was at no stage found to be a necessity. This bodes well for persons of limited means, coming to a host Member State and making some claims on that State while attempting to establish themselves there.

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[51] Hailbronner K., 'Union citizenship and access to social benefits', (2005) 42 *Common Market Law Review* 1241, at 1261.

[52] See Chapter 4.6 below.

[53] O'Brien C., 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity', (2008) 33 *European Law Review* 643, at 649.

4.5. Application of the 'Economic Risk' conditions permitted under Article 21 TFEU

4.5.1 Economic Risk Conditions

As analysed in the previous section, a crucial debate initiated by the creation of citizenship is that between the rights of Union citizens to travel, reside in and make claims from other Member States, versus the desire of the host Member States to limit their financial obligations to these new residents. Having examined the treatment of national legislative conditions on the claims of Union citizens, it is also necessary to review the conditions placed on such claims by Union law. In order to alleviate the concerns of the Member States, free movement and residency rights granted to Union citizens under Article 21(1) TFEU are not unqualified – the provision states that the rights are "[…] subject to the limitations and conditions laid down in this Treaty and the measures adopted to give it effect". This was inserted to ensure that "[...] the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States".[54]

This qualification was not without precedent. As discussed in Chapter 3, even prior to the creation of Union citizenship, the existing Residency Directives each contained a pair of similar limiting conditions concerning the economic risk to the host state of the person seeking residency under that directive – firstly a requirement of a degree of financial security on the part of the person and secondly that the person and any family possess health insurance. These limitations were a prerequisite to the right of residence itself and a breach of these conditions undermined that right and consequently, offered a justification for a denial of the right of free movement or residence granted under Community law.

[54] *Baumbast,* above note 18, at para. 90.

Obviously, the incorporation of a qualification into Article 21(1) TFEU posed the potential for a new barrier to those seeking to use citizenship to move to another Member State. This would be particularly acute for those of limited resources, as it was such people who were the target of the economic risk conditions in the existing Residency Directives and who presumably, the qualification in Article 21(1) TFEU was designed to catch. However, the treatment by the Court of Justice of persons who were in breach of the economic risk conditions subsequent to the advent of Article 21 TFEU has not consistently conformed to this approach and again demonstrates the determination on the part of the Court to interpret Union citizenship in a broad manner in order to provide Union citizens with as comprehensive a range of protection as possible.[55]

4.5.2 Declaration of Sufficient Resources

The consequences of a breach of the economic risk conditions contained in one of the former Residency Directives were addressed in *Grzelczyk*. The applicant's residence in Belgium was based on the Student Residency Directive 93/96.[56] At issue was whether, by making a claim for social welfare assistance, the applicant had breached the condition which stated that before being able to claim residency on the basis of the directive, the prospective student had to assure the host Member State by declaration or other method that he had sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during the period of residence.[57] Under Article 3 of the Directive, the continuance of the right of residence was conditional on the fulfilment of these conditions.

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[55] The changes made to the economic risk conditions by the Citizenship Directive will be assessed in Chapter 5.
[56] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59.
[57] *Ibid.*, Article 1.

In analysing the requirement for a declaration of sufficient resources, the Court noted that similar provisions were included in the General Residency Directive 90/364[58] and the Retirees Residency Directive 90/365[59] but that both of these included specific guidance on how to calculate whether the income of a person seeking residence in that Member State was enough to avoid that resident becoming a burden on national social funds. By contrast, the Student Residency Directive contained no such guidelines. This was held to be because of the different nature of a student residency compared to that of other categories of residency.[60] The Court conceded that if a student did have recourse to the social assistance schemes of the host Member State, the authorities of that state could reach the decision that the conditions of the residency as set out under the Directive had been breached, and within the limits of Community law, withdraw it or refuse to renew it. However, the Court was quick to emphasize that "[...] in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system".[61]

In further discussion of the condition regarding adequacy of resources, the Court noted that, in the preamble to the Student Residency Directive, it was stated that the beneficiaries of the directives "[...] must not become an *unreasonable* burden on the public finances of the host Member State".[62] By placing its focus on the notion of unreasonable burden, the Court indicated that some degree of burden on the host Member State could be considered reasonable and as such, it held that the Directive "[...] accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member

[58] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26.
[59] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28.
[60] *Grzelczyk*, above note 8, at para. 41.
[61] *Grzelczyk*, above note 8, at para. 43.
[62] Recital 6 (emphasis added).

States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary".[63]

It is submitted that the lenient manner in which the Court was prepared to treat the applicant under the Student Residency Directive was based on its concession that student residency was of a different nature to the other residency directives. Support for this argument could be found in the fact that the General Residency Directive and the Retirees Residency Directive both set down a definite formula for calculating the adequacy of resources of persons seeking residency rights, with resources being regarded as sufficient where they either "[...] are higher than the level of resources below which the host Member State may grant social assistance to its nationals" or where "[...] they are higher than the level of the minimum social security pension paid by the host Member State".[64] Nevertheless, it is relevant to note that the preambles to both the other residency directives also contained recitals which made reference to unreasonable burden – the phrase and its implications are not solely fixed to the situation of students.

4.5.3 Health Insurance

The second of the economic risk conditions regarding medical insurance was addressed in *Baumbast*.[65] After its finding that Article 21(1) TFEU granted the applicant an automatic right of residence as a Union citizen, the Court of Justice had to examine whether the applicant and his family complied with the conditions contained within Directive 90/364.[66]

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[63] *Grzelczyk*, above note 8, at para. 44.
[64] Directive 90/364/EEC, above note 58, Article 1; Directive 90/365/EEC, above note 59, Article 1.
[65] *Baumbast*, above note 18.
[66] Article 1(1) of which stated that the applicant and his family must have sufficient resources to avoid becoming a burden on the social welfare funds of the host state and that the applicant and his family must be covered by sickness insurance in respect of all risks in the host Member State.

In examining the facts of the case, the Court noted that at no time had the applicant or his family sought social assistance from the host State and as such they clearly possessed sufficient resources as required. Regarding the issue of sickness insurance, the evidence before the Court suggested that the insurance that the applicant and his family had covered everything except emergency medical treatment in the host Member State. While the Court accepted that the condition on sickness insurance was expressed within the directive as a device to ensure that applicants did not become unreasonable burdens on the host Member State, it nevertheless emphasised that such limitations had to be construed within the general principles of Community law, in particular the proportionality principle.[67] When assessing the position of the applicant and his family as a whole, the Court held that to refuse to allow him the right of residence under Article 21(1) TFEU on the grounds that his medical insurance would not cover emergency treatment in the host Member State would be a disproportionate interference with the exercise of his rights under the Treaty.

Through its application of the proportionality analysis to the limitations provided for under Article 21(1) TFEU, we see the Court restricting the scope of the Member State to use the economic risk conditions against a Union citizen. Admittedly, it was obvious from the facts of the case that the applicant family was self sufficient and did not pose a risk to the finances of the Member States. However, the judgment arguably demonstrates a further decoupling of citizenship and the corresponding right of residence from purely financial concerns. In undertaking the proportionality analysis the Court looked at five factors. Three of these were of an economic nature; the fact that the applicant had sufficient resources, the fact that he and his family had medical insurance and the fact that neither he nor his family had become a burden on the finances of the host state. The other two factors related to the applicant's residency – he had previously held lawful residency as a worker and his family

[67] *Baumbast*, above note 18, at para. 91.

had had lawful residency, even after he ceased to be a resident worker. It is submitted that the fact that the Court looks, even if only in a cursory manner, at the nature of the residency of the applicant and his family, suggests a move away from a purely economic analysis. The judgment also shows that the Court was not prepared to allow some minor infraction of the economic risk conditions to justify a finding by domestic authorities that the conditions had not been met – the fact that the applicant's sickness insurance did not cover emergency treatment and was therefore arguably in technical breach of the requirement under the directive was not sufficient to trump the applicant's rights when an analysis based on proportionality was applied to his situation.

4.5.4 Failure to meet Economic Risk Conditions

The Court's willingness to undertake a detailed review of a Member State's application of the economic risk conditions does not mean that it will allow the conditions to be breached in a grievous manner. In *Trojani*, the applicant, a French national, was living in a Belgian charity hostel.[68] A former drug addict, he was engaged in a reintegration programme where he did various jobs around the hostel amounting to about 30 hours a week, for which he received bed, board and an allowance. The applicant sought receipt of the minimex payment, but was refused it on the ground that he was not a Belgian national nor did he qualify as a worker under Regulation 1612/68.

The Court emphasized that the right of residency flowed directly from the provisions of Article 21(1) TFEU. As had been held in *Baumbast*, such a right could be relied upon by the applicant, purely as a citizen. However, the Court also stated that the rights under the article were conditional and it made reference to the economic risk conditions placed on the

[68] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573.

right of residence under the General Residency Directive. At the same time, the Court noted its statement in *Baumbast* that any limitations or conditions placed upon the right of residence must be in accordance with the general principles of Community law and comply with the proportionality principle.[69]

In undertaking its analysis of the applicant's compliance with the economic risk conditions, the Court highlighted that the reference from the national court made it clear that the very basis of the applicant's claim to a minimex was his lack of financial resources.[70] This allowed the applicant's claim to be distinguished from the situation in *Baumbast*. In light of this, the Court was able to conclude that the applicant did not enjoy a right to reside in a host Member State under Article 21 TFEU due to his lack of sufficient resources as required under the directive.[71] This judgment clearly sets a limitation on the potential assistance a Union citizen who is in breach of the conditions of her residence, can receive from a proportionality analysis undertaken on the application of the economic risk conditions to her situation. The comparison that the Court draws between the contrasting situations that the applicants found themselves in *Baumbast* and *Trojani* would appear to suggest that the Court did not envisage the proportionality analysis applying to situations where the breach of the economic risk conditions was significantly more than a technical one. While the proportionality analysis was to serve as a tool to guide the application of the economic risk conditions – its role was certainly not to offer indigent citizens a means of avoiding these conditions.[72]

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[69] *Ibid.*, at para. 34.
[70] *Ibid.*, at para. 36.
[71] The Court subsequently found that the applicant derived a right to the minimex through his lawful residence in Belgium, at paras 37 and 46. AG Geelhoed took a significantly different approach on this point, see paras. 73-4 of his opinion.
[72] A discussion of the sufficient resources criterion in *Commission v. Italy*, though not in conjunction with Union citizenship, has already been noted in Chapter 3.9.3. Case C-424/98 *Commission v. Italy* [2000] ECR I-4001.

4.5.5 Origin of Resources

The decision in *Chen*[73] demonstrates another example of the Court using proportionality as a guide to the application of the economic risk conditions. The judgment saw the Court reject attempts by a number of Member States to read into the General Residency Directive a new condition regarding the origin of the 'sufficient resources' required of citizens before they could claim a right of residence under the directive. As was discussed above in Chapter 4.3, the first applicant was held to be the primary carer of the second applicant, who was totally dependent on her. The evidence before the Court clearly indicated that both applicants were in receipt of private healthcare and had adequate resources to avoid becoming a burden on British social services.[74] However, both the UK and Irish authorities argued that the 'sufficient resources' required under the Directive must come from the Union citizen him/herself and that the fact that the infant second applicant, the Union citizen in question, was relying on the resources of her mother to meet the requirements of the directive, was not permissible.

The Court of Justice strongly rejected such an approach. Speaking of the need to interpret the provisions on free movement broadly, it noted that Directive 90/364 only required nationals of Member States to 'have' adequate resources but did not set out a requirement as to the origin of these resources. Referring to *Baumbast* and the right of the Court to assess the proportionality of any restrictions placed on Article 21 TFEU rights by the Member States, the Court held that:

> [...] a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances

[73] *Chen,* above note 26.
[74] *Ibid.*, at para. 13.

of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 21 TFEU.[75]

While initially this judgment might be considered to stretch the application of the proportionality analysis to the economic risk conditions further than in *Baumbast*, in that now a person does not need to possess the adequate resources themselves in order to meet the conditions in the directive, it is submitted that from the point of view of an indigent citizen, the judgment is of little benefit and actually reaffirms the Court's approach regarding resources. This can be seen in the Court's contention that the objective of the conditions in question is to protect the public finances of the Member States. As such, once the Court is satisfied that the person seeking the right under the directive will not become a financial risk for the Member State in question, a technical failure to meet one of the conditions (*Baumbast*) or the fact that the resources are not provided by the applicant him/herself (*Chen*) will not be considered relevant. However, a citizen wholly lacking in resources, as personified by the situation of the applicant in *Trojani*, is no better off under this approach.

4.5.6 Appropriateness of the Economic Risk Conditions

The Court's direct appropriation of the sufficient resources and health insurance conditions from secondary legislation and its application of these to situations where Union citizens are claiming the direct application of Article 21 TFEU, begs the question as to whether this was an appropriate development. Nic Shuibhne is critical of their use, as she points out that generally, the Court of Justice has not permitted economic grounds to justify a Member

[75] *Ibid.*, at para. 33.

State's derogation from Community law obligations.[76] As such, she notes the "[...] irony that economic criteria can nonetheless regulate the most 'fundamental status' granted by Community law, and end the rights attached to it".[77] She goes on to suggest that the long standing refusal of the Court to recognise economic grounds for permitting Member States to avoid Community law obligations is subsequently demonstrated by the refusal of the Court of Justice to use the sufficient resources criteria to block residency rights in cases such as *Chen*. As such, the Court has introduced a new variable into its assessment of whether an individual met the conditions for citizenship, but the variable it chose is one that it has traditionally been so reluctant to use that it really only is of any substantial assistance in situations where the sufficient resources criteria are blatantly not being met, such as in *Trojani*.

As regards the legitimacy of taking the economic risk conditions from secondary legislation and implementing them directly as the conditions provided for by Article 21(1) TFEU, a similar approach was undertaken in *Raulin*, discussed in Chapter 3.9.2. In holding that a student from a Member State had a right of residence in another Member State for the duration of their studies, the Court of Justice stated that the host Member State could apply conditions to this right "[...] deriving from the legitimate interests of the Member State such as the covering of maintenance costs and health insurance".[78]

On the wider question of the use of the economic risk conditions and a Member State's ability to limit abuses of its social welfare system, the concern has been raised that the case law goes into more detail setting out what a Member State cannot do to a Union citizen as regards deportation, rather than stating what it can.[79] It is submitted here that the *Ruiz Zambrano* decision substantiates this argument and may have significant consequences for

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[76] Nic Shuibhne N., 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?', (2005-06) 8 *Cambridge Yearbook of European Legal Studies* 187, at 209. See for example Case 72/83 *Campus Oil v. Minister for Industry & Energy* [1984] ECR 2727.
[77] Nic Shuibhne, above note 76, at 209-10.
[78] Case 357/89 *Raulin v. Minister for Education and Science* [1992] ECR I-1071, at para. 39.
[79] Nic Shuibhne, above note 76, at 215.

the economic risk conditions.[80] As outlined above at Chapter 4.3, the judgment offers further protection for the Union citizen and her family in the assessment of the sufficient resources criteria. Now, a Member State cannot place a legal barrier in the way of a non-Union citizen family member undertaking employment in order to attain the sufficient resources necessary to meet the condition, if the national legal barrier is the obstacle to achieving the sufficient resources.[81]

This decision, combined with *Chen* and *Grzelczyk*, indicates that the sufficient resources condition is not a particularly effective tool for the host Member State seeking to limit residency. It is argued that the health insurance condition is clearer and, despite the approach taken to it in *Baumbast*, offers the Member State a more easily evidenced justification for the refusal of residency. It must be asked however, whether the Court of Justice will also attempt to limit the scope of this condition. The questions posed by the national court in *Ruiz Zambrano* were on the basis that the applicant did meet the health insurance criterion.[82] The Court made no mention of this aspect in its judgment. Future cases will indicate whether this silence was merely due to the Court's belief that the issue was not pertinent, or the first steps in undermining the health insurance condition.

4.6. Financial Solidarity between Member States – A new protection for Union Citizens

The previous section focused on the application of the economic risk conditions contained within Union legislation. While the decisions show that the Court was willing to be somewhat flexible in its interpretation of the conditions, arguably they are of little advantage to the Union citizen who finds herself in a genuinely precarious financial position; observe

[80] *Ruiz Zambrano*, above note 34.
[81] *Ibid.*, at para. 44.
[82] *Ibid.*, at para. 35.

the decision in *Trojani*. Nevertheless, a closer analysis of the jurisprudence, focusing in particular on the treatment of the concept of financial solidarity in the General Residency Directive after the *Grzelczyk* decision and its relationship to the proportionality principle, has created the potential for Union citizens to avoid the strict application of the economic risk conditions.

In an article discussing the constitutional impact of the decisions on Union citizenship, Dougan places particular importance on the *Grzelczyk* and *Baumbast* judgments.[83] He singles these cases out as in both, the Court of Justice was reviewing the Community secondary legislation itself, rather than the Member State's implementation of this legislation. He makes the argument that in *Grzelczyk* and *Baumbast*:

> [t]he principle of proportionality is used precisely to assess the application of national rules merely implementing Community secondary legislation which is not disproportionate to its own objectives; the Court was prepared to undertake judicial review of Member State acts even though they were in full compliance with valid Community legislation. And in effect [...] this amounts to judicial review of that very Community legislation, not of the "privileged" sort one would expect as regards questions of competence in the exercise of the Community's own legislative powers, but rather of the "front line" sort one witnesses all the time as regards national provisions restricting free movement under the primary Treaty provisions.[84]

As such, he argues that the introduction of Union citizenship has resulted in the Court of Justice applying a more searching form of proportionality analysis to restrictions on freedom

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[83] Dougan M., 'The constitutional dimension to the caselaw on Union citizenship', (2006) 31 *European Law Review* 613.
[84] *Ibid.*, at 620-1.

of movement on residence, not only if these are in the form of national rules but also if they are contained in validly adopted Community secondary legislation.[85]

Dougan is supportive of this new approach of the Court, suggesting that the introduction of Union citizenship left the Court with a choice whereby it could either:

> [...] treat Union citizenship in general, and Art.[21 TFEU] in particular, as essentially cosmetic provisions which did not justify any radical change in the conduct of judicial review [... or] instead treat Union citizenship as an innovation of constitutional importance, and Art.[21 TFEU] as a Treaty provision of such strength and virility that it justified striking a new balance between the public and private interests at stake in the regulation of free movement rights, even for the purposes of determining how thoroughly the judges should oversee the proportionality of restrictive measures adopted by the Community legislature.[86]

He suggests that the new approach of the Court can first be discerned in *Grzelczyk* where, as discussed above, the Court of Justice determined that the reference to an "[...] *unreasonable* burden on the public finances of the host Member State [...]",[87] contained within the recital to Directive 93/96, showed that the directive accepted "[...] a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary".[88] As this author previously noted, in placing emphasis on the notion of 'unreasonable burden', the Court introduced the concept of financial solidarity as a requirement on the Belgian authorities to apply the conditions contained within the Directive

[85] *Ibid.*, at 621.
[86] *Ibid.*, at 625.
[87] *Grzelczyk*, above note 8, at para 44 (emphasis added)
[88] *Ibid.*, at para 44.

in a more lenient fashion in this case of transitory financial dependency experienced by the non-national EU citizen.[89]

It is submitted that this concept of financial solidarity is the starting point from which the new approach of the Court, identified by Dougan, has evolved. While financial solidarity was not mentioned within the *Baumbast* judgment, (and as such, does not feature prominently in Dougan's analysis), it has subsequently been addressed by Advocate General Geelhoed in his opinions in *Ninni-Orasche*[90] and *Bidar*.[91] The fact that it continues to feature in the case law combined with the significance that is invested in it in the Advocate General's opinion in the latter case suggests that the concept of financial solidarity as 'discovered' in *Grzelczyk* is one which requires further scrutiny.

In *Ninni-Orasche* a claim was brought by the applicant for financial support while she undertook a university degree. Since the applicant's right of residence in Austria derived from national law (she was married to an Austrian national) the Advocate General argued that the Student Residency Directive did not apply to her. However, in the event that she could claim to be a student under the Student Residency Directive, Advocate General Geelhoed distinguished between her position and that of the applicant in *Grzelczyk*. In the latter case, the claimant was seeking a short term benefit to enable him to maintain his residence in the host Member State in order to complete the final year of a four year course of study. Denial of the benefit would have had the consequence of undermining the legal basis of his right of residence. Ms. Ninni-Orasche was held to be in a different situation, as she was just commencing her course of study, and her right of residency in Austria did not depend on obtaining the study finance.[92] The Advocate General went on to state that the reference to financial solidarity in *Grzelczyk* was not to be construed as the Court attacking the economic

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[89] O'Gorman R., 'Evolution of the Concept of 'Financial Solidarity' in EU Law', (2006) 6 *Hibernian Law Journal* 229 at 232.
[90] C-413/01 *Ninni-Orasche v. Bundesminister fur Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.
[91] *Bidar*, above note 16.
[92] *Ninni-Orasche,* above note 90, at para. 86-7 of the opinion.

risk conditions laid out in the residency directives which state that citizens must have sufficient resources to avoid becoming a burden on the host state's public finances. Supporting this point, he highlighted the express prohibition on students seeking maintenance support from the host Member State, stating that the restriction set down in Article 3 of the directive was "expressed unequivocally".[93] The Advocate General's opinion would appear not to develop the concept of financial solidarity in the context in which it was discussed in *Grzelczyk* in any significant way, other than to reassure that it would not be used to undermine the economic risk conditions.[94] No mention of financial solidarity was made in the Court's judgment in the case.

In his opinion in *Bidar*, discussed above at section Chapter 4.4, AG Geelhoed again addressed the concept of financial solidarity, this time with much further reaching implications. Referring to the *Grzelczyk* decision, the Advocate General held that the notion of unreasonable burden contained within the directive was a "flexible" one.[95] In seeking to define what 'financial solidarity between Member States' amounted to, he repeated his view stated in *Ninni-Orasche* that it could not form a device to undermine the existing residency directives, one function of which was the protection of national social security systems from unlimited access by nationals of other Member States. At the same time, the Advocate General stated that EU citizens lawfully living in a host Member State for significant periods of time could become entitled to social benefits on the same conditions that applied to nationals of that State. As such, Advocate General Geelhoed considered the concept of

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[93] *Ibid.*, at para. 88 of the opinion.

[94] It should be noted that AG Geelhoed did proceed to discuss the basis of Ms. Ninni-Orasche's residency in the event that she was not covered by Directive 93/90. As part of this discussion, the Advocate General declared that "In my view, the principle of a minimum degree of financial solidarity can, in specific, objectively verifiable circumstances, create a right to equal treatment", *Ninni-Orasche,* above note 90, at para. 90 of the opinion. However, this author has previously argued that, in relation to the discussion of equal treatment in the opinion in *Bidar*, "[...] it would have been more apposite for the Advocate General to invoke the *Martinez Sala* judgment, where the ECJ had previously held that "a citizen of the European Union ... lawfully resident in the territory of the host Member State, can rely on Article [18] of the Treaty in all situations which fall within the scope ratione materiae of Community law", O'Gorman, above note 89, at 239.

[95] *Bidar*, above note 16, at para. 31 of the opinion

financial solidarity to be "[...] a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance".[96] Outlining the criteria needed to ensure that the proportionality principle was met, the Advocate General noted that the conditions for such assistance must not discriminate between nationals and citizens of other Member States, must be clear and suited to their purpose, be known in advance and subject to judicial review.

AG Geelhoed then proceeded to go beyond the *Grzelczyk* jurisprudence by placing significant emphasis on looking at the "[...] particular individual circumstances of the applicants in question". He made reference to the German concept of "Kernbereich",[97] which refers to the actual core of a fundamental right; something that the Advocate General argued needed to be protected by ensuring that the economic risk conditions were applied proportionately. The Advocate General argued that this notion of a core of a fundamental right was protected by the Charter of Fundamental Rights, which states that limitations on the exercise of the rights and freedoms within the Charter had to respect the "essence" of such rights and freedoms.[98]

It is submitted that these two opinions both clarify and expand the notion of financial solidarity considerably from the position outlined by the Court of Justice in *Grzelczyk*. As was decided in that case, it remains a device by which to lessen any potential harshness resulting from the strict application of the economic risk conditions contained within Community legislation in times of temporary financial difficulties. The distinction made in *Ninni-Orasche* between the facts in that case and those in *Grzelczyk*, where recourse to the

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[96] *Ibid.*, at para. 32.

[97] This concept refers to Art 19(2) of the German Basic Law that states that "In no case may the essence of a basic right be affected".

[98] The Advocate General was referring to Article II-112(1) of the now defunct Draft Constitutional Treaty which stated "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" [2003] OJ C169/01. The provision was originally Article 52(1) of the Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

national social security system was necessary to secure the applicant's residency in the host Member State, suggest that a certain threshold of legitimate need or fairness must be passed before financial solidarity comes into play which would prevent it being used in a *laissez-faire* manner to undermine the economic risk conditions contained within the residency directives. However, as this author has previously argued, the *Bidar* opinion demonstrates a substantial development of the concept of financial solidarity as a manifestation of the proportionality principle, which applies when "[...] the very core of a fundamental right is threatened by the refusal of certain social benefits".[99]

While previously the Court of Justice had held in *Baumbast*[100] that the limitations contained within the Residency Directives must comply with the general principles of Community law, including proportionality, it is submitted that the *Bidar* opinion goes notably further in that, as well as the reference to the proportionality principle, the Advocate General also links the notion of financial solidarity to national constitutional traditions and to the Charter of Fundamental Rights. It is particularly significant to see the reference to the Charter, where Article 52(1) is used to ensure the fortification of the applicant's right against restrictive secondary Community legislation. The discussion of these three sources represents a substantial development from the position of the Court outlined in *Grzelczyk*.[101]

4.6.1 Financial Solidarity – Undermining Community Secondary Legislation

It must be conceded that the Court of Justice only made passing reference to the financial solidarity point in reaching its eventual decision in *Bidar*.[102] Nevertheless, it is worthwhile to address, as the Advocate General did, the possible consequences of granting the concept of

[99] O'Gorman, above note 89, at 235.
[100] *Baumbast*, above note 18, at para 91.
[101] *See* O'Gorman R., 'The Proportionality Principle and Union Citizenship', Edinburgh Mitchell Working Papers Series, 1/2009, (Europa Institute, University of Edinburgh).
[102] *Bidar*, above note 16, at para. 56.

financial solidarity between Member States as strong a status as he proposed. While the Court eventually determined that the applicant was an EU citizen who had chosen to exercise his right of freedom to move under the Treaty and as such had residency under the General Residency Directive, the Advocate General also considered the situation had the applicant fallen within the Student Residency Directive. As such, he was considering the implementation of a provision of secondary Community legislation, thus framing the situation in *Bidar* in the same scenario as that in *Baumbast* and *Grzelczyk*. Though acknowledging that Article 3 of the Directive, which prohibited such students from seeking maintenance payments from their host state, proved a major obstacle to the applicant's claim, the Advocate General nevertheless argued that there were circumstances in which Article 3 should be applied leniently. In order to ensure that the core of the fundamental rights granted to citizens by Article 21(1) TFEU were respected, the Directive was to be interpreted in light of general principles of Union law, in this case, the proportionality principle. Referring to his discussion of the use of proportionality earlier in the opinion and also in the *Grzelczyk* judgment, the Advocate General stated:

> [w]here, according to [*Grzelczyk*], under Articles 21(1) and 18 TFEU, an EU citizen, as a student, is entitled to a minimum subsistence allowance in his final year of studies on an equal footing with nationals of the Member State if his financial position has changed since he took up his studies, there would be no reason to exclude entitlement of EU citizens in a similar situation under those provisions to the less burdensome instrument of a student loan. *In such exceptional situations the principle of financial solidarity between the nationals of the Member States entails that once a student has commenced a course of studies in another Member State and has progressed to a certain stage of these studies, that State should enable him to*

complete these studies by providing the financial assistance which is available to its nationals.[103]

It is submitted that this statement by the Advocate General has potentially far-reaching consequences. The concept of financial solidarity, now being described as a "principle", is being shaped by AG Geelhoed into a tool to ensure the application of the proportionality principle to the situation even though the result directly contradicts the prohibition contained within Article 3 of the directive. The outcome is to significantly increase the ability of a Union citizen to obtain social benefits. Describing similar reasoning in *Baumbast*, Dougan and Spaventa stated that "[...] the Court uses the obligation incumbent upon the Member State to respect the principle of proportionality so as to create a cleavage, within each Directive, between its substantive text and its preamble".[104] The outcome of such a "cleavage" is basically a rewriting of the secondary legislation to meet the intentions of the Treaty articles, as interpreted by the Court.

While the Advocate General does describe this occurring in 'exceptional situations', he was nonetheless prepared to use financial solidarity to outflank the clear prohibition, contained within the directive, on EU citizens claiming educational grants in their host states. In light of this aggressive use of financial solidarity, even if only in limited circumstances, it is difficult to accept the Advocate General's protestations that he was not attempting to undermine the degree of control attributed to national Governments as part of the Residency Directives.[105] Indeed, he would appear to be flatly contradicting his own opinion in *Ninni-Orasche*, when he had previously stated that the reference to financial solidarity was not to be seen to be undermining the economic risk conditions contained within the Residency

[103] *Bidar*, above note 16, at para. 45 of the opinion (emphasis added).
[104] Dougan M. and Spaventa E., 'Educating Rudy and the (non-) English Patient: A double-bill on residency rights under Article 18 EC', (2003) 28 *European Law Review* 699, at 705.
[105] *Bidar*, above note 16, at para. 32 of the opinion.

Directives and that the prohibition in Article 3 of the directive was "expressed unequivocally".[106]

The extent to which this position would represent an extension of the concept of financial solidarity can be seen when the factual situation is compared to those in *Grzelczyk* and *Baumbast*. In the former case, the Court held that social advantage being sought (the minimex) was not specifically excluded by Directive 93/96 and that a strict application of the economic risk condition on adequacy of resources would result in the applicant being unable to complete the final year of his degree. In *Baumbast*, the Court determined that the applicant and his family broadly complied with the economic risk conditions; they possessed health insurance and had not made any claims on the national social welfare system. In these circumstances, the Court stated that to hold the mere fact that their health insurance did not cover one aspect (emergency treatment) meant that they were in breach of the health insurance condition would be a disproportionate interference with their residency rights. As such, we see the application of financial solidarity in *Grzelczyk* and proportionality in *Baumbast* to factual situations where there was considerably more legitimate scope for interpretation on the part of the Court in relation to the actual circumstances, as opposed to the clear-cut prohibition contained within the relevant directive in *Bidar*.[107]

4.6.2 Relationship between Financial Solidarity and Proportionality

Successive decisions and opinions have failed to clarify the nature of the relationship of the concept/principle of financial solidarity to the proportionality principle. Should financial solidarity be understood as a manifestation of the proportionality principle, or as something

[106] *Ninni-Orasche*, above note 90, at para. 88 of the opinion.

[107] While the issue in *Bidar* surrounded a student loan, as distinct from a financially more burdensome student 'grant' as prohibited under Art 3 of Directive 93/96, the Advocate General had previously conceded that for the purposes of Art 3, no real distinction could be made between the two instruments *Bidar*, above note 16, at para 44.

more significant? Clearly, the manner in which proportionality is applied in *Baumbast* is similar to the way in which financial solidarity is used in *Grzelczyk* and the Advocate General's opinion in *Bidar* – the end result being the overturning of a prohibition contained in Community legislation.

In his opinion in *Bidar*, AG Geelhoed suggests that financial solidarity is simply "[...] a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance".[108] Similarly, it has been argued elsewhere that financial solidarity should be classified as one of a range of interests which is to be taken into consideration in undertaking an intensive scrutiny proportionality analysis.[109] In this latter analysis, it would appear that the notion of financial solidarity, which lay dormant as represented by the unreasonable burden language contained in the residency directives prior to the EU Treaty, has been activated by the introduction of Union citizenship and now forms a key aspect of the proportionality principle in the area of free movement and residence.[110]

While Dougan's analysis conceptualises the *Baumbast* judgment as a continuation of the decision in *Grzelczyk*,[111] it is worth pointing out that there is only one reference to *Grzelczyk* in *Baumbast*, and this is in the context of citizenship as a fundamental status – not in the context of financial solidarity or proportionality analysis. This seems to be a peculiar omission on the part of the Court as *Grzelczyk* is generally regarded as a key case in this area. Nevertheless, the discovery of the concept of financial solidarity in *Grzelczyk* is based on the repeated use of the phrase "unreasonable burden" in the recitals to each of the three residency directives.[112] As such, while the *Baumbast* decision may not mention financial solidarity, the

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[108] *Bidar*, above note 16, at para. 32 of the opinion.
[109] Dougan, above note 83, at 621.
[110] Of course, it should be acknowledged that the very existence of a degree of financial solidarity between Member States would not find support in all quarters.
[111] Dougan, above note 83, at 620-1.
[112] *Grzelczyk*, above note 8, at para. 44.

reference to 'unreasonable burden' and the General Residency Directive in paragraph 90 of the decision places *Baumbast* within the context of the *Grzelczyk* judgment and as such allows it be incorporated within the financial solidarity argument. In light of this analysis, it is suggested that Dougan understates the relevance of the concept of financial solidarity by classing it as one of a range of interests which is to be taken into consideration in undertaking an intensive scrutiny proportionality analysis.[113] Rather, it is submitted that instead of being merely one of a range of interests, the *Bidar* opinion points to the "principle" of financial solidarity being the very basis upon which the more intensive analysis is being undertaken.

Perhaps the haphazard treatment of the issue by the Court of Justice, demonstrated by the twin application of financial solidarity and proportionality to the same type of situation, is both a reflection of the Court's initial uncertainty as to how to treat Union citizenship, but also a demonstration of the developing desire of the Court to use the new provisions in an expansive way which increases its scope to review Community legislation.[114] This latter point is certainly evidenced by the bold use of financial solidarity as demonstrated by AG Geelhoed in the *Bidar* opinion.[115]

4.6.3 Financial Solidarity before the Citizenship Directive

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[113] Dougan, above note 83, at 621.

[114] The unsatisfactory nature of the application of proportionality in these cases can be seen in the *Trojani*. The applicant sought to argue that his status as a citizen of the Union would enable him to avail of a right of residence in Belgium by direct application of Article 18 EC. As it had held in *Baumbast*, such a right could be relied upon by the applicant, purely as a citizen. However, the Court also stated that the rights under the article were conditional and as such, it was subject to the economic risk conditions placed on the right of residence under Directive 90/364 – coverage by sickness insurance and sufficient resources. However, it is submitted that the eventual application of the proportionality principle to the economic risk conditions was undertaken in a mechanical fashion with the Court noting that, "[i]t follows from the judgment making the reference that a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex". The Court concluded by stating, "[c]ontrary to the circumstances of the case of *Baumbast and R*, there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive", *Trojani* above note 65, at para. 35-6.

[115] The term 'financial solidarity' is mentioned once in *Forster*, but only in the context of a reference to what was said in *Bidar*. Case C-158/07 *Forster v. IB-Groep* [2008] ECR I-8507, at para. 48.

The impact that the Citizenship Directive will have on the body of law created by the Court of Justice will be assessed in the following chapter. The *Forster* case is the last case that addressed the pre-Citizenship Directive legislative position, though the outcome of the decision was certainly influenced by the content of the then draft directive. Similarly to *Bidar*, at issue were national restrictions placed on the granting of maintenance assistance for students – specifically a five year residency requirement before the payment could be claimed from the Dutch authorities.[116] Making reference to its previous decision in *Bidar* and specifically to the ability of Article 3 of Directive 93/96 to prevent claims for maintenance support, the Court stated:

> [h]owever, that provision does not preclude a national of a Member State who, by virtue of Article [21 TFEU] and the provisions adopted to implement that article, is lawfully resident in the territory of another Member State where he or she intends to start or pursue education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article [18 TFEU] (see, to that effect, *Bidar*, paragraph 46).[117]

The implication of the statement is that a person in the applicant's position can enjoy the right to equal treatment under Article 18 TFEU in conjunction with Article 21 TFEU, despite the prohibition contained in Article 3 of the Directive. As such, the Court appears to endorse AG Geelhoed's hypothetical scenario in *Bidar* discussed above when he considered that applicant's position if he had solely enjoyed residency in the UK under Directive 93/96, though it does not at this stage make reference to the term financial solidarity or

[116] *Forster*, above note 115, at para 48.
[117] *Ibid.*, at para 43.

proportionality as the Advocate General did. What distinguishes and increases the significance of this statement from the one referred to in *Bidar* is that the applicant in that case enjoyed his residency under Directive 90/364, while the applicant in *Forster* owed her right of residence solely to Directive 93/96. As such, the Court's decision in *Forster* represents a clear adoption of the broad principle that Article 18 TFEU can be used to get around specific exclusion clauses in secondary legislation.

The Court then proceeded to make a distinction between the five year residency criterion that formed part of the Dutch national provisions implementing the directive and the factual situation in *Bidar*. It placed its focus on the dual burden imposed by the UK regulations in that case – the requirement to be settled and to meet residency conditions.[118] Accepting it had previously stated in *Bidar* that in the organisation and application of their social assistance systems, Member States had to show a certain degree of financial solidarity with nationals of other Member States, the Court reiterated that Member States nevertheless had the ability to ensure that such nationals would not become an unreasonable burden. This could be done by ascertaining if the Community national was sufficiently integrated within the host Member States, particularly if they had been residing in that state for a certain amount of time.

Looking at the situation in *Forster*, the Court determined a five year continuous residence requirement was proportionate.[119] Despite the fact that the Citizenship Directive did not have legal effect at that stage, the Court made reference to Article 24(2) and the prohibition contained within it on students claiming maintenance support. The Court also referred favourably to the five year period set out in Article 16(1) after which Union citizens have a permanent right of residence in their host state. Thus the Dutch regulations were found to comply with the key focus of the Court's judgment, that being to protect those who were

[118] *Ibid.*, at para 47.
[119] *Ibid.*, at para 52.

sufficiently integrated. This was at odds with the opinion of Advocate General Mazak, which is examined further in Chapter 5.5

4.7. Conclusion

Despite the uncertainty demonstrated in elements of the case law, this Chapter has demonstrated the significance of the creation of Union citizenship in fundamentally altering and strengthening the position of many Community nationals living in another Member State. In particular, it has shown how the new provisions have opened up a range of social entitlements for Union citizens living in a host Member State through the Court's conclusion that Union citizenship has made the personal scope of EU law universal. The magnitude of the transformation is clear when the pre-citizenship limitation of such rights to 'workers' and certain other limited categories is considered. This has been brought about through the changes that the Court of Justice has determined that Union citizenship has created; by widening the availability of protection (extending the personal and material scope of the Treaties and making Article 21 TFEU a directly effective right) and also deepening the level of protection offered by Community law (the use of Article 18 TFEU and the application of the financial solidarity/proportionality review). Indeed, this reinvigorated role that Article 18 TFEU now plays as a result of its application in conjunction with Articles 20 and 21 TFEU is striking.

The use of citizenship to extend the application of Union law to a wider category of persons and situations may initially be considered the most significant aspect of the jurisprudence. However, while this chapter illustrates the importance of these developments, it is argued that other aspects of the judgments are at least of equal importance. Firstly,

through its recognition in *Baumbast* that the rights of free movement and residence under Articles 20 and 21 TFEU are not conditional on the exercise of economic activity, the Court has broken a significant limitation to the accessibility of social benefits in the host Member State. Obviously, the fact that such rights are subject to the limitations provided for in the Treaty and elaborated on in secondary legislation, allows a Member State some control over the inflow of nationals from other States in the event of inadequate resources or a lack of medical insurance.

However, taking us to our second point, in making its decisions on the adequacy of the resources or insurance available to a Union citizen, the Member State authorities are bound by the principle of proportionality, which the Court will police. Should the Court go further and endorse the use of Advocate General Geelhoed's 'financial solidarity' device as a means of overruling restrictive provisions of secondary legislation, as it would tacitly appear to do in *Forster*, it will amount to the Court taking for itself the power to determine the adequacy of the provisions regarding social rights arrived at by the Union Legislature. Considering the sensitive nature of the issue of social entitlements, both in terms of its huge impact on state finances and its symbolic status as a determination of who has the right to claim from the national purse, this would represent a bold challenge by the Court of Justice to the Union legislature.

Even if the Court of Justice was not to go as far as the approach taken by AG Geelhoed to the principle of financial solidarity in *Bidar*, the scale of the change wrought by the introduction of citizenship is significant. This transformation was clearly not anticipated by the national governments. In *Martinez-Sala*, the French, British and German Governments all made submissions that the Treaty articles on Union citizenship did not "[...] give freedom of movement any new broader substance than earlier legislation did".[120] Further, while the

[120] *Martinez-Sala*, above note 1. at para. 15 of the opinion.

'creative interpretations' adopted by the Court have been described as creating a social citizenship alternative to market citizenship,[121] nevertheless is has to be accepted that this has been done using the same concepts as were used to create the internal market in the first place, rather than innovating in the interpretative techniques used.[122]

The following chapter will analyse the response of Member States, implemented via the Union Legislature, in the form of the Citizenship Directive. This legislation could have removed some of the ambiguities that had emerged from the case law. However, this Directive may set the stage for future conflict between the Court and the other institutions as some provisions of the Directive would appear to represent a rolling back on the part of the Union Legislature of the Court's jurisprudence. Indeed, there are provisions of the Citizenship Directive which would be at risk of being struck down in light of the new approach demonstrated to the proportionality analysis.[123] If the concept of financial solidarity, or alternatively the *Baumbast* proportionality approach, is as significant as suggested by this thesis, then there exists the possibility of a serious divergence between the Court and the Union Legislature on the nature of the limitations that can be placed on citizenship rights.

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[121] Guibboni S., 'Free Movement of Persons and European Solidarity', URGE Working Paper 9/2006 (University of Florence), at 8-9.

[122] Illiopoulou A., 'The Transnational Character of Union Citizenship', *Empowerment and Disempowerment of the European Citizen*, Liverpool University, 21 October 2010, at 1.

[123] Dougan, above note 83, at 631.

Chapter 5 – Citizenship Directive

5.1 Introduction

If the initial jurisprudence on the citizenship provisions demonstrated a bold interpretive approach by the Court of Justice, the Citizenship Directive represented on the part of the Union Legislature both a codification of the gains made by Union citizens through the early cases, but also a brake on some of the more expansive aspects of the Court's decisions. [1] However, the success of this brake in areas where the generous approach of the Court opened national exchequers to significant financial claims has been limited due to subsequent judgments of the Court of Justice.

The passing of the Directive marks an important change in the nature of residency rights for Union citizens. It has acted to consolidate the disparate pieces of secondary legislation that covered the right to free movement across different sectors, within a single legislative act.[2] In light of its wide scope, an analysis of the entire directive shall not be undertaken here. Rather, the focus will be on how key provisions related to the accessibility of social entitlements represent the legislative reaction to the innovative decisions of the Court of Justice discussed in the previous chapter.

A significant aspect of the Directive is its establishment of three specific time periods whereby Union citizens can avail of differing bundles of rights within their host Member State: residence for up to three months, residence between three months and five years, a permanent right of residence after five years. These time periods, the limitations placed upon

[1] Directive 2004/58/EC of the European Parliament and 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77.
[2] Recital 4.

them and in particular, the significance of the creation of a permanent right of residence shall be examined. An analysis shall be undertaken of the exceptions set out in the Directive in two areas that were highlighted in Chapter 4 as being controversial: the rights of job-seekers and the availability of maintenance support grants for students. In light of the focus in the last chapter on those persons who were at risk due to financial difficulties of being deported from their host Member State, a further analysis of the provisions in the Citizenship Directive regarding the circumstances whereby residency rights can be lost will be undertaken. Finally, a review will be undertaken of the initial treatment of the Directive by the Court of Justice to determine what trends have emerged to date from the case law.

5.2 Time Periods

5.2.1 Three Month Period

Under Article 6, the Directive mandates a three month time period during which the Union citizen has the right to reside within that Member State.[3] During these three months, the only condition that the Union citizen must meet in order to enjoy the right is that she must hold a valid identity card or passport. The three month residency right under Article 6 also applies to those family members who are not nationals of a Member State accompanying or joining the Union citizen, if they possess a valid passport. Article 14(1) makes it clear that the right of residence is predicated on the Union citizen and family members not becoming an

[3] This three month period had initially been set at six months in the original draft of the Directive. Proposal for a European Parliament and Council Directive on the rights of citizens of the Union and their family member to move and reside freely within the territory of the Member States, Brussels, 23.5.2001 COM(2001) 257 final, at 32.

"unreasonable burden on the social assistance system of the host Member State". This is discussed below in more detail.

Recital 21 explains that the Member State has discretion in deciding if it is to pay social assistance to Union citizens (excluding workers, self-employed persons, their families and persons retaining these statuses) during the three month period or the longer period provided for in the case law for job-seekers. The recital also states that the Member State has discretion regarding the payment of student maintenance before the permanent right of residence is granted to this same group of persons. These points are elaborated upon in Article 24, which is discussed in detail below.

5.2.2 Right of Residence for more than Three Months

Article 7 sets out the requirements for a Union citizen who wishes to avail of a right of residence within another Member State for periods longer than three months. This right can be invoked by four separate groups of people: workers and the self-employed;[4] persons who have sufficient resources, both for themselves and family members, not to become a burden on the social assistance system of the host Member State and who possess comprehensive sickness insurance in the host Member State (restatement of the 'economic risk conditions' from the Residency Directives); persons enrolled in qualifying education establishments who have comprehensive sickness insurance in the host Member State and who have assured the national authorities in the host Member State that they have sufficient resources for themselves and their families not to become a burden on the social assistance system of that state;[5] and family members of persons who meet the criteria of any of the first three

[4] Article 7(3) sets out the position of Union citizens in these categories who have ceased to work due to illness, accident, involuntary unemployment or engagement in vocational training.

[5] In the original draft of the directive, there was no mention of a requirement that students were required to have sickness insurance under Article 7(1)(c). This was altered in the Amended proposal for a Directive of the

categories. It is clear from these provisions that the Directive confirms the approach of the Court of Justice in *Baumbast* by introducing these economic risk conditions as restrictions on the right of residence permitted under Article 21(1) TFEU, as discussed in Chapter 4.5.

The Preamble to the Directive justifies the imposition of conditions on those seeking a right of residence for periods exceeding three months on the grounds that "Persons exercising their right of residence should not [...] become an unreasonable burden on the social assistance system of the host Member State during an *initial* period of residence".[6] The provision sees the re-use of the term 'unreasonable burden' which was a feature of the recitals of the pre-TEU Residency Directives. The implications of the term and the potential difficulties cause by its vagueness have previously been analysed in Chapter 4.5. The use of the word 'initial' would appear to open the possibility, if not an expectation on the part of the framers of the Directive, that at some stage a Union citizen exercising a right of residence in another Member State may legitimately become a financial or social burden on that State. Presumably, the initial period is assumed to have concluded once the five year permanent right of residence has been obtained.

It is worth noting that Article 7(1)(b) requires Union citizens to possess "comprehensive sickness insurance cover in the host Member State". This would seem to be a lower standard than that which was required in the original draft of the Directive which spoke of "health insurance covering all risks in the host Member State".[7] The lesser standard set in the final version of the directive reflects the decision taken in *Baumbast*, previously

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European Parliament and Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 15.04.2003 COM(2003) 199 final, at 3.1.2.

[6] Recital 10. Emphasis added.

[7] Proposal for a European Parliament and Council Directive on the rights of citizens of the Union and their family member to move and reside freely within the territory of the Member States, Brussels, 23.5.2001 COM(2001) 257 final, Article 7(1)(b).

addressed in Chapter 4.5.3, where a small gap in insurance cover was not sufficient to render the economic risk condition broken.[8]

Article 8 draws a distinction between the manner in which non-economically active persons and students satisfy national authorities that they meet the conditions laid out in Article 7. Students must provide proof of sickness insurance and enrolment in an educational establishment, along with a "declaration or equivalent means" in order to satisfy the host Member State of the availability of sufficient resources.[9] For non-economically active persons, the requirement is to "provide proof" that they satisfy the economic risk conditions.[10]

Assessing Sufficient Resources

As noted above, Article 7 lays out conditions under which non-economically active Union citizens may enjoy residency in a host Member State. Article 8(4) seeks to clarify these conditions. In explaining the meaning of the term 'sufficient resources' in Article 7, it states that a fixed amount cannot be laid down by a Member State to determine what 'sufficient resources' entails. Rather, the Member State must take account of the personal situation of the individual concerned. The amount cannot be higher than the threshold below which nationals of the host Member State become eligible for social assistance. If this criterion is

[8] The change to the wording on this point was made in the Commission's amended proposal for the Directive. It should be noted that the explanatory text makes no reference to the *Baumbast* decision. Indeed, it makes no reference at all to the change in wording. Amended proposal for a Directive of the European Parliament and Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels 15.04.2003 COM(2003) 199 final, at 3.1.2. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091

[9] Article 8(3).

[10] Article 8(3).

not relevant, then the threshold cannot be higher than the minimum social security pension paid by the host Member State.[11]

Continuing on from the treatment of the point in the Student Residency Directive, Article 8(3) states that, specifically in the case of persons enjoying the right of residence as students, the condition about declaring sufficient resources on the part of the Union citizen cannot require that a specific amount of resources be listed.

It is submitted that the text of Article 8(4) makes the individual decisions on the sufficiency of resources that the Member States will have to make highly subjective and as such, favourable to those seeking benefits. The option of setting out broad guidelines as to what will be regarded as sufficient resources is closed to the Member States. Instead, they are under an obligation to examine the individual situation of each person seeking this right, a process which undoubtedly will be both costly and time consuming. As noted in Chapter 4.5.6, the very use of economic criteria to justify limitations is something that the Court has always treated with scepticism.[12] It is submitted that the approach adopted in the Directive significantly limits the potential of the sufficient resources criterion to justify a Member State refusing residency to a Union citizen. Indeed, the position of the Member State is made even more difficult by the creation of an upper limit on the amount of resources that it must require on the part of the Union citizen. An alternative approach would have been to allow the Member States set guidelines, while at the same time requiring some degree of flexibility or discretion in the manner in which these guidelines would be applied; for example, using the notion of financial solidarity. However, as has previously been illustrated in the discussion of

[11] This provision is significantly more developed than the original version in Article 8(5) which solely stated that Member States could not lay down an amount which they regarded as sufficient resources.
[12] See Nic Shuibhne N., 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?', (2005-06) *8 Cambridge Yearbook of European Legal Studies* 187, at 209-212.

Commission v. Italy, the Court of Justice has taken a strict approach in its interpretation of the resource criteria.[13]

This would suggest that the criterion on sickness insurance will become a more effective tool for the Member State in policing the application of this provision. It will be easier to ascertain whether this condition has been reached or not. For those Union citizens who are of limited means and presumably are of greatest concern to a host Member State regarding a drain on its resources, obtaining the necessary degree of health insurance is probably going to be a difficult task. As such, it is submitted that this criterion will in practice be more difficult to comply with. The only possible point of flexibility is the fact that Article 7 uses the term 'comprehensive' sickness insurance. This suggests that a Union citizen who possesses a certain level of sickness insurance, while not complete, still has 'comprehensive' cover. This aspect of the legislation is probably aimed at dealing with the narrow situation which arose in *Baumbast* where the host Member State tried to argue that the applicant did not have complete sickness insurance because, despite its extensive nature, it did not cover certain emergency treatments (see Chapter 4.5.3). It remains to be seen if that aspect of the *Baumbast* decision will be confined to its narrow facts, or it presupposes a generally flexible approach to the extent of sickness insurance needed.[14]

Assessing a Breach of the Conditions

Article 14(2) states that the right of residency under Article 7 continues so long as the Union citizen meets the conditions set out therein. The section gives the Member State the right to investigate if the Union citizen continues to satisfy the conditions in the event of "reasonable doubt". However, such an investigation cannot be carried out systematically.

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[13] Case C-424/98 *Commission v. Italy* [2000] ECR I-4001. *See* Chapter 3.9.3.
[14] See discussion *of Ruiz Zambrano* at Chapter 4.5.6 regarding the effectiveness of the economic risk criteria.

Confirming the decision in *Grzelczyk*, Article 14(3) states that in the event that the Union citizen or his family did seek help from the social assistance system of the host Member State, this would not automatically be grounds for expulsion.[15] The Recital 16 restates this and continues by setting out the degree of recourse to the national social welfare system that is required in order for a Member State to be able to determine that a Union citizen had become an 'unreasonable burden' on its social security system. Account should be taken of whether the difficulties being faced are of a short-term nature, the amount of time the applicant has lived in the host Member State, the amount of financial assistance being sought and the personal circumstances of the applicant. Interestingly, the recital makes no mention of assessing the degree of integration of the Union citizen into the host Member State. Again, the highly detailed and subjective nature of the analysis that the national authorities have to undertake is significant.[16]

Absence of Reference to Financial Solidarity

In light of the degree to which it featured in the previous chapter, it is relevant to note that there is no reference to the term 'financial solidarity' within the Citizenship Directive. This could be interpreted as representing a refusal by the Union Legislature to endorse the notion of financial solidarity as set out in the *Grzelczyk* case. On the other hand, the fact that the term 'unreasonable burden' is still mentioned in Recitals 10 and 16 and also in Article 14(1) means that the link to the debate on financial solidarity remains.

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[15] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at para. 43. The Council specifically stated that this provisions represented an integration of the *Grzelczyk* decision into the Directives text. Common Position adopted by the Council of 5 December 2003 [2004] OJ C 54 E/31.

[16] In adding Recital 16 to the Commission's original text, the Council stated that it would "provide useful indication for the criteria to follow in order to establish if a person has become an unreasonable burden", Common Position adopted by the Council of 5 December 2003 [2004] OJ C 54 E/31.

5.2.3 Permanent Right of Residence

Article 16 sets out a new and significant development in the law implemented by the Citizenship Directive – the creation of a right of permanent residence. This right can be claimed by Union citizens and their families who had been legally residing in the host Member State for a continuous period of more than five years.[17] The key aspect of this provision is that the permanent right of residence is not subject to the various conditions already discussed pertaining to the other two categories of residency rights.[18] This makes it a "genuine vehicle for integration into the society of the host Member State".[19]

On attaining the right of permanent residence, the citizen is entitled to enjoy full equality with nationals of the host state. The "[...] negative, residence-threatening effects of claiming solidarity benefits must cease".[20] This right of permanent residence can only be lost through leaving the state for consecutive periods of more than two years as set out in Article 16(4) or on serious grounds of public policy or public security laid down in Article 28(2).

It is relevant to note that the Commission's original proposal for the Citizenship Directive envisaged the right of permanent residence applying after four years, rather than five.[21]

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[17] Article 17 sets the out circumstances in which workers and self-employed persons and their families can obtain the permanent right of residence before the 5 year period has elapsed, such as retirement, permanent incapacity from work and cross-border workers. Each of these circumstances is further limited by conditions.

[18] Article 16(3) sets out a number of circumstances in which temporary absence from the host State will not detract from the calculation of the five year period.

[19] Recital 18.

[20] O'Brien C., 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity', (2008) 33 *European Law Review* 643, at 650.

[21] Proposal for a European Parliament and Council Directive on the rights of citizens of the Union and their family member to move and reside freely within the territory of the Member States, Brussels, 23.5.2001 COM(2001) 257 final, at 37

5.3 Specific Limitations Provided for in the Directive

5.3.1 Jobseekers

Having seen in Chapters 3 and 4 that the treatment of job-seekers is an issue that has come before the Court of Justice on a number of occasions, it is unsurprising that the position of this group is addressed by the Directive. Article 14(4)(b) states that a Union citizen or her family cannot be expelled in the event that the Union citizen entered the host Member State in order to search for work so long as she "[...] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". This new provision represents legislative affirmation of the decision in *Antonissen*, discussed in Chapter 3.3.4. The fact that the Directive confirms the 'window' which the *Antonissen* case provided for job-seekers is significant in the context of the *Collins* decision. There, as was discussed in Chapter 4.2.2, the Court determined that as a result of Union citizenship, benefits linked to accessing the labour market in a host Member State fell within the equal treatment for workers proviso of Article 45(3) TFEU.[22] As such, these could now be accessed by job-seekers, though it was legitimate for the Member State to require a "genuine link" between the person seeking work and the employment market of the host Member State.[23] The consequence of Article 14 (4)(b) when read with the *Collins* decision would be to allow Union citizens reside in a host Member State on an open ended basis, as long as they could show that they were seeking employment and had a real chance of getting a job. During this time they would be entitled to claim any payments made by the host State to its own nationals linked to helping them while seeking a job. The potential for significant cost to the host Member State's exchequer is obvious.

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[22] Case C-138/02 *Collins* [2004] ECR I -2703, at para. 63. *See* Oosterom-Staples H., note on *Collins* (2005) 42 *Common Market Law Review* 205.
[23] *Ibid.*, at para 69.

Such a situation is addressed by the provisions of Article 24, which reiterates the principle of equal treatment for all Union citizens. Article 24(1) sets out the broad rule, requiring that all beneficiaries of the residency rights contained within the Directive enjoy equal treatment with the nationals of their host Member State. This confirms the jurisprudence of cases such as *Martinez-Sala* and *Grzelczyk* concerning the application of Article 18 TFEU in conjunction with Articles 20 and 21 TFEU. As illustrated in Chapter 4.2.2, it was the creation of Union citizenship by the latter two articles and their joint use in conjunction with Article 18 TFEU that resulted in the jobseekers allowance being held to fall within the scope of the Treaties in *Collins*.

Article 24(2) sets out derogations to this general principle of equal treatment. During the initial three month residency period, the host Member State is not obliged to confer an entitlement to social assistance. Further, the Member State does not have to grant such an entitlement "where appropriate, [during] the longer period provided for in Article 14 (4)(b)". As Art 14 (4)(b) is referring to jobseekers, the provision could appear as an attempt by the Union Legislature to roll back the scope of the *Collins* judgment and the enhancement of the rights of jobseekers it represented.

However, the Court's decision in *Vatsouras* would appear to clarify the meaning of Article 24(2), to the benefit of job-seekers.[24] In the context of claims made by two Greek nationals living and working for short periods in Germany, the Court declared that:

> [b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as

[24] Cases C-22-23/08 *Vatsouras & Koupatantze* (Judgment of 4 June 2009).

constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.[25]

The outcome of this is to maintain the benefits of the *Collins* and *Antonissen* decisions for job-seekers in relation to benefits connected to entering the national job-market. Article 24(2) thus represents a specific derogation from the application of the Article 18 TFEU principle of non-discrimination on the grounds of nationality, but one which is limited in the context of job-seekers to social assistance payments not connected to labour market access. This difference between social assistance and job-seeker benefit has justifiably been described as a "fine line" and one where the Court fails to provide necessary clarity.[26] This failure is particularly significant as in his opinion on the case, AG Colomer takes a substance over form approach in suggesting that certain social assistance payments may be for the purpose of facilitating labour market integration, regardless of their actual designation.[27] This would mean that not only would the Article 24(2) exception apply to explicitly named job-seeker benefits, but also to other forms of social assistance that implicitly achieved the same function. In both circumstances, the only way in which the Member State could avoid making the payment would be if they could prove that the real link stemming from the *Collins* judgment was missing.[28]

The Preamble to the Directive leaves it somewhat unclear as to whether the Union legislature anticipated such a wide gap to exist in the Article 24(2) exception, with regard to the meaning of the term social assistance. Recital 21 states:

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[25] *Ibid.*, at para. 45.

[26] Fahey E., 'Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance": Comment on Cases C-22/08 and C-23/08 *Vatsouras* and *Koupatantze'*, (2009) 34 *European Law Review* 933, at 941.

[27] *Vatsouras & Koupatantze*, above note 23, at paras. 57-7 of the opinion.

[28] *Ibid.*, at para. 40-1.

> [...] it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons.

It was argued in certain quarters that what was meant by the Directive was an attempt to undermine the *Collins* jurisprudence and an indication by the Member States that they were unhappy with the obligations being imposed upon them.[29] However, it is submitted here that the Union Legislature was not trying to discount the *Collins* decision, as Recital 9 of the Directive clearly recognises the more favourable regime that applies to job-seekers "[...] as recognised by the case-law of the Court of Justice". The Commission explanatory document on the Citizenship Directive expands on this point making reference to both *Antonissen* and *Collins*.[30]

With the Court having excluded payments related to labour market access from Article 24(2), it would appear that the Member States are still somewhat limited in the extent to which they can reduce the availability of the remaining social assistance payments to job-seekers. The use of the term "where appropriate" in relation to the derogation, specifically for those who fall within Article 14 (4)(b), implies that there would be circumstances where it would not be appropriate to deny a job-seeker equal treatment in the context of accessing a social benefit. The directive provides no further guidance on how such a situation would be

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[29] "The above provision is not in tune with the ruling in *Collins* and shows that the generous interpretation by the Court of Justice of the consequences of Union citizenship for social solidarity in general and the rights of jobseekers in particular does not accord with what the Member States assumed when they signed the Maastricht Treaty", Golynker O., 'Jobseekers rights in the European Union: Challenges of changing the paradigm of social solidarity', (2005) 30 *European Law Review* 111, at 119. See also, O'Brien C., above note 18, at 653.

[30] Table of Correspondence between Directive 2004/38/EC and Current Legislation on Free Movement and Residence of Union Citizens within the EU.

addressed. It is submitted that the Court will follow the approach taken to equal treatment in accessing social assistance payments followed in cases such as *Grzelczyk*.[31]

The results that the Directive has achieved for jobseekers are broadly positive. It has been interpreted by the Courts as giving legislative confirmation to the decision in *Collins* regarding receiving payments related to labour market access and given a broad definition of what such payments would include. While the derogation from Article 18 TFEU provided for in Article 24(2) regarding social assistance reiterates the lesser status of job-seeker when compared to workers, it itself is still subject to limitations, presumably applied in light of the Court's broader application of Article 21 TFEU.

5.3.2 Maintenance Grants

As was demonstrated in Chapter 4, the liability of Member States to pay maintenance support to students from other Member States resident there while undertaking education is a contentious issue which has been the cause of litigation before the Court of Justice. The Union Legislature has attempted to use the opportunity provided by the Citizenship Directive to clarify the scope of the Member States' obligations.

Article 24(2) states that, as a further derogation from the principle of non-discrimination, a Member State is not obliged to pay maintenance aid to Union citizens who do not possess the status of workers or self-employed persons (or their families), before they have obtained the right of permanent residence. This would appear to be a direct challenge to the decision in *Bidar*, where such a right to maintenance was established, even though this was in direct conflict with a provision of secondary legislation (Student Residency Directive,

[31] It is possible that the term "where appropriate" in Article 24(2) is simply a device to separate out the category of persons living in the host Member State for less than three months from the category of job-seekers. However, it is submitted that this would be a needless insertion of the phrase, and that the argument put forward above is more likely.

Article 3).[32] Unsurprisingly, this change was strongly supported by the Member States working through the Council.[33]

The future treatment of this provision by the Court of Justice will be significant. It could accept the argument that the Union Legislature has fully upheld the equal treatment rights of citizens under Articles 18 and 21 TFEU under this new provision, or alternatively it could again be prepared to strike down restrictions on the availability of student supports for Union citizens from other Member States.

Dougan canvasses the possibility of such a situation. Referring to Article 24(2), he acknowledges that if a situation such as that in *Bidar* arose again:

> [...] Directive 2004/38 would appear to preclude both the approach and the conclusion previously adopted by the Court – unless the domestic authorities were required to apply Art 24(2) in accordance with the *Baumbast* rule, in which case there is a good chance that a refusal of maintenance assistance to an economically inactive Union citizen who has resided in the national territory for several years, and enjoys real links with the host society, would amount to a disproportionate restriction going beyond what is actually necessary to protect the Member State's legitimate interests.[34]

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[32] Case C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119. *See* Barnard C,, Casenote on *Bidar*, (2005) 42 *Common Market Law Review* 1465.

[33] Position adopted by the Council of 5 December 2003 [2004] OJ C 54 E/32.

[34] Dougan M., 'The constitutional dimension to the caselaw on Union citizenship', (2006) 31 *European Law Review* 613, at 631.

The Directive has therefore created the real possibility of a clash between the accommodation reached by the Union Legislature and the view of the Court of Justice in this area of national financial sensitivity.

5.4 Loss of the Right of Residence

Chapter VI of the Directive deals with restrictions on a Union citizen's right of entry and residence to another Member State. The grounds on which such restrictions can be placed are those of public policy, public security or public health, though Article 27 clarifies that these grounds "[...] shall not be invoked to serve economic ends". While the chapter modifies to some extent provisions of the legislation pre-dating the Citizenship Directive, it also features a range of new provisions which codify judgments of the Court of Justice regarding restrictions to the free movement of persons.[35] This chapter of the Directive is worth examining because of the comparisons that can be drawn between the requirements for an investigation of a Union citizen under these provisions, and those of an investigation under Article 14 to determine if a Union citizen has become a burden/unreasonable burden on the host Member State as per Articles 6 and 7, as discussed above at Chapter 5.2.2. Obviously, both sets of provisions can result in a Union citizen losing or being denied the right to reside in another Member State.

For the purposes of refusal of entry or expulsion in Chapter VI, Article 28(1) outlines the factors that that State must consider in taking any decision to expel a Union citizen.[36] These factors are: the length of residence in the host Member State, age, state of health,

[35] See for example Case 30/77 *R v. Bouchereau* [1977] ECR 1999, Case C-348/96 *Criminal Proceedings against Calfa* [1999] ECR I-11.

[36] It is interesting to note that Article 28 only mentions decisions to "expel" a Union citizen, rather than refuse the citizen entry into the Member State in the first place.

family and economic situation, social and cultural integration into host Member State and the nature and extent of ties to Member State of origin. This list of factors would appear to be broader than those outlined under Recital 16, for the purposes of the application of Article 14.[37] This may be because an investigation to determine if a Union citizen is an unreasonable burden can only happen if a claim is being made during the 'right of residence for more than three months' period as outlined in Article 7. As such, the potential for integration is only one that has been formed over that five year period. The grounds listed in Article 28 are also applicable to the 'permanent right of residence' under Article 16, which may involve significantly more integration on the part of the Union citizen in the host Member State.

Further, the factors to be considered under Article 28 are more subjective than those to be considered under Article 14, as detailed in Recital 16. While Recital 16 does make reference to the "personal circumstances of the applicant", and his/her length or residence, the other heading is an economic one – the cost to the host State's exchequer of permitting the claim. Thus Article 28 is much more explicit in setting out the non-economic considerations to be taken into account in making an expulsion order.

Article 30(3) and 31(1) make it clear that there must be a facility for an appeal to be made against a decision to expel made on one of the three grounds. The appeal body must be "a court or administrative authority". Article 15(1) states that the procedural safeguards set out in these two articles for those refused entry or expelled under Chapter VI also apply to "all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health". As such, they are relevant to a decision to expel on the grounds of burden provided for under Article 14. Obviously, this is a sensible position to take as the effect of ending a right of residence due to insufficient

[37] It is possible that the "personal circumstances" referred to in the Recital 16 encompass those extra factors listed in Article 28. However, there are other discrepancies between the two lists that would suggest they are not interchangeable – in particular the requirement set down in the Recital 16 for an assessment of the amount of aid that the applicant is seeking.

resources or lack of health insurance is just as serious as expelling on the basis of being a threat to public security etc. In both cases the Union citizen is forced to leave the host Member State.

5.5 Treatment of the Citizenship Directive by the Court of Justice

Since its passage, the Directive has not yet been the subject of a large amount of litigation. This makes it difficult to assess how individual provisions will operate or draw together wider conclusions as to how the Court is interpreting the various provisions. Three decisions, *Metock*, *Forster* and *Tsakouridis*, are of particular relevance.[38]

Metock involved a question about the scope of Article 3(1) of the Directive. The primary issue was a requirement under Irish law that the non-EU national spouse of an EU citizen needed to have been legally living in another Member State in order to be a beneficiary of the rights contained in the directive. In rejecting this contention, the Court of Justice applied a high degree of scrutiny to the national provisions and gave the text of the Directive a broad reading.

In examining the provisions of the Directive, the Court placed particular emphasis on the fact that there was nothing in it that made any reference to the place or conditions of residence of a Union citizen's spouse before arriving in another Member State.[39] The Court further noted how in cases and legislation prior to the Citizenship Directive, it had highlighted the importance of protecting the family life of Community nationals in order that they could enjoy free movement rights.[40] The Court specifically stated that it was

[38] Case C-127/08 *Metock* [2008] ECR I-6241; Case C-158/07 *Forster v. IB-Groep* [2008] ECR I-8507; Case C-145/09 *Tsakouridis* (Judgment of 23 November 2010).
[39] *Metock*, above note 37, at paras. 49-53.
[40] *Ibid.*, at para. 56-7.

reconsidering its earlier decision in *Akrich*.[41] The Court referred to *MRAX* and *Commission v. Spain* in holding that the benefit of residence rights cannot depend on the prior lawful residence of the spouse in another Member State.[42] Of particular significance here was the fact that the Directive amended the relevant Article 10 of Regulation 1612/68 upon which the *Akrich* decision was based. The Court emphasised this point by referring to Recital 3 which stated that the aim of the directive was to "strengthen the right of free movement and residence of all Union citizens". The Court interpreted this to mean that "Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals".[43]

It is argued that this decision is surprising in light of the previously unambiguous statement on the issue contained in *Akrich*. While a range of amendments were made to the previous definition of family contained in Article 10 of the former Regulation 1612/68 by Articles 2 and 3 of the Citizenship Directive, it is difficult to see how these would have had as significant an impact as the Court understood. The primary changes that the directive made regarding beneficiaries was to include those in registered partnerships provided for in national legislation where such partnerships are treated the same as marriage,[44] persons not falling within Article 2(2) but who have serious health requirements[45] and partners of Union citizens in a duly attestable durable relationship.[46] None of these provisions have any meaningful connection to the determination in *Akrich* regarding prior legal residence, nor could they be said to alter in any way the basis of that decision. Indeed, apart from pointing out that the directive makes no mention of prior legal residence (the exact same point could have been made regarding Regulation 1612/68 in *Akrich*), the only textual ground the Court

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[41] *Ibid.*, at para. 58. Case C-109/91 *Akrich* [2003] ECR I-9607.
[42] Case C-459/99 *MRAX v. Belgium* [2002] ECR I-6591, Case C-157/03 *Commission v. Spain* [2005] ECR I-2911.
[43] *Metock*, above note 37, at para. 59.
[44] Article 2(b)
[45] Article 3(2)(a)
[46] Article 3(2)(b)

has for its decision is its reference to Recital 3 and the interpretation it places on this that the provision mandates that the directive must not provide less protection than the legislation it was amending. It is submitted that what the Court actually does is rule to ensure that the new directive provides significantly more protection for Union citizens, through overruling *Akrich*. The Court makes no meaningful attempt to justify why the decision is necessary to guarantee the ability of Union citizens to enjoy their freedom of movement rights under the Treaties, particularly when in *Akrich* the Court was clear in saying that the prior residence requirement was "not such as to deter the citizen of the Union from exercising the rights in regard to freedom of movement conferred by Article [45 TFEU]".[47]

The *Forster* case, previously discussed in Chapter 4, also addressed an aspect of the Citizenship Directive, though it was in the context of the facts of the case having occurred before the directive had attained legal effect. In question was a provision of national law that required a five year residence period before a Union citizen could be considered sufficiently integrated in the Member State and as such, claim maintenance support while studying. The applicant argued that, as the condition did not apply to students of Dutch origin, it was discriminatory in breach of Article 18 TFEU.

In determining that the five year period was proportionate and did not go further than necessary in indicating sufficient integration, the Court made reference to the Citizenship Directive, specifically Articles 24(2) and 16(1). It highlighted the fact that the directive did state that Member States did not have to provide study maintenance support for certain categories of persons prior to obtaining the permanent right of residence, combined with the fact that a permanent right of residence could be obtained after five years.[48]

Metock demonstrated that the Court was prepared to undertake detailed scrutiny of the national legislative measures implementing the directive. It is to be presumed that the Court

[47] *Metock*, above note 37, at para. 53.
[48] *Forster*, above note 37, at para. 55.

will take an equally hard line in areas where the Member State has some discretion on determining whether to extend a particular benefit, such as deciding if a 'genuine link' exists for the purposes of granting a social assistance or labour market integration related payment under Article 24(2). On the other hand, the treatment of the provisions of time periods by the Court of Justice in *Forster* seems to represent a less critical approach - the fact that the Court made reference to the acceptability of the five year limitation period contained within the directive marked a contrast to the rigorous analysis that the Residency Directives were put to in the cases discussed in Chapter 4.[49] This is particularly noteworthy in light of the opinion of AG Mazak, who took a significantly different approach in his opinion.

The Advocate General emphasised that whatever conditions a Member State imposed on a student in order to demonstrate sufficient integration into the society of the host Member State, such conditions had to abide by the proportionality principle. Conditions had to genuinely demonstrate integration, and could not be so general in scope that they would systematically excludes students, regardless of their actual level of integration into the host society, from being able to pursue their studies. The Advocate General found that five year criterion at issue in the case to be disproportionate, as it was reasonably possible that students could have become integrated into Dutch society before this period had elapsed.[50]

Significantly, in addressing the use of the five year period in the Citizenship Directive, the Advocate General stated that provisions of the directive could not detract from the requirements flowing from Article 18 TFEU and the general principle of proportionality.

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[49] *See* Fahey E., above note 24, at 943 – "*Förster* is remarkable for the obiter consideration of Art.24(2), in a judgment that considers the application of Art. [21 TFEU] extensively throughout but ultimately adopts a particularly legislature-centred position or literal approach as regards the interpretation of the Directive and does not subject the conditions attached to the grant award in the Dutch rules to any critique similar to that conducted in *Bidar*".

[50] *Forster*, above note 37, at paras. 129-30 of the opinion.

Indeed, the five year period was an "outer limit" of the period in which it could be reasonable argued that a student had not become sufficiently integrated.[51]

Bearing in mind Dougan's arguments discussed in Chapter 4.6 above, it is submitted that these two cases show the Court of Justice returning to a deferential standard of review when dealing with the decisions of the Union Legislature, but continuing to maintain an interventionist approach when dealing with Member State's action.[52] While the *Vatsouras* judgment analysed above did see the Court holding in favour of the applicant, it was demonstrated that that was the only option open to the ECJ in light of the wording of the particular provision in question.

Such a conclusion may be put in doubt however in light of the deferential approach taken by the Court of Justice in *Tsakouridis* to the role of national courts in assessing expulsions under Article 28 of the Directive.[53] The applicant was a Greek national who was born and had lived most of his life in Germany. His residence there was based on a permit of unlimited duration. The applicant had worked in Greece for two periods; one of seven months and one of seventeen months. This second period was only ended after he was arrested in Greece and transferred back to Germany on foot of an international arrest warrant. Having been convicted in Germany of drugs offences and being sentenced to six and a half years imprisonment, the German authorities sought to expel him.

While a number of questions were referred to the Court of Justice, these can be distilled to two key issues. Firstly, whether dealing drugs as part of an organised gang constituted 'imperative grounds of public security' for the purposes of Article 28(3) or constituted 'serious grounds of public policy or public security', for the purposes of Article

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[51] *Forster*, above note 37, at paras. 131-2 of the opinion.

[52] As regards the deferential approach to actions of the Union Legislature, it should nevertheless be noted that as was highlighted in Chapter 4.6.3, the Court in *Forster* did suggest that the equal treatment principle of Article 18 TFEU could still be used to overcome direct prohibitions on making claims for financial support from a host state, even if these were contained in Community legislation, *Forster*, above note 37, at para. 43.

[53] *Tsakouridis*, above note 37.

28(2). Secondly, whether periods of absence from the host Member State undermined the ten year term of residence necessary to obtain the enhanced level of protection of Article 28(3).

On the first issue, the Court held that the requirement of imperative grounds of public security could include the fight against organised drug crime.[54] As such, this could form the basis for an expulsion, even of a Union citizen who had met the ten year criterion of Article 28(3). The Court referenced a Council Framework Decision related to drug trafficking, placing particular emphasis on what its preamble stated about the risks and damage caused to health, safety and quality of life by illegal narcotics.[55] As such, " [...] trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it".[56]

The Court determined that it had already decided that fighting the threat of organised drug crime constituted 'serious grounds of public policy or public security'.[57]

The Court set out a range of factors which the national court should take into account in making its assessment under either Article 28(2) or 28(3).[58] Significantly, the Court did state that where a Union citizen had spent much or all of his childhood and youth in the host Member State, "very good reasons" would be required to base his expulsion.[59]

On the issue of whether absences from the host Member State prevented the individual from achieving the ten year period of residence to benefit from Article 28(3), the Court firstly noted that the Directive was silent about the impact any interruptions in the period of residence would have on acquiring the Article 28(3) rights.[60] The Court of Justice rejected the option proposed by the referring Court that an analogy could be made with

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[54] *Ibid.*, at para. 45.
[55] *Ibid.*, at para. 46. Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L 335/8.
[56] *Ibid.*, at para. 47.
[57] *Ibid.*, at para. 54. This had been done in Case C-348/96 *Calfa* [1999] ECR I-11, at para. 22 and Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 67.
[58] *Ibid.*, at paras. 49-55.
[59] *Ibid.*, at para. 53.
[60] *Ibid.*, at para. 29.

Article 16(3) of the Directive, which laid out circumstances in which gaps in residence would not undermine the achievement of the five years necessary to gain the permanent rights of residence under Article 16.[61] Instead, an overall assessment was to be made of the individual's status at the time the question of expulsion arose.[62] Again, it was to be left to the national authorities to make this determination, looking at points like the duration of periods of absence, their cumulative duration, their frequency and cause and whether they involved the individual transferring to another State the centre of their personal, family or occupational interests.[63] The fact of forced return to the Member State in order to serve a prison sentence could be considered.[64]

It is submitted that this judgment is unusually deferential to the national court. No explicit direction is given by the Court as to how the issue should be resolved when the various factors it set out are assessed. It is suggested that the rejection by the Court of the proposal to use the points in Article 16(3) as a guide to dealing with gaps in achieving the ten year period in Article 28(3) actually gives more freedom to the national courts and makes it easier for them to hold that the period has not been reached or was breached.

5.6 Conclusion

This examination of the key provisions of the Citizenship Directive relating to the provision of social rights reveals a number of points. The Directive acts as a consolidating exercise, repealing nine existing directives and drawing together many of the remaining legislative provisions that had previously governed freedom of movement and residence. It can also be

[61] *Ibid.*, at paras. 30-1.
[62] *Ibid.*, at para. 32.
[63] *Ibid.*, at para. 33.
[64] *Ibid.*, at para. 34.

seen as a reaction to the Court of Justice's case law in developing Union citizenship and an attempt to reign in certain aspects of this jurisprudence, such as the decision on maintenance grants in *Bidar*. The reactive nature of the Directive also works in a positive way with a number of the innovations which the Court devised being given legislative confirmation by the Union Legislature; for example the concept from *Grzelczyk* that recourse to the social welfare system of a host Member State cannot be followed by automatic expulsion measures.

In its original draft proposal, the Commission stated that the Citizenship Directive was "[...] being proposed in the context of the new legal and political environment established by citizenship of the Union". The Commission stated that the basic concept of the directive is that:

> [...] Union citizens should *mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Any additional administrative or legal obligations should be kept to the bare minimum required by the fact that the person in question is a 'non-national'.[65]

Initially, this aim reads as highly functional and one which solidifies free movement and residency rights, without really developing them.[66] However, this objective is allied with the rhetoric of citizenship, originally flowing from the Court of Justice and now repeated in the text of the Directive. Recital 3 emphases that Union citizenship "[...] should be the fundamental status of nationals of the Member States when they exercise their right of free

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[65] Proposal for a European Parliament and Council Directive on the rights of citizens of the Union and their family member to and move reside freely within the territory of the Member States, Brussels, 23.5.2001 COM(2001) 257 final, at para. 1.3.

[66] A similar approach was eventually taken in Recital 1 of the preamble to the directive.

movement and residence", representing a further legislative confirmation of the Court's *dicta* in *Grzelczyk*.

Arguably the most significant aspect of the Directive is the creation of a right of permanent residence in a host Member State. The preamble to the Directive describes its function as "promoting social cohesion" which it states is "one of the fundamental objectives of the Union". It would appear that this right, granted to a Union citizen after five years residence in another Member State, represents the culmination of Union citizenship. At this point, full social integration is seen to have been achieved, warranting the removal of any restrictions on the individual's rights to make social claims off the host Member State.

As was seen in *Bidar*, the Court of Justice was prepared to award the applicant the grant sought in light of the fact that it was considered that he had demonstrated sufficient integration into the society of the host Member State.[67] There the Court had indicated that residence in the host Member State for a certain (unspecified) amount of time would be sufficient to demonstrate such a degree of integration.[68] By making provision for the permanent right of residence, the Union Legislature would appear to accept this aspect of the Court's jurisprudence, determining that a five year residence period within the Member State indicates a degree of integration sufficient enough to justify the removal of all the existing economic risk conditions that bound the citizen's residence in the host state up to that time. In turn, the Court's decision in *Forster* discussed above suggests that it endorses the use of the five year time period.

It is argued that the understanding of Union citizenship that has developed through the legislative process is one that broadly accords with Marshallian citizenship. Rather than being a fixed entity, the Directive shows Union citizenship to be a range of evolving statuses, developing over time and in relation to the personal circumstances of the individual citizen.

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[67] *Bidar*, above note 31, at para. 57.
[68] *Ibid.*, at para. 59.

The introduction of the permanent right of residence demonstrates the extension or indeed 'spill over' of equality of status to social rights from the civil rights that were previously the principal group of rights available under Community law.

Nevertheless, both the legislative process leading to the Citizenship Directive and the final result demonstrate that the concept of Union citizenship and what it entails remains contested. Changes made to key provisions highlight areas of controversy. Of particular relevance is the point noted above that in the draft of the directive the initial right to move and reside was for six months, rather than the eventual three month period.[69] Even more significantly, the original directive provided for the right of permanent residence to apply after just four years.[70]

Predictably, these two alterations were made at the behest of the Council, without significant explanation.[71] In its communication of the Council's position to the European Parliament, the Commission gives some justifications for these changes. Regarding the initial period, it stated that "[t]he Member States emphasised the difficulty, for reasons relating to visas, of extending to six months the period which is not subject to any formality for family members who are nationals of third countries".[72] On the increase of the residence period needed before a permanent right was granted, the Commission stated it accepted the change because "[...] the addition of this extra year has overcome the reluctance of some Member States as regards the inclusion of students among those entitled to a right of permanent residence".[73]

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[69] Proposal for a European Parliament and Council Directive on the rights of citizens of the Union and their family member to move and reside freely within the territory of the Member States, Brussels, 23.5.2001 COM(2001) 257 final, Article 6(5).

[70] *Ibid.*, Article 14(1).

[71] 2525th Council meeting- Competitiveness - Internal market, industry and research -Brussels, 22 September 2003 PRES/2003/259.

[72] Council of the European Union, CODEC 26, Brussels, 12 January 2004, 2001/0111(COD), at 9.

[73] *Ibid.*, at 11.

The fact that the final version of the directive was significantly less generous on these two vital points demonstrates the resistance on the part of the Member States to allowing easy access to the benefits that Union citizenship entails. At the same time, the very creation of a permanent right of residence available to all, as opposed solely to economically active nationals, is hugely significant. This new right demonstrates the impact of the Treaty created rights, as developed by the Courts and now incorporated into secondary legislation. Its development through the nexus of citizenship shows how far the European Union had come since the previous attempt of the Commission to introduce a permanent right of residence in the late 1970s, as discussed in Chapter 3.9.1.[74]

[74] Proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State (COM(79) 215 final), [1979] OJ C207.

Chapter 6 – Insufficient Protection of Social Rights and Values at Union Constitutional Level

6.1 Introduction

The analysis up to this point has primarily portrayed the influence of the European Union as enhancing the accessibility of social rights. It has been demonstrated how, through judgments of the Court and secondary legislation, Community nationals and subsequently Union citizens, had a wide range of social entitlements extended to them when residing in a host Member State. At this point therefore, it is necessary to address the opposite situation; the spectre of Union law as a detrimental force in relation to social rights protection.[1] This can occur in circumstances where decisions of the Court, made in furtherance of the fundamental freedoms set out in the Treaties, impact negatively upon social rights and values that are espoused in legislation or the constitutions of the Member States. As was illustrated in Chapter 2, the majority of Member States follow a constitutional model that is commonly defined as the 'social state'.[2] However, actions taken by national governments in pursuance of social state obligations now run the risk of being struck down by the Court of Justice due to its application of a set of market orientated values occurring outside of the national legal systems and which in many circumstances, are alien to them.

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[1] Davies notes that, while in the UK Union law is generally understood as having a positive effect on the protection of social rights, decisions like the Sunday Trading cases, based on free movement of goods, can impact on aspects of social policy, in this case hours of work. Davies P., 'Market Integration and Social Policy in the Court of Justice', (1995) *21 Industrial Law Journal* 49, at 49.

[2] Katrougalos G.S., 'European 'Social States' and the USA: An Ocean Apart?', (2008) 4 *European Constitutional Law Review* 225, at 238; Fabre C., 'Social Rights in European Constitutions', in De Burca & De Witte (Eds.) *Social Rights in Europe*, (OUP, 2005), at 16; Bercussion B., Deakin S., Koistinen P., Kravaritou Y., Muckenburger U., Supiot A., Veneziani B., 'A Manifesto for Social Europe', (1997) 3 *European Law Journal* 189, at 189.

This threat is magnified by two specific features of Union Law. The doctrine of supremacy means that the very constitutional norms that a Member State has adopted may be open to attack if they conflict with Union law. Allied to this, the structure of the Treaties means that there is extensive opportunity for the Court of Justice to rule on possible incompatibilities between national and Union law. In a typical nation state, an individual may take a case against the government, claiming a breach of the social rights and values set out in the state's constitution. The national courts will adjudicate on such a claim. Union law creates a new paradigm. An individual can now attack measures that the national government has undertaken, using values located outside the national constitution (the fundamental freedoms) in order to support this challenge. Compounding this, the national government may also find its actions challenged on another front; by the European Commission, charged as it is with defending the existing values of the Union. As individual claims usually end up before the Court of Justice through the processes of Articles 267 or 263 TEFU and the Commission actions come before it under Article 258 TFEU, the adjudication on any conflict of norms takes place in a forum outside the traditional nation state setting. Therefore Union law threatens social rights in national constitutions on three separate grounds: it increases the range of parties that can challenge these rights, it introduces new values upon which to base such challenges and it creates a new forum in which such challenges are decided. As the Union's competences broaden and strengthen, this leaves both national governments and the citizens of the Member States with a diminishing ability to resort to constitutionally protected rights.[3]

Thus, in order to be able to say that the European Union's legal system protects social rights, it is insufficient to cite Union citizenship as guaranteeing individuals a range of benefits in a host Member State. It is also necessary that social rights values be enshrined at

[3] Watson, 'The Community Social Charter', 28 *Common Market Law Review* (1991) 37 at 45, at 66.

the very core of the Union legal system. While this may not offer protection to national social rights measures on each and every occasion, it will ensure that the Court of Justice has a set of social rights principles that it can use to balance against the existing free market objectives in the Treaties, when reaching its decisions. It is only when this is achieved that it can be said that there is a genuine 'European social citizenship'.

This chapter examines the constitutionalised protection of social rights and values in Union law prior to the Lisbon Treaty. Whereas in Chapter 3 it was illustrated how the Court of Justice created the doctrine of the protection of fundamental rights as part of the general principles of Union law, here it will be shown how these fundamental rights interact with the fundamental freedoms. It will be demonstrated how both judgments of the Court and the manner in which fundamental rights have been referred to in the Treaties have left social rights inadequately defended. The result of this is that social rights are vulnerable, particularly when they come into conflict with fundamental freedoms. This will be illustrated across three substantive areas; healthcare, education and employment rights.

6.2 Balancing Fundamental Rights and Fundamental Freedoms

6.2.1 Fundamental Rights trumping Fundamental Freedoms

Chapter 3 demonstrated how a fundamental rights jurisprudence was created by the Court of Justice, though one that did not protect social rights. The evolution of the relationship between Union law and fundamental rights continues to this day, with recent cases dealing with situations where the protection of human rights has clashed with the enjoyment of the fundamental freedoms. A number of these decisions are examined here to illustrate how the

approach of the Court of Justice indicates significant deficiencies in its approach to rights protection, which, as will be shown, impacts particularly on social rights.

In *Schmidberger*, the Court had to adjudicate on a conflict between the desire of environmental demonstrators to exercise their rights of free speech and free association and the right of a transport company to engage in the free movement of goods.[4] The Court held that Austria had not breached Article 34 TFEU by giving permission for the demonstration, even though this had caused disruption to the applicant's business by blocking a major transport route. In so deciding, it gave precedence to the rights of free expression and free assembly, both of which it noted were guaranteed in the ECHR and also in the Austrian Constitution, over the fundamental freedom in question. The Court declared:

> " [...] since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".[5]

This is an important statement by the Court regarding the hierarchy of rights within EU law. It makes it clear that the fundamental freedoms will not automatically trump human rights in situations where the two come into conflict. In reaching this position, the Court referenced the traditional line of case law which declared that the EU protected fundamental rights and drew inspiration for these from national constitutional traditions, international human rights treaties which the Member States has collaborated on or signed and in particular, the ECHR.[6] The Court noted that this line of case law had been confirmed by the Maastricht Treaty,

[4] Case C-112/00 *Schmidberger v. Austria* [2003] ECR I-5659
[5] *Ibid.*, at para. 74.
[6] *Ibid.*, at para. 71.

where the former Article 6(2) EU had been added to codify respect for fundamental rights within Union law. Having determined that the two rights at issue formed part of the general principles of Union law due to their enumeration in the ECHR,[7] the Court then proceeded to undertake an extremely detailed proportionality analysis of how much the vindication of the fundamental rights in question wound impact upon the freedom to move goods. The Court eventually found in favour of the rights of the protesters.[8] This decision is important as it was the first occasion where the Court allowed the invocation of the protection of fundamental rights as "an independent ground for justification" of the restriction on fundamental freedoms.[9]

A broadly similar outcome was reached in *Omega*.[10] There, the Court of Justice determined that a ban on a war game that simulated killing humans was not in breach of Article 56 TFEU (freedom to provide services) as it was a legitimate restriction in furtherance of the principle of respect for human dignity as protected under the German Constitution.[11] It was argued by the Advocate General and accepted by the Court, that ensuring respect for human dignity was a general principle of Community law. The Court determined that it did not matter that in the German Constitution, respect for human dignity had a particular status as an independent fundamental right.[12] As such, the Member State was entitled to invoke the

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[7] *Ibid.*, at para. 77.
[8] *Ibid.*, at para's 78 – 93.
[9] Hos N., 'The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review', EUI Working Papers, Law 2009/06, at 8.
[10] Case C-36/02 *Omega* [2004] ECR I-9609.
[11] *Ibid.*, at para. 34-5.
[12] *Ibid.*, at para. 34. It is clear from the opinion of AG Stix-Hackl that she considered the concept of human dignity to be located in both the ECHR and the national constitutional traditions:

> Human dignity is not given any express mention at all in the ECHR – although its preamble does refer to the Universal Declaration of Human Rights. However, according to the case-law of the European Court of Human Rights (ECHR) respect for human dignity and human freedom is 'the very essence of the Convention'.
> As far as the constitutional systems of the Member States are concerned, therefore, the concept of human dignity enjoys full recognition in one form or another, especially when one considers (as stated above) that this concept can be expressed in different ways.

need to protect human rights as outlined in its own constitution in order to broaden its margin of appreciation in the application of the public policy Treaty derogation.[13]

The decision in *Schmidberger* was welcomed in some quarters as laying to rest concerns surrounding the Court continuously giving priority to fundamental freedoms over fundamental rights.[14] It certainly demonstrated a heightened prioritisation of the latter when compared to earlier cases such as *Wachauf*, where the Court had declared that the fundamental rights were not absolute but had to be considered in relation to their social function and further, that "[...] restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market".[15]

Both *Schmidberger* and *Omega* deal with conflicts between fundament freedoms set out in the Treaty and civil rights explicitly protected by the ECHR and national constitutions. As a result, it is clearly possible to identify the rights in question in both these cases as falling within the general principles of Union law. However, in a subsequent set of cases where fundamental rights were in conflict with fundamental freedoms, the weakness in the pre-Lisbon approach of the Court to the protection of human rights becomes more apparent. The cases in question, *Viking* and *Laval*, demonstrate a clash between the freedom of companies to engage in services and the rights of unions to strike or engage in collective action. [16]

> As in the aforementioned instruments of international law, however, human dignity seems to appear in the national legal systems of the Member States primarily as a general article of faith or – often in the case-law – as a fundamental, evaluation or constitutional principle, rather than as an independent justiciable rule of law. _A rule such as that contained in the German Constitution whereby – at least according to the majority viewpoint – respect for and protection of human dignity as embodied in Article 1 of the German Basic Law constitutes not just a 'fundamental constitutional principle' but also a separate fundamental right, must therefore be considered the exception.

At paras 82 – 84 of the opinion.

[13] Hos, above note 9, at 8.

[14] Young A., 'The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?', (2005) 11(2) *European Public Law* 219, at 230. For a wider discussion of the relationship between fundamental rights and fundamental freedoms, see Skouris V., 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance', (2006) 17 *European Business Law Review* 225.

[15] Case 5/88 *Wachauf* [1989] ECR 2609, at para. 18.

[16] Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR-I 11767.

Therefore, the fundamental right in question in these cases is one which is regarded as a civil right, but one which is often used in furtherance of social claims. The treatment of the right to strike in these cases will be used to illustrate major potential pitfalls for the protection of social rights, which as demonstrated in Chapter 3 do not even have recognition within either the Union Treaties or the general principles of Union law prior to Lisbon.

6.2.2 Continued Weakness of Fundamental Rights Protection

The *Viking* case concerned a dispute between a seaman's union and the Viking ferry company. When Viking attempted to de-flag a ferry from Finland and set up a 'flag of convenience' in Estonia where it could pay lower rates, the union sent around a circular to unions in other Member States, asking then not to enter into negotiations with Viking. Viking went to the British courts seeking an injunction to have the circular withdrawn for being in breach of its rights under Article 56 TFEU. The matter was referred to the Grand Chamber of the Court of Justice.

Considering the question of whether the right to strike was a fundamental right, the Court referred to a range of international instruments that the Member States had signed or cooperated in where the right was recognised: the European Social Charter, Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted by the International Labour Organisation and the Community Charter of the Fundamental Social Rights of Workers. The Court also made reference to the Charter of Fundamental Rights of the European Union.[17]

In light of this, the Court determined that the right to strike and take collective action was a fundamental right protected under the general principles of Community law, but also

[17] *Ibid.*, at para. 43.

that it was subject to restriction.[18] In reaching this conclusion, the Court specifically referred to the fact that the right of collective action under Article 28 of the Charter was protected according to Community law and national law and practices.[19] Read in the context of the paragraph, the Court suggests that Community law along with national laws and practices formed the basis for possible restrictions.

In determining how this restriction could be assessed, the Court referred to its previous judgments in *Schmidberger* and *Omega*, stating that in those cases it had held:

> "[...] the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements *relating to rights protected under the Treaty* and in accordance with the principle of proportionality [...]".[20]

The emphasised phrase clearly refers to the fundamental freedoms. The Court is outlining a two step process, where it must first determine that a fundamental right falls within the Treaties, and this right must then be balanced against any impact on the fundamental freedoms, through the mechanism of proportionality. The initial hurdle of whether a right comes within the scope of the Treaties is not a significant problem for most civil and political rights such as freedom of assembly, free speech and human dignity, as these are explicitly protected under the ECHR or national constitutional traditions. As such, these values have a basis as recognised general principles of Union law and this allows them be balanced against the fundamental freedoms.

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[18] *Ibid.*, at para. 44.
[19] *Ibid.*, at para. 44.
[20] *Ibid.*, at para. 46 (emphasis added).

The difficulty regarding the protection of social rights is that they do not benefit from this same degree of protection as civil and political rights, under Union Law. It has already been demonstrated in Chapter 3.5 that social rights, either in the form of national constitutional traditions or those contained in international treaties which the Member States have signed up to, have never been recognised by the Court as forming part of the general principles of Union law. Of equal significance is the fact that when fundamental rights were finally mentioned within the Treaties at Maastricht, the concept of using human rights documents that Member States had signed or cooperated in as potential sources of the general principles, was not included in the former Article 6(2) EU.[21] This omission was notable as the other two sources of general principles that have pervaded the cases, national constitutional traditions and the ECHR, were explicitly mentioned. Indeed, recalling the discussion of references to social rights in the Treaties in Chapter 3.2, the only overt mention of the term was contained in the former Article 136 EC. While this article did cite a number of international treaties dealing with social rights which the Member States either signed or cooperated in, the significance of the provision was certainly questionable, containing as it did a mere exhortation to "implement measures" in the areas of improving living and working conditions, promoting employment, maintaining proper social protection and maintaining dialogue between management and workers. There was clearly a difference in the status of the norms contained in that article, and those set out in the former Article 6 EU.

So when the Court stated in *Schmidberger* that "[...] measures which are incompatible with observance of the human rights *thus recognised* are not acceptable in the Community", the highlighted words can only possibly refer to recognised sources of fundamental rights; the national constitutions and the ECHR. This would therefore appear to exclude the possibility of referring to other international treaties which Member States had been involved in drafting,

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

and which would contain explicit recognition of social rights.[22] *Viking* thus demonstrates that Community law lacked either an express enumeration of social rights within the Treaties themselves, or a definitive article permitting the sourcing of general principles of Community law within documents in which social rights could be found.

It is argued that the negative consequences resulting from this aspect of the *Viking* decision is clearly demonstrated in the *Laval* judgment. The case centred on a dispute between a Latvian company, Laval, and Swedish trade unions. Laval was refusing to sign up to a collective agreement with the Swedish unions covering the pay and conditions that would apply to Latvian workers it was employing on sites in Sweden. Laval based its refusal to sign up on the argument that it would not know what wage it would end up having to pay its workers. The unions organised strikes against all Laval's sites in Sweden and eventually the company became bankrupt.

While the case dealt extensively with matters concerning the Posting Workers Directive, the Court also addressed the issue of the interaction between the right to strike and the right to provide services under Article 56 TFEU. The Court repeated much of what it said in *Viking* about the status of the right to strike being a fundamental right comprising part of the general principles of Community law, but also as one which was subject to restriction.[23] The Court reiterated some conclusions it had made in earlier cases; from *Schmidberger*, that a fundamental freedom could be restricted by reference to a fundamental right and thus the exercise of a fundamental right did not fall outside the scope of the Treaties, and from *Viking*, that the fundamental right "[...] must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality".[24]

It is submitted that what is most significant about the judgment was the way in which the Courts undertook the second step of its analysis; assessing the proportionality of the

[22] *Schmidberger*, above note 4, at 73.
[23] *Laval*, above note 16, at para's. 90 – 92.
[24] *Ibid.*, at para 94.

impact of the union's right to strike on the company's right to provide services. In outlining how it balanced the pair of conflicting rights, the Court stated:

> [i]t should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.
>
> Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[25]

In identifying which standards to use in its balancing process, the Court is clearly reaching for those values explicitly set out in the Treaty. While earlier in the case there were references to the Charter of Fundamental Rights, the Social Charter etc, when it comes to the actual balancing of norms, these are not mentioned.[26] Just as in *Schmidberger*, *Omega* and *Viking*, the Court relies on values unequivocally contained in the Treaties or directly linked to the Treaties. As discussed above, both the approach of the Court and the lack of explicit

[25] *Ibid.*, at para's 104 – 5.
[26] *Ibid.*, at para. 90.

enumeration within the text of the Treaties mean that such a link is difficult to establish in the context of social rights. While the three cases listed above all concerned civil rights rather than social rights, they reveal the lack of protection that social right values experience in Union law, which can become an issue in situations where a Member State seeks to use a social right value to justify a restriction on a fundamental freedom – the 'defensive' use of rights.[27]

The decisions in *Viking* and *Laval* have received extensive commentary and criticism.[28] Much of this has focused on the approach that that Court took to balancing the conflicting rights and fundamental freedoms.[29] In light of the identification in Chapter 2 of the importance of the social state model in EU Member State, it is submitted that Joerges is correcting in his argument that the Court of Justice should "[...] refrain from 'weighing' the values of the *Sozialstaatlichkeit* against the values of free market access", as this would demonstrate judicial deference towards the constitutional compromises that had been reached in the Member States.[30] For the purposes of this thesis however, the key concern that the judgments raise is that, even bearing in mind the positive approach taken by the Court in *Schmidberger* to the balancing of fundamental rights and fundamental freedoms, social rights are not contained in any of the sources from which fundamental rights are drawn. Social rights are therefore always going to be at a disadvantage if they come into conflict with the fundamental freedoms.

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[27] Hos, above note 9, at 11.

[28] See Joerges C., 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', EUI Working Papers, LAW No.2007/25, (European University Institute); Barnard C., 'Employment Rights, Free Movement under the EC Treaty and the Services Directive', Edinburgh Mitchell Working Paper Series 5/2008, (Europa Institute, University of Edinburgh); Eklund R., 'A Swedish Perspective on Laval', (2008) *Comparative Labour Law and Policy Journal* 55

[29] "[...] one of the paradoxes of the *Viking* and *Laval* judgments is that cases which, for the first time, give express recognition to the right to strike as a fundamental human right, do not lead to enhanced protection of that right". Barnard C., 'Solidarity and the Commission's 'Renewed Social Agenda' in Ross & Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, (OUP, 2010), at 104.

[30] Joerges, above note 28, at 28.

From the point of view of legal certainty, it may be legitimate to argue that the Court should only be drawing its human rights jurisprudence from sources that are clearly set out or defined within the Treaties. But undoubtedly, the approach adopted in these cases narrowed the range of fundamental rights that it could canvass in coming to its decisions. The failure to list general human rights documents within the provisions of the former Article 6(2) EU took on real significance as it meant that there were no detailed sources of social rights from which the Court might legitimately seek inspiration, according to the boundaries that had been set for it by the Member States. While reference to other international documents still appeared in the case law, it is clear from both the Treaties and the interpretative approach adopted by the Court that the sources from which it could draw specifically social rights based influence were of a lesser nature.

6.3 Treatment of Social Rights by the Court of Justice

The provision of public services is one of the key responsibilities of the national government under the social state model followed in most European countries. As such, the state is regarded as the guarantor of social rights. No provisions of the original Community Treaties or subsequent amendments directly impinged upon this. A number of judgments of the Court in the 1980s and 1990s explicitly acknowledged that Community law did not detract from the powers of the Member States to organise their social security systems.[31] However, developments in the case law of the Court relating to the fundamental freedom to provide and avail of services under Articles 56 and 57 TFEU have gradually begun to encroach on these aspects of Member States responsibilities. These cases are significant as they illustrate the

[31] *See* Case 238/82 *Duphar and Others v Netherlands* [1984] ECR 523, at para. 16; Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637, at para. 6; Case C-70/95 *Sodemare* [1997] ECR I-3395, para. 27.

approach that the Court takes in situations where social rights guaranteed under national law come into conflict with the fundamental freedoms which are so intrinsic to the *raison d'être* of the European Union. This issue will be highlighted across three distinct fields, all considered crucial in the context of a social state; healthcare, education and employment rights.

6.3.1 Healthcare

Issues related to the compatibility of national rules regarding the financing of health care with Union law have come before the Court of Justice with increasing regularity in the last fifteen years. As will be shown, the Court has taken a highly interventionist approach to this area through its application of the fundamental freedom to provide services.[32] This is significant due to the wide variation in the manner in which health care is paid for across the Member States, and also the large proportion of national expenditure that these costs constitute for each country.

In *Kohll*, a Luxembourgeois national was seeking permission from the State sickness insurance fund to travel to Germany to obtain dental treatment for his daughter.[33] The insurance fund stated that it would not pay for this treatment abroad on the basis that the procedure could be provided for free in Luxembourg and that it was not urgent. The applicant argued that the dental treatment was service provision and by its refusal Luxembourg was in breach of Article 56 TFEU.

While the Court restated the position from *Sodemare* and other cases that Community law does not detract from the powers of the Member States to organise their own social

[32] Hatzopoulos describes the case law as being a "spectacular development". Hatsopoulos V., 'Current Problems of Social Europe', European Legal Studies, Research Papers in Law 7/2007 (College of Europe), at 12.
[33] Case C-158/96 *Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931.

security systems,[34] it also noted that the fact that certain services are of a special nature does not remove them from the ambit of the fundamental principle of freedom of movement. It thus reached a key initial conclusion that just because the legislation in question fell within the scope of social security, the issue was not excluded from the application of the Treaty provisions, specifically Articles 56 and 57 TFEU.[35]

The significance of this finding could be observed subsequently when the Court had to analyse the relevant national rules for compatibility with the Treaty articles on free movement. While accepting that these rules did not prevent an insured person seeking a medical service from a provider in another Member State, the Court found that they did make this more difficult. It therefore determined that any national rules that deter a person from approaching a provider of medical services established in another Member State, constituted for both the service provider and the patient, a barrier to their freedom to provide/receive services.[36]

The national government had submitted that the prior authorization rules in place were necessary to control health expenditure and balance the budget of the social security system. While the Court accepted that the risk of seriously undermining the financial balance of the social security system could form an overriding reason in the general interest which would be capable of justifying national measures, this was not the situation here.[37] The reimbursement being sought would have no significant effect on the financing of the system.[38]

The Court also rejected the justification put forward that the measures were needed to maintain balanced medical and hospital services open to all. While the Court did accept that under Article 52 TFEU, such a goal could allow a restriction of freedom to provide services if

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[34] *Ibid.*, at para 17.
[35] *Ibid.*, at para 20-1.
[36] *Ibid*, at paras. 34-5.
[37] *Ibid.*, at 41.
[38] *Ibid.*, at 42.

it was essential to public health, it determined that no observations were submitted to prove that the national rules were essential to maintaining a balanced medical and hospital service or were indispensible towards the provision of essential treatment facilities or medical services in the state.[39]

Three subsequent cases followed a similar pattern; *Geraerts-Smits & Peerbooms*, *Muller-Faure* and *Watts*.[40] The applicants in each case travelled to another Member State to seek medical treatment there. In each instance they did so without the prior authorisation of their national health system or sickness insurance provider and were refused when they subsequently sought reimbursement of the cost of the procedure from their national provider. These cases address an extensive range of issues relating to the application of the Treaty provisions on services. For the purposes of this thesis a number of key themes can be observed across the three judgments. Of particular importance is firstly, the interaction between social rights provision in national law and the fundamental freedoms promoted by Union law and secondly, the extent to which the Court was prepared to scrutinize the operation of the national health systems.

National Autonomy and the Effect of Article 168(7) TFEU

In each of its decisions, the Court began by emphasising the autonomy that the Member States enjoy as regards the organisation of their social security systems, but then qualified this by stating that these systems must still comply with Union law.[41] Significantly, in *Muller-Faure*, the Court went somewhat further and stated that the achievement of the

[39] *Ibid.*, at paras 50-2.
[40] Case C-157/99 *Geraets-Smits & Peerboms* [2001] ECR I-5473; Case C-385/99 *Muller-Faure* [2003] ECR I-4509; Case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325.
[41] *Geraerts-Smits*, above note 40, at paras 53-4; *Muller-Faure*, above note 40, at paras. 39, 100; *Watts*, above note 40, at para. *92.* Note the comment of Davies that "[it] is suggested that the capacity to believe that these statements are compatible serves as a test of true faith", Davies G., 'Welfare as a Service', (2002) 29 *Legal Issues of Economic Integration* 27, at 28 note 4.

fundamental freedoms would result in the need for some adjustments to national social welfare systems, though this would not undermine sovereign powers in the field.[42]

Surprisingly, despite the existence of Article 168(7) TFEU on Union action in the field of public health, this provision was only considered in the *Watts* case.[43] The national Court asked whether Article 56 TFEU in conjunction with Article 22 of Regulation 1408/71 meant that there was an obligation on a Member State to fund hospital treatment in other Member States regardless of budgetary constraints and if so, whether this complied with Article 168(7) TFEU.[44] The Court stated that no such obligation existed. Rather, Article 56 TFEU required a balancing to be undertaken between the objective of fee movement of patients, as against overriding national objectives relating to the management of the available hospital capacity, control of health care expenditure and the financial balance of the social security system.[45] The Court the noted that under Article 168(7) TFEU, Union action in the field of public health must fully respect the responsibilities of the Member States in the organisation and delivery of health care, but also repeated its jurisprudence that Treaty obligations such as 56 TFEU may require Member States to make adjustments to their national social security systems, though this would not undermine state sovereignty.[46] It is submitted that this exchange shows that the introduction of Article 168(7) into the analysis made no real difference to the Court's approach. This raises legitimate questions about the function of the article and whether the Court was giving its provisions adequate weight, particularly as it should act as a defence for a Member State against excessive EU intrusion.

Acceptable Limitations on the Freedom to Provide Services

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[42] *Muller-Faure*, above note 40, at paras. 101-2; see also *Watts*, above note 40, at 121.
[43] Formerly Article 152(5) EC. The provisions are the same other than the inclusion of a new second sentence during the Lisbon Treaty process which states, "The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them".
[44] *Watts*, above note 40, at 144
[45] *Watts*, above note 40, at 145
[46] *Watts*, above note 40, at 146-7.

In the three judgments, the Court highlighted a number of justifications that it would accept for limitations on the freedom to provide services. These included situations where the financial solvency of the healthcare system was under threat.[47] This applied despite the fact that it was settled case law of the Court that purely economic concerns could not justify a barrier to the fundamental freedom to provide services.[48] In relation to the assessment of the potential impact for the national system, the Court noted in *Muller-Faure* that:

> [i]t is self-evident that assuming the cost of one isolated case of treatment, carried out in a Member State other than that in which a particular person is insured with a sickness fund, can never make any significant impact on the financing of the social security system. Thus an overall approach must necessarily be adopted in relation to the consequences of freedom to provide health-related services.[49]

In light of this stance, it is legitimate to ask whether there ever will be circumstances in which this ground can practically be invoked. The cases coming before the Court of Justice usually concern individuals who are in the position to claim the benefit of the Union right. While a 'floodgates' argument is a blunt instrument, if each individual claimant is safe in the knowledge that their singular bill will not be found to be the tipping point that threatens the financing of the health care system, it would appear to undermine this as a potential basis for limiting free movement of services.

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[47] *Geraerts-Smits*, above note 40, at para. *72; Muller-Faure*, above note 40, at para. *73; Watts*, above note 40, at para. *103.*

[48] *Muller-Faure*, above note 40, at para. 72. *See* point made by Nic Shuibhne on the difficulty of using economic justifications for derogating from the fundamental freedoms, Nic Shuibhne N., 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?', (2005-2006) 8 *Cambridge Year Book of European Legal Studies* 187, at 210.

[49] *Muller-Faure*, above note 40, at para. 74

This criticism of the Court's approach to the solvency of national healthcare systems has not been restricted to the area of the scale of individual financial claims. Concerns have also been raised about other financial assertions the Court has made. For example, it has been noted that distinctions made in both *Watts* and *Muller-Faure* that allowing patients go to another Member State to receive non-hospital medical treatment would not cause financial risk, while allowing them to travel for hospital based medical treatment would, were not based on any substantive economic analysis.[50] The Court appears comfortable making wide generalisations, which may result in major expenses being incurred by the Member States.

A further potential justification for restricting the freedom to provide services was determined to be requirements surrounding the provision of an appropriate health system.[51] However, having given this degree of flexibility to the Member States, the Court proceeded throughout the cases to draw together a series of rules designed to strengthen the position of the individual patient *vis-a-vis* the Member State. The Court conceded that in order to allow for the proper planning of a hospital system, a prior authorisation scheme for persons seeking to travel to another Member State for medical treatment was of itself compatible with Article 56 TFEU.[52] However, the Court also placed major emphasis on the need for the conditions for prior authorisation to be as clear as possible and also made it a requirement that a refusal of prior authorisation could be reviewed by a quasi-judicial body.[53]

It is in the Court's discussion of waiting lists in these cases that its willingness to directly interfere with the planning and management of the systems operated by the national health authorities can be most clearly seen. At issue was the concern that by being compelled to pay for nationals who left the country to seek healthcare in another Member State, the

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[50] Davies G., 'The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare' in Ross & Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, (OUP, 2010), at 117.

[51] *Geraerts-Smits*, above note 40, at para. *73-4; Muller-Faure*, above note 40, at para. *67; Watts*, above note 40, at paras. *104-5.*

[52] *Geraerts-Smits*, above note 40, at paras. 76-81*; Watts*, above note 40, at paras. 107-113.

[53] *Geraerts-Smits*, above note 40, at para. 90*; Muller-Faure*, above note 40, at para. 85*; Watts*, above note 40, at para. 116.

national health authorities were in fact undermining their own waiting list system that they had implemented as persons lower down on the list now had the opportunity to get the treatment earlier, in another Member State, and still have it paid for by that health authority. This would have the effect of allowing them by-pass persons higher up on the national list.

In *Watts*, the Court determined that refusal to grant authorization to travel for a medical procedure on the basis of the existence of a waiting list could only occur if the patient in question had undergone a objective medical assessment of her medical condition, examining the history and probable course of her illness, the degree of pain being suffered and the nature of the disability at the time when the request for authorisation was made.[54] If the delay for the patient resulting from the waiting list was found to exceed an acceptable period, having regard to an objective medical assessment of all the circumstances and the clinical needs of the patient concerned, the health authority could not refuse the authorisation to travel on the grounds of the existence of those waiting lists. Nor could any possible distortion of the normal order of priorities linked to the relative urgency of the cases to be treated justify a refusal of the authorisation sought.[55]

Addressing the issue of the legitimacy of individual delays caused by the existence of waiting lists versus the right of health authorities to run their own system in *Muller-Faure*, the Court somewhat loftily declared that waiting times which were too long or abnormal would be likely to restrict access to balanced, high-quality care.[56] While it may be enjoyable for the Court of Justice to feel that it is defending individual patients against the tyranny of hospital beuaracacy, the simplicity of the reasoning demonstrates a stark lack of understanding by the Court about the huge financial, logistical and priority setting pressures that national health systems operate under.[57]

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[54] *Watts*, above note 40, at para. 119.
[55] *Watts*, above note 40, at para. 120.
[56] *Muller-Faure*, above note 40, at para. 92.
[57] Du Bois-Pedain A., 'Seeking Healthcare Elsewhere', (2007) *Cambridge Law Journal*, at 46-7.

Financing of National Healthcare System

The factual situation in the *Watts* case was somewhat different to the other cases, as the British NHS is run on a direct provision basis, rather than as an insurance scheme. As such, the money financing the system comes from general taxation revenue, rather than from individual health insurance premiums. Arguably, the remuneration relationship is less obvious here than in the cases dealing with insurance based systems, so the Court of Justice was asked to address whether health care delivered under a direct provision system would be classified as a service.

However, the Court deftly side-stepped dealing with this contentious issue by noting that it had already been established that Article 56 TFEU applies to a patient who receives medical treatment for payment in a hospital in another Member State, irrespective of the organisation of the healthcare system in her own Member State. As such, the Court determined that there was no need to rule on whether the provision of hospital treatment in the context of a national health service such as the NHS is itself a service within the meaning of Article 56 TFEU.[58] This was significant as had the Court ruled that the national system was a service provider, it would have represented a direct intrusion by Union law into the social security prerogatives of a Member State.

A Threat to the Social Right to Healthcare

The principal concern about the cases discussed above is not the substantive outcomes, but rather with the overall approach taken by the Court. From the point of view of the individual

[58] *Watts*, above note 40, at para. 90.

patients concerned, these decisions are positive in that they were able to obtain reimbursement for the treatments that they had received. However, the judgments have wider implications for how national social security systems are organised.[59]

Member States have to manage entire healthcare systems and make choices about which group of patients or which type of illness is to be prioritized. For example, in the event of a policy decision to make major investment in vaccinating against a certain type of cancer, at the expense of screening for the same disease, it is possible that individuals could use these precedents to obtain the screening in another Member State, but nevertheless have it paid for by the national system. This could start happening on a large scale, considering the Court has not been prepared to look at the financial impact of individual cases, and could eventually completely undermine the policy decision taken by the national government. In light of the degree to which the Court was prepared to scrutinise the workings of the health care system in these cases, its claim that Union law continues to respect the sovereignty of the Member States and allows them full control over their own social services, is not reassuring. This is particularly the case when it is clear that the impact of the Court's approach will be to force competition between national health systems or insurers, which in turn will generate rationalisation pressures.[60] It is also clear that the actual economic assertions the Court applies are not particularly robust.

It has been suggested that the ability to access health care which has been created through these judgments is actually a right to choose between alternative health services.[61] The approach of the Court consistently benefits a certain type of patient; those who are have greater mobility as a result of greater wealth. These will gain from the individualist approach

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[59] *See* Hatzopoulos V.,'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in *Vanbraekel* and *Peerbooms'*, (2002) 39 *Common Market Law Review* 683.

[60] Hatsopoulos, above note 32, at 13.

[61] Katrougalos G., 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07, at 45.

of the Court, to the detriment of poorer patients who could never afford to go abroad for treatments in the first place and are therefore wholly dependent on the national systems, which in turn must now subsidize the wealthier individual for the treatment they received outside the state.[62] While it has already been acknowledged here that this is of benefit to the individuals concerned, it must be recognised that major decisions relating to healthcare are being made based solely on market principles and without any recognition of healthcare as a social and therefore fundamental right. This, combined with the propensity of the Court to attempt to micro-manage the inner workings of the healthcare systems, gives those preoccupied with the vindication of social rights grounds for genuine fear about the approach being taken. It would appear that the invocation of the fundamental freedoms can trump any argument offered by Member States that a particular area falls outside of the scope of Union law.[63]

6.3.2 Education

The fundamental freedom to provide and receive services has also interacted with the provision of education in the Member States, but with different consequences to those in healthcare. In *Humbel*, the applicants were seeking repayment of the cost of their son's education fees for a year.[64] A question arose as to whether, in attending the course provided

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[62] This point is originally made by Barnard in relation to education but is equally applicable to healthcare. Barnard C., 'EU Citizenship and the principle of solidarity' in Spaventa & Dougan (eds.) *Social Welfare and EU Law*, (Oxford and Portland: Hart Publishing, 2005), at 178. For a contrary view, welcoming these decisions as a means of democratising the provision of healthcare for patients, *see* Flear M., '"Together for Health"? How EU Governance of Health Undermines Active Biological Citizenship', (2009) 26 *Wisconsin International Law Journal* 868.

[63] Lenaerts K & Foubert P., 'Social Rights in the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing', (2001) 28(3) *Legal Issues of Economic Integration* 267, at 275.

[64] Case 263/86 *Humbel* [1988] ECR 5365.

in a national secondary education institute, he was engaged in receiving a service within the meaning of Article 56 TFEU.

As the text of the article makes clear, key to determining this issue was whether remuneration existed. The Court stated that the essential characteristic of remuneration is that it constitutes consideration for the service in question, and is normally agreed upon between the provider and recipient of the service. Such a situation was held not exist in this case as firstly, the State was not seeking to engage in gainful activity, but rather was fulfilling its duties towards its own population and secondly, the system was funded by the public purse and not by pupil fees.[65] In dealing with the fact that some states requested students or their parents to make some degree of payment or enrolment fee, the Court considered these to be contributions to the operating expenses of the system.[66] As such, courses taught in a technical institute which form part of the secondary education provided under the national education system could not be regarded as services for the purposes of Article 56 TFEU.[67]

The *Humbel* ruling was important as it protected a significant proportion of public sector economic activity, in an area that would be considered to fall within the concept of the social state, from the application of Union law. As such, the fundamental freedom to provide and receive services did not generally avail the Court of Justice to rule on the financing of state education, though a narrow exception was made in the *Wirth* case where the Court did determine that educational institutions which were privately run and profit making though student fees, could constitute providers of services under Article 56 TFEU.[68] The institutions in question would need to be "essentially" funded from such private sources.[69] This distinction was repeated subsequently by the Court in *Commission v. Germany*.[70] It is

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[65] *Ibid.*, at paras. 17-18.
[66] *Ibid*,, at para. 19.
[67] *Ibid.*, at para. 20.
[68] Case C-109/92 *Wirth* [1993] ECR I-6447, at para. 17.
[69] *Ibid.*,
[70] Case C218/05 *Commission v. Germany* [2007] ECR I-6957, at paras. 71-2.

interesting to note that in AG Colomer's opinion in *Geraets-Smits*, he referenced both *Humbel* and *Wirth* in defending his position, contrary to the one eventually arrived at by the Court, that the Dutch benefit-in-kind health insurance system in question was not a service in return for remuneration, and as such did not fall within Article 56 TFEU.[71]

It is difficult to divine the reason for the Court's very different approaches to education and healthcare. Davies highlights the inconsistency in holding in *Humbel* that the Government was fulfilling its duty to the population by supplying education, while making no such similar statements in the healthcare cases, when the provision of public health is as significant a role for a government as the provision of education.[72] The issue of how the Court assesses the existence or otherwise of consideration is clearly the distinction which is central to the decisions. Significantly, in the more recent case of *Rhiannon Morgan*, AG Colomer suggested a radically different approach to the treatment of education services.[73] The facts involved German nationals who were challenging a decision of national authorities to refuse them a study grant to pursue university courses in other Member States. On this occasion, the Advocate General stated he was applying a similar approach to education as had been applied to cases concerning health care.[74] His concern was that the national rules were limiting the freedom to provide services by lessoning the attractiveness of foreign providers of education to German students. By focusing on the existence of remuneration in exchange for education services, and the presence of consideration in the form of fees paid, he suggests that the provision of university education at the very least falls under Article 56 TFEU. However, he also wrote of "schools" within his opinion, which would suggest his interpretation could have an even broader application within the field of education.[75]

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[71] *Geraets-Smits*, above note 40, at para. 30 of the opinion.
[72] Davies, above note 41, at 32.
[73] Cases C-11/06 and 12/06 *Rhiannon Morgan*.[2007] ECR I-9161.
[74] *Ibid.*, at para. 100.
[75] *Ibid.*, at para. 102.

The Court of Justice dealt with the case without addressing the issue of education as a service. However, it is submitted that from the point of view of the protection of social rights, the opinion is deeply concerning. The cases above on healthcare illustrate the extent to which the Court's determination that healthcare is a service has allowed it involve itself significantly in decisions taken by national healthcare providers. Undoubtedly, there are occasions when the Court has been justified in intervening in national education systems, particularly when these were being operated in a clearly discriminatory manner.[76] Nevertheless, the Advocate General's approach to the categorisation of education represents a radical reversal of the position stemming from *Humbel*. This is particularly so as AG Colomer had previously used the education cases as part of his argument, rejected by the Court, that the health insurance system in *Geraets-Smits* was not a service. The Advocate General thus reversed his more restrictive position on what constitutions remuneration in light of the Court's decisions, and then went further in the opposite direction. Should the Court follow the Advocate General on this trajectory, it will mean a significant erosion of the Member State's sovereignty in another aspect of their social services.

6.3.3 Employment Rights

It was noted in Chapter 3 that certain issues related to employment, particularly the protections that workers enjoy, fall within the heading of social rights. As has been outlined earlier in this chapter, rights related to the protection of workers and rights of companies, as protected by the fundamental freedom to establish and provide services, often come into conflict. One area which has seen extensive litigation on this point surrounds the posting of workers. This is when a service provider, established in one Member State, seeks to provide

[76] *See* Case C-147/03 *Commission v. Austria* [2005] ECR I-5969; Case 293/85 *Commission v. Belgium* [1985] ECR 3521.

its service in another Member State but also wishes to use its own workforce from the first Member State to undertake that service. This can lead to issues regarding which set of labour protection rules are applied to the posted workers; those of the home state or the host state. Where the standards of protection for conditions such as minimum wage, holiday time etc. are considerably different, a concern arises that to allow the company to rely on the lower standards in its Member State of establishment would be to facilitate social dumping within the Union. Eventually, the Union Legislature passed legislation dealing with this issue; the Posted Workers Directive.[77] What will be demonstrated here is that, while concerns about workers' rights were mentioned in the cases, both prior to and after the Directive was passed, there were no specific provisions on social rights which the Court could have used to counterbalance the influence of the fundamental freedoms, specifically Articles 56 and 57 TFEU.

Pre-Posted Workers Directive Litigation

Rush Portuguesa concerned a Portuguese firm which had won a contract to build a rail line in France in the period after Portugal's accession to the EC.[78] The firm was using its own Portuguese employees to undertake the work. When the French authorities attempted to enforce certain provisions of the French Labour code on the company, it claimed that its rights were being breached under Articles 56 and 57 TFEU.

[77] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1,
[78] Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.

Of key significance were provisions of the Portuguese Treaty of Accession to the EC. Article 215 of this provided that the application of the free movement of workers provisions of the Community Treaties was to be delayed for a period of years after Portugal joined the Community. This was based on the need to protect the labour markets of the new accession countries but also the markets of the existing Member States.

As such, specific derogations based on social concerns allowed the non-application of certain Treaty freedoms. However, the derogations were found not to apply to the Treaty provisions on freedom to provide services.[79] The Court distinguished the temporary non-application of the provisions on free movement of workers, saying that this was designed to avoid disturbances in the employment markets of Portugal and the Member States following Portugal's accession, in the event of large and immediate movements of workers.[80] Posted workers were to be treated differently, as they would leave the host country after a certain period of time, without gaining full access to the job's market of the Member State.[81]

Despite acknowledging that the very reason for the derogation was concerns about disturbances to labour markets, the Court's analysis of the impact of posted workers is paltry. There was no recognition of the risk of posted workers being used by firms established elsewhere to undercut national minimum wage provisions. It is perhaps significant that this case was heard before the Maastricht Treaty, and as such before the Social Protocol included some reference, however weak, to employment protection policies within the Treaties.

The *Arblane* case dealt with a number of challenges to Belgian national legislation surrounding the protection of workers, in circumstances where the Belgian authorities were seeking to apply these provisions to posted workers employed by a company established in

[79] *Ibid.*, at paras. 15-17.
[80] *Ibid.*, at para. 13.
[81] *Ibid.*, at para. 15.

France but providing services in Belgium.[82] These protections placed a range of obligations on the company to; pay their workers the minimum wage that would be paid to Belgian workers, pay employer worker contributions, have a specific record of the worker contributions for each individual worker, arrange for these records to be kept at the address of a natural person where they could be inspected and keep these documents for a five year period after the company had ceased to provide the services in Belgium. The companies in question were already subject to many of the same or similar rules in France. Significantly, while the Belgian rules were contained in an extensive range of laws and decrees, Article 3 of the Belgian Civil Code stated that all laws relating to the protection of workers constituted public order legislation. The companies in question argued that the national laws breached Articles 56 and 57 TFEU.

The Belgian authorities argued that the term 'public order' should be understood as covering "[...] national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory [...]".[83] The concerns basing such legislation should only impact on the application of Union law in situations where the Treaties provide for exceptions to the fundamental freedoms and where appropriate, because they constitute overriding reasons related to the public interest.[84]

The Court acknowledged that reasons relating to the protection of workers and in particular, the social protection of workers in the construction industry, had been previously recognised by it as constituting overriding reasons of public interest.[85] While purely administrative requirements could not justify a derogation from the fundamental freedoms,

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[82] Joined Cases C-369/96 and C-376/96 *Arblane* [1999] ECR I-8453. *See* also Case C-49/98 *Finalarte* [2001] ECR I-7831.
[83] *Arblane.*, above note 82, at para. 30
[84] *Ibid.*, at para. 31.
[85] *Ibid.*, at para. 36.

the Court accepted that the overriding requirements related to the protection of workers' rights may also justify measures necessary to achieve their compliance.[86]

The Court then proceeded to analyse the various provisions to see whether they met with the requirements of overriding interest, but also bearing in mind whether similar provisions were already protected in the company's country of establishment. The Court determined that Union law did not preclude a requirement that the workers be paid the appropriate minimum wage, so long as this was clearly set out in national rules. Nor did Union law preclude a requirement that certain social documents relating to workers should be kept in the state to facilitate monitoring of the companies' adherence to these provisions. However, the Belgian rules on employer worker contributions and on drawing up and holding individual worker records were struck down, as the workers already had similar protections under the legislation of the state in which the companies had been established. Similarly, the requirement to hold social documents for five years after the work had ceased was found to be excessive and the objectives could have been achieved in less restrictive ways.

Litigation after the Posting Workers Directive

The *Ruffert* case concerned an action between the liquidator of the Objekt company (Mr. Ruffert) and the German state of Lower Saxony.[87] At issue was Article 3 of the Posted Workers Directive which stated that posted workers were to be guaranteed similar terms and conditions, including minimum pay, as national workers if the host Member State set out

[86] *Ibid.*, at para. 37-8.
[87] Case C-346/06 *Ruffert* [2008] I-2189.

those terms and conditions in certain prescribed ways: (a) legislation or (b) universally applicable collective agreements.

A state 'legislative measure' provided that certain public contracts would only be awarded to companies that paid the wage laid down in the collective agreement operating at the place where the service was provided. Objekt had won a contract from the state government to build a road and had signed up to the local collective agreement. Objekt then hired a subcontractor firm from Poland to do some of the work. When it was subsequently discovered that the subcontractor was paying its workers less than the required wage, Lower Saxony terminated Objekt's contract and sued it for breach of terms.

The key issue before the Court of Justice was whether a law that compelled a firm to promise, before it could tender for a public contract, that it would pay its workers the minimum wage set out in collective agreements in the place where the service was provided, was an illegal restriction of 56 TFEU. The case was determined on the relatively narrow grounds that the state legislative measure could not be described as 'legislation' per the Posted Workers Directive. Neither was the collective agreement one that had been declared universally applicable.[88] As such, the state measures did not fix the rate of minimum pay in one of the ways required under the Posted Workers Directive.[89]

The Court emphasised that the minimum level of protection that must be guaranteed to workers posted to the territory of a host Member State was limited to that provided for in the Directive.[90] To allow a national law like the one in question which set down a minimum wage, "[...] may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State".[91] The Court

[88] *Ibid.*, at para. 29.
[89] *Ibid.*, at para. 30.
[90] *Ibid.*, at para. 34.
[91] *Ibid.*, at para. 37.

also rejected any arguments that the measure in question was necessary for the protection of workers,[92] or for the financial balance of the German social security system.[93]

Significantly in his opinion on the case, AG Bot reached the opposite conclusion. He portrayed the issue as being about striking a balance between the freedom to provide services, as against the overriding requirements of the protection of workers and the prevention of social dumping.[94] The Advocate General analysed the state provisions under both the Posted Workers Directive and Article 56 TFEU, and in both situations determined that the national rules were compatible.

Under the Posted Workers Directive, the Advocate General held that the relevant provisions allowed a Member State to implement higher levels of social protection for employees posted to its territory.[95] Turning to Article 56 TFEU, he noted that any legislation, such as that in question, that restricted the freedom to provide services, had to be justified by overriding reasons related to the public interest. He noted that the Court had already held that the aim of stopping unfair competition by companies paying their workers less than the minimum wage may also be taken into consideration as an overriding requirement justifying a restriction on the freedom to provide services.[96] The rules adopted by Lower Saxony were, in his opinion, appropriate for protecting workers and preventing social dumping, but did not go further than was necessary.[97] The Advocate General backed this up by indicating how the Polish workers excluded from the collective agreement were getting less than half the pay that similar German workers would have received.[98]

It should be noted that in the course of this determination, the Advocate General made a reference to the provisions of Art 151 TFEU dealing with increased living and

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[92] *Ibid.*, at paras. 38-41.
[93] *Ibid.*, at para. 42.
[94] *Ibid.*, at para. 2 of the opinion.
[95] *Ibid.*, at para. 83 of the opinion.
[96] *Ibid.*, at para. 108 of the opinion.
[97] *Ibid.*, at para. 114 of the opinion.
[98] *Ibid.*, at para. 118 of the opinion.

working conditions and dialogue between management and labour. However, it is submitted that this was vague and was not really linked to any of the rest of the discussion.[99]

The provisions of the Posted Workers Directive came to the fore again in a series of cases taken by the Commission against Member States under Article 258 TFEU for their failure to implement the Directive.[100] The case of *Commission v. Germany* is relevant as it demonstrates one of the occasions when the Court was convinced that a national measure providing for the protection of workers was justified, even though it was a barrier under Article 56 TFEU.

The situation involved a requirement in German law that firms posting workers from another Member State had to have a range of documents concerning each individual worker translated into German.[101] While it had been held in *Arblane* that requirements to maintain documents could be a restriction of Article 56 TFEU, the Court of Justice accepted that the aim of the German provision was linked to the social protection of workers and also to the effective monitoring of that protection. This had already been recognised by the Court as being an objective amounting to an overriding requirement justifying restrictions on the freedom to provide services.[102] The Court noted that monitoring compliance with pay and working hours requirements would be extremely difficult if such documents were not in the language of the host Member State and as such, the requirements made the monitoring practically possible.[103] The fact that there were only four, relatively small forms to translate meant that the obligation on the company did not go further than was necessary for the

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[99] *Ibid.*, at para. 121 of the opinion.
[100] Case C-244/04 *Commission v. Germany (Third Country Nationals)* [2006] I-885, Case C-490/04 *Commission v. Germany* [2007] ECR I-6095, Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323.
[101] Employment contract, pay slips, time-sheets and proof of payment of wages as well as any other document required by the German authorities.
[102] *Commission v. Germany*, above note 100, at para. 70.
[103] *Ibid.*, at paras. 71 and 75.

achievement of the goal of social protection.[104] Finally, there were no other methods of achieving the relevant protection.[105]

At issue in *Commission v. Luxembourg* was the interpretation of Article 3(10) of the Posted Workers Directive.[106] The article contained a 'public policy' clause which allowed the Member States apply certain other terms and conditions related to employment to companies posting workers, on public policy grounds, outside those already set out in Article 3(1) of the Directive. Luxembourg had included a range of extra conditions under this clause including requirements that; the posted workers had to have a written contract with the company employing them, foreign companies had to comply with Luxembourg's rules regarding part-time and full-time work and also that posted workers were to benefit from automatic increases in wages to adjust to the cost of living. Luxembourg had also set out quite demanding requirements regarding monitoring of posted workers

The Court firstly held that the public policy clause was a derogation from Union law which meant that it had to be construed in as narrow a way as possible.[107] The Court was not responsive to the arguments from Luxembourg attempting to justify the provisions under Article 3(10). It noted that it was settled law that when a Member State sought to use public policy to derogate from a Treaty freedom, this would be interpreted strictly and was under the control of the Court. Public policy could only be relied on if there was a genuine and sufficiently serious threat to a fundamental interest of society.[108] It was up to the Member State to produce evidence of the threat and of the impact that the measures it proposed to take would have.[109]

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[104] *Ibid.*, at para. 76.
[105] *Ibid.*, at para. 77.
[106] *Commission v. Luxembourg*, above note 100.
[107] *Ibid*,, at para. 30-2.
[108] *Ibid.*, at para. 50.
[109] *Ibid.*, at para. 51.

As regards the automatic adjustment of wages in line with increases in the cost of living, the Court determined that the Member State had not submitted sufficient evidence to prove the proportionality of this measure, but rather had "[...] merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations".[110] As such, it was unable to rely on the public policy exception in Article 3(10) of the Directive.

The Court also promptly dismissed the argument that certain national provisions related to collective agreements fell within the public policy exception of Article 3(10). It stated that there was no reason why such provisions should *per se* fall under public policy and further, any such finding must relate to the provisions of the actual collective agreements themselves. Finally, it determined that the only collective agreements that could possibly fall within Article 3 (10) where those which had been declared universally applicable. This was not the case with the national legislation in question.

Conclusion on Employment Protection

The case law on employment protection demonstrates that Member States had in place a range of national provisions with the stated design of improving employment protection for workers. It is accepted that in some of the situations protectionism may have formed part of the unstated reasoning behind such laws. However, what stands out most clearly is that the Member States defending their national laws have no social rights provisions within the Treaties or the general principles which they could use to counterbalance the application of the fundamental freedoms. Even the modest Article 151 TFEU was only mentioned on one occasion and then in the context of an offhand reference in an Advocate General's opinion.

[110] *Ibid.*, at para. 53.

The outcome of these cases, combined with the vigorous application of Article 56 TFEU in the right to strike cases, aids business but threatens national labour laws.[111]

In its efforts to deal with concerns about posted workers, the Union Legislature made little effort to include social rights provisions as part of its response. The Posted Workers Directive was based on what are now Articles 53 and 62 TFEU, locating it clearly in the context of free movement of services. While in Recital 5, reference is made to creating a climate of fair competition and measures guaranteeing respect for the rights of workers within the context of transnational provision of services, there is no reference to the Social Charter, the Community Charter or indeed, the Social Protocol.

6.4 Conclusion

The cases discussed above demonstrate "[...] the Court's failure to engage in an overt assessment of the values underlying Member State's social policies, as against the values underlying the Community norms with which they appear to come into conflict".[112] The traditional means whereby the Court of Justice compensated for the deregulatory weight of the Treaties - the discovery of various fundamental rights as general principles of Union law - has not worked in the context of social rights values, due to the lack of social right protection in the ECHR, the uncertainty of human rights protection in national constitutions and the failure to list international treaties on which the Member States have cooperated as a possible source of rights.

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[111] Barnard C., 'The UK and Posted Workers: The Effect of Commission v. Luxembourg on the Territorial Application of British Labour Law', Case C-319/06 *Commission v. Luxembourg* (Judgment 19 June 2008), (2009) 38 *Industrial Law Journal* 122, at 122.

[112] Davies, above note 1, at 66.

The cases discussed here dealing with conflicts between rights and freedoms are indicative of the position that the Court had taken as regards which rights it considered 'fundamental', prior to the incorporation of the Charter. In each of *Schmidberger*, *Laval* and *Viking*, the Court did mention social rights traditions in national constitutional, international documents that the Member States have collaborated on such as the Social Charter, or indeed Article 151 TFEU. All of these sources obviously pertain to social rights. However, as was most clearly demonstrated in *Laval*, mentioning a source and applying a source are two different things. In light of the treatment that these sources received from the Court, they are clearly not considered to be a legitimate basis for fundamental rights inspiration. The result is a gaping lack of social rights values within Union law. While it has been recognised that certain elements of the jurisprudence acknowledge Member State preferences – for example the prior authorization rules being necessary for the economic stability of hospitals in the healthcare cases – this does not come close to a social state level of protection.[113]

The impact of these decisions on the overall funding of national social security systems has yet to be fully ascertained. It has been suggested that, the lessening of national control over how welfare schemes are used may eventually lead to an overall reduction in the benefits available.[114]

Davies argues that while the Court may not have been completely wrong in each of these cases, it has failed to create its own legitimacy by not addressing all the issues at stake. It is argued here that this failure goes past the Court and attaches to the entire European Union.[115] Social rights are recognised as having a "market correcting" function.[116] The application of the fundamental freedoms has allowed the Court to impose and interfere with

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[113] Guibboni S., 'Free Movement of Persons and European Solidarity', URGE Working Paper 9/2006 (University of Florence), at 7.

[114] Guibboni S. 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice', in Ross M. & Borgmann-Prebil Y., (eds) *Promoting Solidarity in the European Union*, (OUP, 2010), at 194.

[115] Davies, above note 1, at 76.

[116] Hatsopoulos, above note 32, at 2.

social policy, against the core interests of the Member States.[117] It is submitted that the failure to have constitutionalised protection of social rights and values, as would be the norm within a social state, calls the very legitimacy of Union citizenship into question.

[117] Lamping W., 'Mission Impossible? Limits and Perils of Institutionalizing Post-National Social Policy', in Ross M. & Borgmann-Prebil Y., (eds) *Promoting Solidarity in the European Union*, (OUP, 2010) at 66.

Chapter 7 – Comparing Union Citizenship to the Marshallian Model

7.1 Introduction

If Marshall's theory concerning how citizenship developed in the United Kingdom is generally described as "evolutionary", then it can be argued that the development of citizenship in the European Union could be described as 'revolutionary'. This term is suggested as the status arrived abruptly as a result of the Maastricht Treaty, and was then rapidly developed by the European Court of Justice.

Beallamy states that:

> [...] calls for a new form of post-national citizenship must show that it can rightfully claim in certain relevant respects to be a conception of citizenship rather than, say, a theory of what persons are entitled to by virtue of their status as human beings, while indicating why the new social and political context justifies such a move and in the process indicating the conceptual and empirical weakness of alternative views".[1]

This view that any new model of citizenship requires a defence is particularly apposite in the case of Union citizenship in light of criticism it has received regarding whether it was justifiable to describe the status created as a valid version of citizenship.[2] Having outlined in earlier chapters both the Marshallian model of citizenship and the way in which Union

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[1] Bellamy R., 'Introduction: The Making of Modern Citizenship', in Bellamy et al, *Lineages of European Citizenship*, (Palgrave MacMillan, 2004), at 3.

[2] *See* Weiler J., 'Introduction: European Citizenship – Identity and Differentity', in La Torre (ed) '*European Citizenship: An Institutional Challenge'*, (Kluwer Law International, 1998).

citizenship and social rights have been treated in the Court of Justice and the Union Legislature, it is now necessary to examine whether the practice of Union citizenship can be aligned with the prescriptions of the Marshallian model. Undoubtedly, Union citizenship has developed in a different manner to national citizenships. As was demonstrated in earlier chapters, its creation has been elite led, rather than as a response to any sustained campaign for the extension of rights. For the most part it has been driven in a pre-emptory fashion by institutional actors, rather than as a reaction to any major incident or event. To the extent that any of its evolution has been reactive, this has not been as a result of organised political pressure, but rather in light of individual rights claims that have come before the Court of Justice. Indeed, after the initial creation of Union citizenship through the Maastricht Treaty, the political or legislative process was not really a factor in its initial years of existence until the passing of the Citizenship Directive.[3] It is clear therefore, that the growth of Union citizenship has followed a significantly different path to the evolutionary approach discussed in Chapter 2 in the context of national citizenship.

This chapter begins by examining the position of Community nationals prior to the Maastricht Treaty in order to address the argument that the status they enjoyed equated to a form of citizenship. Secondly, it looks at citizenship as it is applied in the context of the Union, focusing on the relationship between movement and rights, the wholly internal situation and the connection with civil and political rights. It then seeks to rebuff two arguments that the Marshallian model should not be applied to Union citizenship; firstly on the basis that it does not match Marshall's evolutionary chronology and secondly that it may be an exclusionary device. Finally, it will be shown that while Union citizenship manifests some of the features of the Marshallian model of citizenship and as such, is a device that furthers the protection of social rights, it fails to protect specific elements of citizenship,

[3] Directive 2004/58/EC of the European Parliament and 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 [2004] OJ L 158/77. See Chapter 5.

namely constitutionalised social rights and values. The chapter therefore concludes by finding that Union citizenship on its own cannot fully realise a European social citizenship.

7.2 Status of Community Nationals Prior to the Maastricht Treaty

In order to be able to determine if the arrival of Union citizenship was a 'revolution' as suggested in Chapter 7.1 above, it is necessary to assess and categorise that which went before it. In Chapter 3, a detailed review was undertaken of the treatment of workers and self employed persons by the Court of Justice, concerning the rights that were held to be bestowed upon these groups prior to the Maastricht Treaty. It is now necessary to consider how the status of these Community nationals can be best categorised and address the arguments put forward that they exemplified a form of initial or embryonic citizenship.

7.2.1 Citizenship or denizenship?

To begin with, it is necessary to examine the existing idiom of the relationships between persons and the state in which they live; particularly the term 'denizenship'. This word has generally been understood to mean an individual who enjoys a range of rights similar, though of a lesser nature, to those of a citizen.[4] The key distinction from citizenship is that rather than gaining these rights from an engagement with the democratic apparatus of the state, denizens obtain them "[...] by virtue of their participation in the social and economic life of the community".[5] This means they "[...] are nonetheless significantly excluded from full

[4] Chalmers et al, *European Union Law*, (1st Edition, Cambridge, 2006), at 564. This point was not repeated in the Second Edition of the text.
[5] *Ibid.*

status and participation in what we might refer to as the 'constitutional public sphere' [...]".[6] Roche outlines that this constitutional public sphere is made up of both 'civil-political' and 'socio-economic' dimensions.[7] As such, the denizen is an outsider, but one who can enter, stay inside, voice and even in certain circumstances share in the community she has joined.[8] Throughout these definitions, the most important common distinguishing feature identified as separating denizens from citizens is their limited political rights,

Other authors give a somewhat conflicting view of the status. For example, Meehan states that a denizen is a lawfully resident alien with the same primary rights of political participation as native or naturalised citizens.[9] She notes a separate status called a 'metric'; an individual who is a resident alien with legal status but who could only avail of a limited range of the rights of citizenship. For example a metric might be allowed the secondary political right to join a political party, but not the primary political right to vote.[10]

Despite the contrary views articulated, the preponderance of writing suggests that denizenship is understood as including a degree of civil, economic and social participation within the life of a host state, but with significant restrictions placed on political participation.[11]

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[6] Roche M., 'Citizenship and Exclusion: Reconstructing the European Union' in Roche M. & van Berkel R., *European Citizenship and Social Exclusion* (Dames, 1997), at 8.

[7] For discussion on why the public sphere is particularly important for the protection of social rights, see Bercusson B., Deakin S., Koistinen P., Kravaritou Y., Muckenburger U., Supiot A., Veneziani B., 'A Manifesto for Social Europe', (1997) 3 *European Law Journal* 189, at 202.

[8] Ferrera, 'Towards an 'Open Social Citizenship? The New Boundaries of Welfare in the EU', in De Burca, (ed.) *EU Law and the Welfare State: In Search of Solidarity*, (OUP, 2005).

[9] Meehan E., *Citizenship and the European Community* (1993, Sage Publications, London), at 18.

[10] *See* also Closa C., 'Citizenship of the Union and Nationality of Member States', (1995) 32 *Common Market Law Review* 487, at 493.

[11] See Layton-Henry Z., 'Citizenship or Denizenship for Migrant Worker?', in Layton-Henry (ed.) *The Political Rights of Migrant Workers in Western Europe*, (Sage Publications, London, 1990), at 190.

7.2.2 Link between citizenship and economic activity

There remains significant debate about whether the increased range of rights that was granted to workers prior to the TEU was reflective of a mere desire to remove distortions in labour markets, or a deeper belief about building a rights based culture. While it has been noted that much of the secondary legislation developed prior to the Maastricht Treaty was based on the former objective,[12] it has been demonstrated in Chapter 3 that the Court's activism regarding the entitlements of workers was undertaken on the basis of protecting rights. Indeed, its drive to extend the definition of worker to those engaged in relatively minor part-time work arguably went some way towards undermining the requirement for engagement in economic activity.[13]

Irrespective of its basis, it is abundantly clear that workers and those taking advantage of the fundamental freedoms enjoyed a privileged position as the beneficiaries of Community law rights, up until the early 1990s, leading some to describe their status as one of incipient citizenship.[14] This divide between the rights of 'workers' and the rights of others was visible in the Social Charter, adopted in 1989. In its initial drafting, the term 'citizen' was used to describe the bearers of the rights outlined. However, in the final draft the term 'worker' had been substituted as indicating the recipients of the rights.[15] While work is undoubtedly central to most notions of social citizenship,[16] was it appropriate to elevate the position of workers

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[12] Meehan, above note 9. at 59 and 67.

[13] Golynker O., 'Jobseekers rights in the European Union: Challenges of changing the paradigm of social solidarity', (2005) 30 *E.L.Rev.* 111, at 115.

[14] Katrougalos G., 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07, at 38.

[15] Sykes R., 'Social Policy, Social Exclusion and Citizenship in the European Union: The Right to be Unequal?' in Roche & van Berkel (eds.) *European Citizenship and Social Exclusion* (Dames, 1997).

[16] Moller suggests that work is "one of the central elements of social citizenship", Moller IH., 'Social Integration and Labour-Market Marginalization: The Scandinavian Experience', in Roche & van Berkel (eds.) *European Citizenship and Social Exclusion* (Dames, 1997), at 83. This links to the wider issue of whether in the context of social citizenship, there is an obligation to work, see Leisink P., 'Work and citizenship in Europe', in Roche & van Berkel (eds,) *European Citizenship and Social Exclusion* (Dames, 1997).

and those taking advantage of the Treaty benefits in such a way and ascribe the term 'citizenship' to the resulting status?

Meehan posits the idea of 'industrial citizenship' as being a status which would have particular legitimacy in the context of the European Community. She argues that such an approach would be a more honest indicator of standing, as property or economic independence has always in the past been regarded as a legitimate basis for citizenship.[17] Such a conception could not include all persons in all their capacities, but would have the advantage of allowing some to enjoy partial rights of citizenship, rather than denying it to all on the basis of the limited competence of the EC at that stage. Such an approach was arguably supported by the opinion of AG Jacobs in *Bettray*, when reviewing whether a social integration scheme constituted work for the purposes of Article 45 TFEU.[18] The Advocate General noted that while labour was not to be regarded as a commodity and the fundamental rights of workers took precedence over the economic requirements of the Member States, the Treaty provisions on free movement of workers were solely for the benefit of those who were available to take up employment opportunities. Those unable to take up employment were to be regarded as not falling within the scope of the Treaty provisions or secondary legislation.[19]

The pre-Maastricht status of Community nationals has also been defined as a 'market citizenship'.[20] This can be understood as a refinement of the industrial citizenship concept, drawing together the Treaty based guarantees for those exercising the fundamental freedoms, with the protections contained in secondary legislation for those able to support themselves in a host Member State. However, Everson is quick to reject any suggestion that the model of 'market citizen' could comply with the traditional notions of citizenship, on two specific

[17] Meehan, above note 9, at 16.
[18] Case 344/87 *Bettray* [1989] ECR 1621.
[19] *Ibid.*, at paras. 29-32.
[20] Everson M., 'The Legacy of the Market Citizen', in Shaw J. and More G. (eds.), *New Legal Dynamics of the European Union* (Oxford, Oxford University Press, 1995), at 84. For further discussion of the idea of 'market citizenship, see Nic Shuibhne N., 'The Resilience of EU Market Citizenship', (2010) 47 *Common Market Law Review* 1597.

grounds. Firstly, a distinction is drawn between entitlement and provision. A citizen gains rights of entitlement through her status as citizen. However, the market citizen is only entitled to provision – options rather than rights. For example, the right of free movement to take up a job is conditional on there being jobs available to take up. The market citizen does not have the right to a job *per se.* Secondly; the market citizen is not sovereign as regards decisions taken in respect of the market. She cannot "command" the market to deliver a particular want.[21]

7.2.3 Status of Community law rights prior to the introduction of Union citizenship

In light of their limited scope of application, it cannot be accepted that the concept of an industrial citizenship, based on civil and limited social rights, or market citizenship, with its failure to recognise the status and sovereignty of the citizen, act as a sufficient representation of the model set out by the Marshallian analysis.[22] Core concepts, such as equality of status, are missing from these conceptions. While rejecting the argument that citizenship existed in the EC prior to the Maastricht Treaty, an alternative position posited by some authors is that the range of rights granted to Community nationals prior to that stage equated with the early elements of the development of citizenship.[23] This notion of an 'incipient form of European Citizenship' was based not just on Community law regarding free movement, but also on the social protection that Community law provided in a range of areas such as social security and

[21] *Ibid.*, at 84-5.

[22] *See* generally O'Leary S., 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law', (1995) 32 *Common Market Law Review* 519; Martiniello M., 'The development of European Union Citizenship: A Critical Evaluation', in Roche & van Berkel (eds.) *European Citizenship and Social Exclusion* (Dames, 1997), at 83.

[23] *See* Meehan, above note 9; O'Leary S, 'Developing an ever closer Union between the people of Europe', Edinburgh Mitchell Working Papers Series 6/2008, (Europa Institute, University of Edinburgh); Mancini G.F., *Democracy and Constitutionalisation in the EU* (Oxford: OUP, 2000), at 10; Plender R., 'An Incipient Form of European Citizenship', in Jacobs (ed), *European Law and the Individual* (North Holland, 1976), at 50; Jacobs F., 'Citizenship of the European Union – A Legal Analysis', (2007) 13 *European Law Journal* 591, at 592-3.

assistance, participation by workers in the undertakings in which they are employed and the equal treatment of men and women.[24] While Meehan accepts that, prior to the Maastricht Treaty there was no explicit protection of political rights, an element that Chapter 2 demonstrated was key to citizenship, nevertheless she states that "[...] it is also possible to suggest that what is happening is simply a different ordering in national and Community histories of the acquisition of a triad of citizenship rights".[25] Such an argument would see the eventual development of political rights, as Marshall outlined the eventual development of social rights. Maintaining a diametrically opposed view, Monar argued that due to the lack of political participation, the pre-TEU relationship between Community nationals and the EC was one akin to absolutism.[26]

It has been shown that prior to the introduction of Union citizenship, engagement in economic activity through one of the fundamental freedoms, or the express granting of rights through secondary legislation was a condition precedent to enjoying rights in a host Member State. This meant that the use of a civil right was prerequisite for availing of these protections. At the same time, the few political rights which did exist were as a result of national agreements, rather than Community wide norms.[27] This demonstrates that there was no evidence of the existence of a unified concept that would signify a citizenship type arrangement. Even allowing for Meehan's point about each of the three elements of citizenship developing at a different pace in relation to the European Community (as compared to, for example, their development in the UK in Marshall's account) it is difficult to accept that argument that the pre-TEU position equated with a full or indeed even an embryonic form of citizenship. At very best, this period saw the Community national

[24] Meehan, above note 9, at 10.
[25] Meehan, above note 9, at 21.
[26] Monar J.. 'A dual citizenship in the making: A citizenship of the European Union and its reform', in La Torre, above note 2, at 172.
[27] The Representation of the People Act, 2003, Schedule 3, permits Irish citizens to vote in British Parliamentary Elections.

enjoying a denizenship status in the host Member State, based on extensive civil rights, limited social rights but with political rights absent.

7.3 Citizenship as Applied in the European Union

In Chapter 2.4, it was illustrated how the specific nature of a transnational entity like the European Union required that the rights stemming from Union citizenship had an application in two spheres; firstly a Union citizen's enjoyment of rights when she travelled to a host Member State, but also the enjoyment of rights in her home state. The extent of the applicability of Union law rights to a person who has not left their home state is significant. This section examines whether some degree of movement is required before an individual can enjoy citizenship rights. It also considers the case law surrounding the wholly internal situation to see if this limits the applicability of Union citizenship. It concludes by illustrating how in order to gain a full appreciation of Union citizenship, both in the context of civil rights and political rights, it is necessary to assess it in the context of the host Member State and the home state.

7.3.1 Relationship between Movement and the Enjoyment of Rights

It has been legitimately argued that ""[t]he central theme underpinning the judicial construction of Union citizenship is the will to facilitate movement if migration contributes to the realisation of the individual's personal potential, be it professional or social".[28] The

[28] Illiopoulou A., 'The Transnational Character of Union Citizenship', *Empowerment and Disempowerment of the European Citizen*, Liverpool University, 21 October 2010, at 3.

response of the Union legislature, as seen in the Citizenship Directive, has also concentrated on the issues of movement.

In light of this focus, it can sometimes be forgotten that Union citizenship is not dependent on migration. This is apparent from the text of Article 20 TFEU. Firstly, the provision makes clear that the right to possess Union citizenship is dependent, not on movement, but on being a national of one of the Member States. Article 20(2) TFEU states broadly that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties". The article then goes on to expand on four specific rights, but it is clear that this is not an exhaustive list. While three of these rights are movement based (the right to move and reside, the right to vote and stand in elections in a host Member State and the right to consular protection in a third country), Article 20(2)(d) TFEU sets out a right to petition the Parliament, apply to the Ombudsman and make and receive a communication to one of the institutions in one of the official languages of the EU. This provision is elaborated upon in more detail in Article 24 TFEU.

Not only do Articles 20(2)(d) TFEU and Article 24 TFEU demonstrate that citizenship cannot be based solely on movement, but Article 20(2) TFEU reveals that the rights flowing from Union citizenship are far more extensive than solely what is laid down under Articles 20 – 25 TFEU. It states that Union citizens also enjoy the other rights set out in the Treaties. These would include the diverse range of rights included within the Unions competences, such as consumer protection, non-discrimination and environmental protection.[29] Significantly, these rights are enjoyed by the Union citizen, while she remains in her home Member State. AG Colomer encapsulated the developments by stating:

[29] Nic Shuibhne, above note 20, at 1617.

> I repeat that 'the creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.[30]

Through his use of the word corollary, the Advocate General clearly sees that the bundle of protections derived from citizenship stretches past movement. As such, it is submitted that it is appropriate to look at the implications of Union citizenship for an individual who has not left her own Member State. In order to be fully confident that non-movers enjoy citizenship rights, it is also necessary to address the concept of the 'wholly internal situation' and ascertain whether its continued application creates a barrier.

7.3.2 Wholly Internal Situation

The case law of the Court of Justice has demonstrated that in order to obtain the protection of Union law in the enjoyment of the four fundamental freedoms, there must be some cross border element involved in the issue.[31] Absenting this feature, the issue falls within the 'wholly internal situation' and is addressed under national law. This leads to the criticism that 'reverse discrimination' exists - a national of a Member State who has not engaged in

[30] Cases C-11/06 & C-12/06 *Rhiannon Mogan*, at para. 82.

[31] *See* Case 175/78 *R v. Saunders* [1979] ECR 1129; Joined Cases 35/82 and 36/82 *Morson and Jhanjan v State of the Netherlands* [1982] ECR 3723; Case 298/84 *Pavlo Iorio v. Azienda Autonomo delle Ferrovie Stato* [1986] ECR 247; Case 147/87 *Zaoui v Cramif* [1987] ECR 5511; Case C-332/90 *Steen v Deutsche Bundespost* [1992] ECR I-341.

movement receives less favourable treatment than a national of another Member State.[32] The wholly internal situation concept has been reviewed in the context of Union citizenship in a number of cases since the latter's introduction. The implications of these must be examined for any potential restriction that the 'wholly internal situation' doctrine may place on the rights of a person who has chosen to remain in her home state, but seeks the benefit of the citizenship provisions to protect her from interference from Union law.

In *Uecker*, the Court reiterated its previous case law that Union law cannot be applied to cases which lack a link to any of the situations governed by Union law and all elements of which are purely internal to a single Member State.[33] In the relevant situation, concerning alleged Article 45 TFEU rights of non-EU nationals married to EU citizens, the Court made clear that Article 20 TFEU was not intended to extend the material scope of the Treaty to internal situations which have no link with Union law.[34] Similarly in *Kremzow*, the Court stated that the purely hypothetical prospect of exercising one of the four fundamental freedoms did not establish a sufficient connection with Union law to justify the application of Union provisions.[35] The applicant was invoking the right to move as a citizen under Article 21 TFEU, though the Court did not specifically refer to the article in its decision.

The decision in *Schempp* also gives an indication of the boundaries of the wholly internal rule.[36] Here a German national was challenging the failure of national tax authorities to deduct maintenance payments to his former wife, now living in Austria, from his tax bill. If his former wife was still living in Germany, the applicant would have been permitted to make the relevant deductions. The German authorities argued that that case fell within the wholly internal situation as he had not exercised a right under the Treaties. However, citing

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[32] O'Leary S., 'The past, present and future of the purely internal rule in EU law', *Empowerment and Disempowerment of the European Citizen*, Liverpool University, 21 October 2010, at 2.
[33] Cases C-64/96 and 65/96 *Uecker and Janquet v. Land Nordrhein-Westfalen* [1997] ECR I-371, at para. 16.
[34] *Ibid.*, at para. 23.
[35] Case C-299/95 *Kremzow v. Austria* [1997] ECR I-2629, at para. 16.
[36] Case C-403/03 *Schempp v. Austria* [2005] ECR I-6421.

the *Chen* decision, the Court rejected the argument that the applicant fell within the wholly internal situation purely because he had not exercised his rights.[37] Due to the fact that his former wife had taken advantage of her own right of movement as a citizen under Union law, which resulted in German law having to take account of the tax regime in her host State, the applicant's situation could not be described as wholly internal.[38]

A number of cases have come before the Court dealing with national rules surrounding registering the name of children who are born and live in one Member State, but are nationals of another. In *Garcia Avello* the applicants were the parents of children with dual Belgian-Spanish nationality.[39] They wished to register the children with double-barrel surnames, comprising of both their own surnames, as is the practice in Spain. When the Belgian authorities rejected their application, they challenged this as a breach of Articles 20 and 21 TFEU.

The Court restated that Union citizenship was not meant to extend the material scope of the Treaties to areas which fell outside of their scope.[40] Significantly, the Court then determined that this was not such a situation as the children were nationals of one Member State legally living in another.[41] The situation was not wholly internal. The fact the children in question had lived all their lives in Belgium did not alter this. The Court stressed that a Member State could not attempt to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.[42] In light of this, the children were able to claim the benefit of Article 18 TFEU in conjunction with Article 20 TFEU in order to overturn the decision of the Belgian authorities.

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[37] *Ibid.*, at para. 22.
[38] *Ibid.*, at paras. 19-25.
[39] Case C148/02 *Garcia Avello v. Belgium* [2003] ECR I-11613. *See* Case C-353/06 *Grunkin-Paul* [2008] ECR I-7639.
[40] *Garcia Avello*, above note 39, at para. 26.
[41] *Ibid.*, at para. 27.
[42] *Ibid.*, at para. 28.

The impact of Union citizenship on the rights of children was examined in the *Chen* case, discussed previously at Chapter 4.5.5.[43] It will be recalled the case dealt with the refusal of the British Authorities to give a long term residence permit to a Chinese woman and her daughter, the latter of whom was born in Northern Ireland and hence acquired Irish nationality and therefore Union citizenship. One question that arose was whether the wholly internal situation covered a Union citizen who lived all her life in one Member State but was a national of another and had not exercised her freedom of movement.

Citing *Garcia Avello*, the Court distinguished the situation in which Chen found herself from the wholly internal rule, on the basis of her having been born in the host Member State but not yet having exercised her right of freedom of movement.[44] The results of these cases have led Nic Shuibhne to comment that "[...] mere possession of the passport of another Member State is enough to trigger Community protection in the host state, even without actual movement between the two states in question".[45]

It has been suggested that this case law on citizenship demonstrates that the concern of the Court has moved away from whether any movement has been undertaken by the citizen, to focusing on that citizen's future ability to move and enjoy rights.[46] As such, Union citizenship is understood to "[...] guard against potential inconveniences that might affect the (as yet indeterminate) exercise of free movement rights".[47] This is particularly clear from decisions such as *Garcia Avello* and *Rottmann*. In both cases the Court based its judgment on the general principle of Union citizenship under Article 20 TFEU rather than the free movement of citizens provision of Article 21 TFEU.[48] In both the context of national rules on

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[43] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I – 9925.
[44] *Ibid.*, at para. 19.
[45] Nic Shuibhne N., 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?', (2005-2006) 8 *Cambridge Yearbook of European Legal Studies* 187, at 195.
[46] O'Leary, above note 32, at 21.
[47] Nic Shuibhne, above note 20, at 1613
[48] *Garcia Avello*, above note 39, at paras. 26 and 30; Case C-135/08 *Rottmann* (Judgment of 2 March 2010), at paras. 42 and 44.

children's surnames in *Garcia Avello*, or the risk of losing national citizenship and consequently Union citizenship due to a fraudulent citizenship application in *Rottmann*, the Court sought to remove potential hindrance to the enjoyment of Union citizenship.[49]

O'Leary's understanding of these cases is worth stating in full:

> *Rothmann* and *Garcia Avello* suggest that triggering the protection afforded by the provisions on Union citizenship and Article 18 TFEU is not simply dependant on movement. National measures which threaten the very status of Union citizenship or render impossible or excessively difficult the enjoyment by EU nationals of the rights conferred by that status may fall foul of the Treaty provisions on Union citizenship absent any cross-border movement.[50]

The retreat from sole reliance on movement, demonstrated in the cases above, is significant for the overall status of Union citizenship and for the thesis being proposed here. It is arguably indicative of the Court moving in the direction of what some academics have proposed; that in its judgments it should combine Articles 20 and 18 TFEU to provide protection for Union citizens who have remained in their home Member State and not exercised any of the fundamental freedoms.[51]

The recent opinion of AG Sharpston in *Ruiz Zambrano* makes some radical proposals surrounding the nature of Union citizenship and the rights flowing from it, particularly in the context of non-movers in their home state.[52] At issue was the status of the Belgian born children of a Colombian couple who had unsuccessfully claimed asylum in Belgium, but had

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[49] *Garcia Avello*, above note 39, at para. 36; *Rottmann*, above note 48, at para. 56. On the interaction of national rules on names and the provisions on Union citizenship, see Case C-208/09 *Sayn-Wittgenstein* (Judgment of 22 December 2010).
[50] O'Leary, above note 32, at 29.
[51] Spaventa E., 'From Gebhard to Carpenter: Towards a (Non)-Economic European Constitution', (2004) 41 *Common Market Law Review* 743, at 769-77.
[52] C-34/09 *Ruiz Zambrano* (Opinion of 30 September 2010).

continued to live and work in the state for a number of years. The Advocate General summed up the nature of the question that was referred to the Court of Justice by stating:

> At a more conceptual level, is the exercise of rights as a Union citizen dependent – like the exercise of the classic economic 'freedoms' – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights and obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?[53]

On the question of whether movement was necessary to trigger the citizenship provisions, the situation in this case was different to that in *Chen*, as there the Union citizen was an Irish citizen living in the UK, whereas in *Ruiz Zambrano*, the children were both nationals of and resident in Belgium. In discussing the case law on Union citizenship, the Advocate General identified several cases where the movement element was either barely existent or non-existent.[54] As regards the enjoyment of fundamental rights, she stated:

> It would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free

[53] *Ibid.*, at para. 3 of the opinion.
[54] *Ibid.*, at para. 77 of the opinion.

movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when invoking EU secondary legislation (such as the services directive), but could not do so when merely 'residing' in that Member State.[55]

The Advocate General determined that, in light of the *Rottmann* and *Chen* decisions, the children fell within the scope EU law and the issue was not a purely internal one. Once they had received Belgian nationality, they also obtained Union citizenship and were entitled to exercise that citizenship.[56]

AG Sharpson went to declare that Article 21 TFEU protected a free standing right of residence, separate to the right of movement.[57] This would be enjoyed by the Ruiz Zambrano children. However, after an analysis of the family's position, the Advocate General also determined that their parents should enjoy a derivative right of residence.[58]

In contrast to the detailed analysis of the Advocate General's opinion, the Court of Justice reached the same conclusion in a much briefer manner. It restated its earlier jurisprudence about Union citizenship being the status of all nationals of the Member States and that it was meant to be the fundamental status of these persons.[59] It then stated that Article 20 TFEU precluded national measures which had the effect of depriving citizens of

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[55] *Ibid.*, at para. 84 of the opinion.
[56] *Ibid.*, at para. 95 of the opinion.
[57] *Ibid.*, at paras. 100-1 of the opinion.
[58] *Ibid.*, at para. 121 of the opinion. In the event that the Court did not pursue this approach, the Advocate General suggest another option for the applicants, and in doing so proposed a radical reworking of the law on reverse discrimination. After engaging in an extensive review of the existing case law on the point, highlighting the various inconsistencies, she went on to suggest to the ECJ that "[...] Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law". Three conditions were placed on this proposal. Firstly, the reverse discrimination would have had to be caused by the fact that Union citizens who had exercised a fundamental freedom were able to assert rights under Article 21 TFEU whereas non-moving Union citizens in their own Member State would unable to rely on national law for protection. Secondly, the reverse discrimination would have to involve the breach of a fundamental right protected under Union law. Finally, there could only be reliance on Article 18 TFEU if national law did not provide adequate fundamental rights protection.[58] C-34/09 *Ruiz Zambrano*, at paras. 144-148 of the opinion.
[59] *Ibid.*, at paras. 40-1 of the judgment.

the Union of the genuine enjoyment of the substance of the rights conferred on them by virtue of being Union citizens, citing the *Rothmann* decision.[60] This marks the clearest judicial pronouncement so far regarding the independent nature of the Union citizenship rights. The Court barely even considers the argument that the applicants were caught by the purely internal rule. The only oblique reference to it is when the Court stated that Article 3 of the Citizenship Directive could not apply to a case such as this, as that article requires the beneficiaries to have moved or resided in another Member State.[61] However, this did not act as a wider bar to the applicant's claim. The decision would appear to confirm O'Leary's argument noted above at p 219 that where there is a threat to the enjoyment of the benefits of citizenship, the Treaties offer protection even if no movement has taken place.

In light of the case law examined here, it is submitted that when undertaking an examination of the extent to which Union citizenship corresponds to the Marshallian model, it is not sufficient to confine the study solely to the treatment of the Union citizen once she has moved to another Member State (or indeed, exercised any of her fundamental freedoms). The relationship between Union citizenship and each of the three rights categories within the home Member State is also of crucial importance.

7.3.3 Civil Rights

This thesis is written under the assumption that civil rights were adequately protected by Union law prior to the introduction of Union citizenship and continue to be so. This assumption arises on a number of grounds. The Court of Justice has since *Rutili* recognised that the rights protected by the European Convention of Human Rights form part of the

[60] *Ibid.*, at para. 42.
[61] *Ibid.*, at para. 39.

general principles of Community law and as such receive protection.[62] The Maastricht Treaty reinforced the link between Union law and the extensive range of civil and political rights protected within the Convention through referencing the latter in the former Article 6 EU.[63]

On a wider point, the importance of civil rights to a functioning market economy has always been acknowledged.[64] As the European Community was founded on the basis of creating a market, it is axiomatic that civil rights were protected within it. This point is confirmed by the elevation of civil right values such as free movement and free trade to the status of fundamental freedoms.

In light of the fact that the protection of civil rights under Union law is clearly not in question and that they fall outside the broad scope of this thesis, no more extensive examination of them will be undertaken.

7.3.4 Political Rights

On its introduction, one of the new rights that Union citizenship granted was for citizens to vote and stand in European and municipal (local) elections in their host Member State. This was provided for in what is now Article 22 TFEU and was to be implemented through secondary legislation.[65] Bearing in mind the complete absence of Community law based political rights prior to the introduction of this article; its addition to the Treaties was

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[62] Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219. The Court of Justice has protected a wide range of civil rights in its judgments; see *inter alia* Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351 (right of defence); Case C-344/08 *Rubach* (Judgment of 16 July 2009) (presumption of innocence); Case 374/87 *Orkem v. Commission* [1989] ECR 3283 (protection from self-incrimination).

[63] *See* Everson, above note 20, at 75.

[64] Marshall TH., 'Citizenship and Social Class', in Marshall & Bottomore (eds.), *Citizenship and Social Class*, (Pluto Press, London, 1992), at 20-1.

[65] Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L 368/38, amended by Directive 96/30/EC [1996] OJ L 122/12; Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. [1993] OJ L 329/34.

certainly symbolically significant. While some Member States has pre-existing reciprocal voting arrangements, the creation of such Treaty based political rights, with all their connotations for any system of citizenship, have to been seen as a key component in the formation of Union citizenship.[66] Indeed, though restricted to the two forms of election explicitly mentioned, the move necessitated some Member States to change their Constitutions to provide for the new voting rights.[67] In this way the creation of political rights could, initially at least, be seen as the most tangible change that Union citizenship had brought to Community nationals when compared with the pre-Maastricht scenario.

Despite this, the political rights that citizens enjoy in their host Member State have proved to be one of the foremost sources of criticism of Union citizenship.[68] A range of problems are identified. The primary concern is that the right to vote and stand for election applies only to European Parliament and local government elections and thus excludes national elections, still the most significant form of political expression in each Member State. As such, the nature of the political rights bestowed on citizens is regarded as insufficient. Further, the poor take-up of the voting rights by Union citizens in the host Member States is also a source of concern. A question exists about whether Article 22 TFEU actually guarantees a right to vote in a citizen's own state. Finally, the secondary legislation passed permitting citizens to vote in their host Member State contains a range of derogations which enable some Member States to avoid their obligations.

The first of these two points relates to the use and benefit a Union citizen derives from the rights to vote in her host Member State. The latter two points are more pertinent to the impact of the new rights on home Member States.

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[66] See note 26 above.

[67] See Shaw J., 'Sovereignty at the Boundaries of the Polity', in Walker (ed.) *Sovereignty in Transition* (Oxford/Portland, Hart, 2003).

[68] *See* Closa, above note 10; O'Leary, above note 22; Nic Shuibhne above note 20, at 1622.

Impact of Political Rights within the host Member State

From the point of view of a traditional nation state based citizenship, the criticism regarding the inadequate nature of the political rights provided has some legitimacy. As was outlined above, one of the reasons why Union citizenship is argued to be a form of denizenship is the exclusion of citizens from the constitutional public sphere of the European Union.[69] Denying the right to vote in national elections to a proportion of the population on the basis of not sharing national citizenship would appear to break with the principle of equality of status. The concern is that the validity of Union citizenship is at stake if its beneficiaries cannot exercise the right to vote in national elections, the foremost expression of the political right in every state.

It is submitted that in order to address this point, it is necessary to look at Union citizenship in its transnational context. It is relevant to recall the words of Marshall, when he stated "[a]ll who possess the status are equal with respect to the rights and duties *with which the status is endowed* [...]".[70] The political rights which are granted by Union citizenship enable citizens influence those issues which fall within the field of Union law, but not within the field of national law.[71] By allowing Union citizens to vote and stand as candidates in European elections, regardless of what Member State they are living in, the Treaties ensure that citizens have a voice in one of the key institutions that generates legislation on almost all areas that fall within the material scope of the Treaties.[72] Each successive Treaty amendment process has seen more powers ceded to the European Parliament, which in turn makes the elections to this body more significant.

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[69] Roche, above note 6, at 8. See above Chapter 7.2.1.
[70] Marshall, above note 64, at 18 (emphasis added).
[71] "... intimately connected with a European society", Everson, above note 19, at 76. Everson makes the legitimate point that granting the right to vote in municipal elections undermines this argument somewhat in that these do not bear the same connection to European issues as European Parliament elections do.
[72] See Chalmers et al, above note 4, at 94.

As already discussed, Union citizenship is stated to be "complementary" to national citizenship, not an effort to replace it. Giving Union citizens full voting rights in their host Member States would severely undermine the distinction with national citizenship.[73] The status of Union citizenship as it currently stands has not been broadened to include rights to vote in general elections dealing with national issues outside the scope of the Union's competences. While there continues to be pressure to allow Union citizens the right to vote in national elections, it is submitted that the political rights that Union citizenship already confers give citizens the ability to influence the political discourse and legislative direction of the EU, no matter where they may be living.[74]

It could be pointed out that the national government in whose election the Union citizen is not entitled to vote will still have influence in the operation of the EU through its seat on the Council of Ministers. As such, the Union citizen in a host Member State is denied a voice here. In response, it is argued that were a comparison to be drawn between the Council of Ministers and European Parliament aspects of the Union Legislature and a traditional bi-cameral legislature, it is not unusual for sections of a national population to be deprived of a say in the composition of one of the houses of parliament.[75] As such, the fact that a Union citizen cannot influence Union politics through voting in the national election of a host state does not "[offend] both the spirit and substance of constitutional market citizenship [...]" but is in fact representative of the notion of political rights at EU level.[76] Indeed, Article 10 TEU makes it clear that Union citizens are represented by the European Parliament, while the Council and the European Council represent the Member States, to whose parliaments and citizens they are accountable.[77]

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[73] Some authors have argued that full voting rights in national elections could be an eventual consequence of European integration. *See* Meehan, above note 9, at 150.
[74] *See* the view of the European Commission COM/2002/260.
[75] The House of Lords in the United Kingdom, the Seanad in Ireland.
[76] Nic Shuibhne, above note 20, at 1622.
[77] Article 14(2) TEU describes MEPs as "representatives of the Union's citizens".

Regarding the point about concerns surrounding the exercise of the new political rights, surveys undertaken by the Commission after successive European Elections have indicated that the number of citizens taking up their right to vote in their host Member State has been small.[78] This remained the case even after the 2004 Accession, when a large volume of nationals from the new Member States spread across the Union. Disappointing as this failure of Union citizens to use their newfound rights is, it cannot be said to undermine the theoretical basis for the existence of political rights as an aspect of Union citizenship.

Political Rights in the Home Member State

The implications of the introduction of these political rights for Union citizens remaining in their own Member States are fairly minimal. However, as noted above, some Member States did need to undertake constitutional amendments in order to permit Union citizens to exercise their franchise in these two sets of elections.[79]

Article 22(2) TFEU provides for derogations from the voting and standing rights where this is warranted by problems specific to a Member State. Such derogations are laid out clearly within the secondary legislation and only apply when a certain threshold of the registered voters are not nationals of the Member State. In the case of the Directive on Municipal Elections, the threshold for non-national Union citizens living in the state had to be over 20%.[80] In the case of that directive, only Belgium originally sought the derogation. It is submitted that in view of the considerable change that the political rights aspect of Union

[78] EC Commission, On the Application of Directive 93/109/EC to the June 1999 Elections to the European Parliament, COM (2000) 843.
[79] See note 67 above.
[80] Article 12, Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L 368/38.

citizenship has brought about, by allowing non-nationals vote in their host Member States, a minor derogation of this nature is not enough to undermine the new right.

While Article 22 TFEU grants the right to vote and stand to a person who has exercised their right to move to another Member State, it is silent on the home state voting rights in European elections of the Union citizen who has not exercised her right of freedom of movement. This issue came before the Court in a pair of cases concerning the legality of the extension by the British Government of the right to vote in European Parliament elections to residents of the territory of Gibraltar; *Spain v. UK* and *Eman & Sevinger*.[81] In his opinion in *Spain v. UK*, AG Tizzano stated that while no provision of the Treaties directly gave Union citizens the right to vote in European elections, "[Article 22(2) TFEU], by allowing the citizens of a Member State to vote in European elections in another Member State in which they reside on the same basis as citizens of that State, in any event takes it for granted that the right in question is available to citizens of the Union".[82] The Advocate General also based the right to vote on the principles of democracy upon which the EU is based and the principle of universal suffrage.[83]

The Court of Justice addressed this issue by stating that Article 22(2) TFEU "[...] implies that nationals of a Member State have the right to vote and to stand as a candidate in their own country and requires the Member States to accord those rights to citizens of the Union residing in their territory [...]".[84] This would suggest that Union law requires a Member State to allow its own nationals, and therefore Union citizens, to stand and vote in European elections. As the Court also accepted that the definition of who can vote and stand in a European election is a competence of the Member States, it is interesting to surmise what would happen if a Member State passed legislation precluding a certain section of the

[81] Case C-145/04 *Spain v. UK* [2006] ECR I - 7917; Case C-300/04 *Eman & Sevinger* [2006] ECR I-8055.
[82] *Spain v. UK*, above note 81, at para. 68 of the opinion.
[83] *Ibid.*, at para. 69 of the opinion.
[84] *Ibid.*, at para. 76.

national population from voting or standing, outside of legitimate restrictions such as age or mental capacity.[85]

What is perhaps even more interesting is that in the same paragraph, the Court compared the position of European elections under Article 22(2) TFEU with municipal elections under Article 22(1) TFEU. The way in which the paragraph is structured clearly suggests that the Court also holds that Union citizens have a right to vote and stand in municipal elections, whether in a host Member State or their own. This again raises the interesting legal question of whether it would be a breach of Union law if a Member State restricted those who could vote in a municipal election or indeed, decided not to hold the elections at all.[86]

7.4 Concerns surrounding Union Citizenship as a valid form of Citizenship

Having established how Union citizenship applies within the EU, it is necessary to examine whether it meets the requirements of the Marshallian model. However, before undertaking this, it is first important to address two arguments put forward stating that Marshall's approach is not suitable for use in conjunction with Union citizenship; firstly because his evolutionary approach does not coincide with the development of Union citizenship and secondly that Union citizenship is inherently exclusionary in nature.

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[85] An example of such a situation where a gap arises in relation to who a Member State regards as being entitled to vote occurred in relation to the slowness of the British Government to respond to *Hirst v. UK (No.2)* [GC] no. 74025/01 (2004) 38 EHRR 40, the decision of the European Court of Human Rights that prisoners should be entitled to vote.

[86] In 1996, the Irish Government decided not to hold the scheduled local elections and instead postponed them for three years to run in conjunction with the 1999 European Elections.

7.4.1 Applicability of the Marshallian model to Union citizenship

Geddes is sceptical about any attempt to apply the Marshallian model of citizenship to Union citizenship. He notes firstly that Union citizenship cannot replicate the formation of a nation state, as the EU lacks "agents of socialisation" like a common church, an army or school system.[87] The second concern is that the sequence in which rights of citizenship have been received is different to that portrayed by Marshall. As such, Union citizens in most host Member States have received more in the way of social rights than political rights.[88]

It is submitted that the second criticism misses the wider point about the Marshallian model. It has been accepted here and in other sources already discussed that the relevance of the model is not in the context of the evolutionary theory regarding when various rights developed. The key value of the Marshallian model is the normative arguments it makes about the place of equality of status in the development of citizenship and the need to have social rights protection as a key element in any valid form of citizenship.

The argument about agents of socialisation falls outside the scope of this particular thesis. However, before moving away from it, it is noted; firstly, that the European Union is not a nation state and the social bonds between its citizens may be of a different nature; secondly, there are common European agents, such as the Euro or the Schengen free travel area, that remind Union citizens of their commonality. Added to these tangible benefits, the Union has resulted in the creation of common values, rights and legal frameworks which all citizens benefit from.[89]

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[87] Geddes A., *Immigration and European Integration: Towards Fortress Europe?*, (Manchester: Manchester University Press, 2000), at 56.

[88] Geddes, above note 86, at 57. These points are reiterated by Dell'Olio F., 'Supranational undertakings and the determination of social rights', (2002) 9 *Journal of European Public Policy* 292, at 294

[89] Amtenbrink F., 'Europe in Times of Economic Crisis: Bringing the Union Closer to its Citizens?', *Empowerment and Disempowerment of the European Citizen: The Citizen's Policy Agenda?* (University of Edinburgh, 10 December 2010), at 3. *See* generally on this point Closa C. 'Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution', (2005) 11 *European Law Journal* 411.

7.4.2 Union citizenship as an exclusionary devise

One of the arguments made as to why Union citizenship does not meet the criteria of the Marshallian model is that it creates or maintains an exclusionary stance between the economically active and inactive. The basis of this exclusionary argument is that Union citizenship "[...] perpetuates and legitimises certain inequalities of opportunity against and between Community nationals".[90] Chalmers posits that this division "[...] compromises the unitary nature of citizenship, namely that all holders should be subject to the full rights and obligations of membership".[91] Extensive emphasis has already been placed on the concept of equality of status being the basis of citizenship under the Marshallian model in Chapter 2, along with the significance of the role Union citizenship played in breaking down the need for economic activity, highlighted in Chapter 5. In light of these positions, should it be proven that the benefits of Union citizenship to persons in another Member State can only ever be enjoyed in a conditional manner by those who are not economically active, this would have the crucial effect of undermining the thesis that Union citizenship can been seen as reflecting the Marshallian model. This section will examine the case law for evidence that the exclusionary approach does exist. It will then be argued in Chapter 7.5 that in the context of individual citizens in a host Member State, Union citizenship and the related case law and secondary legislation cannot be said to operate as a device of exclusion.

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[90] Dougan M., 'Free Movement: The Work Seeker as Citizen', (2002) 4 *Cambridge Yearbook of European Legal Studies* 94, at 131. For more on the argument that Union citizenship is exclusionary in nature, see Roche above note 6.

[91] Chalmers, above note 4, at 572. This argument was made in the 1st Edition of the book and is not directly repeated in the 2nd Edition. Chalmers also argued that the exclusion of non-EU nationals from Union citizenship is a form of exclusion. While the legitimacy of the exclusion of this body of persons is a valid question, it is submitted that it does not undermine the concept of Union citizenship as a citizenship. For more see Oliveria, 'The position of resident third-country nationals: It is too early to grant them Union Citizenship?', in La Torre, above note 2; Closa, above note 10, at 496.

Evidence for the exclusionary argument

Probably the most persuasive evidence pointing towards the validity of the exclusionary argument are the decisions regarding the use of the economic risk conditions in conjunction with Article 21(1) TFEU. As was illustrated in Chapter 4.3, the Court of Justice determined in *Baumbast* that it was appropriate to use the economic risk conditions, drawn from pre-citizenship secondary legislation, to fill out the meaning of the phrase "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect" in Article 21(1) TFEU. The Court did explicitly state that Union citizenship meant a departure from the need for some sort of professional or trade activity in order to benefit from EU law rights.[92] But the adoption of the sufficient resources and health insurance criteria confirmed that those seeking direct application of Article 21(1) TFEU need to be in a position to provide for themselves from their own resources to a considerable extent.

Article 21(1) TFEU makes it clear that the right of movement and residence is not unlimited. As such, the imposition of some limitations on its enjoyment was legitimate. Presumably, the Court felt it had the duty to act and attach some conditions via its decisions in light of the failure of the Union legislation at that stage to pass legislation clarifying the citizenship provisions. However, it could be argued that the strength of these conditions in requiring economic resources on the part of the Union citizen is also their weakness. Nic Shuibhne's point about the reluctance of the Court of Justice to allow the use by a Member State of economic arguments to avoid its Treaty obligations has already been referred to.[93] Opposed to this, the economic risk conditions had been generally used in the past in the Residency Directives, so it is perhaps unsurprising that the Court chose these to act as limits

[92] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, at para. 83.
[93] *See* Chapter 4.5.6. Nic Shuibhne, above note 45, at 209.

on the movement and residency right. However, the repetition of the economic risk criteria in the Citizenship Directive demonstrates that the Union Legislature wished to see these controls maintained and represents an endorsement by it of the actions of the Court.[94]

Arguably, the *Trojani* decision is the best illustration of the position that Union citizenship is exclusionary in nature.[95] The circumstances of a man denied the ability to avail of residency in a host Member State on the basis of not having sufficient resources to meet the economic risk conditions clearly sets out the outer boundary of Union citizenship.[96] In dismissing the applicant's argument, the lack of a rigorous analysis of his circumstances was particularly noticeably. The approach provides a strong contrast with that in *Baumbast* and *Chen*, were the Court was content to allow the arguments from applicants who were clearly of a relatively wealthy nature. As such, the case illustrates the continued exclusion that can result from the application of the economic risk conditions, and raises legitimate questions about whether Union citizenship is exclusionary and thus, a genuine form of citizenship.

7.4.3 Case against the Exclusionary Argument

Despite these concerns regarding whether Union citizenship acts in an exclusionary manner, it is submitted that both the changes brought about to the position of Union citizens in a host Member State, and the avenues that it opens to them in the context of social rights, equates with the form of citizenship as proposed by Marshall. This will be demonstrated primarily through the Court of Justice's interpretation of the citizenship provisions which have added complexity to the case law. It will be shown that these decisions have for the most part enhanced the protections available to citizens and limited the ability of the Member States to

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[94] Article 14. *See* Chapter. 5.2.2.
[95] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* (CPAS) [2004] ECR I-7573. *See* further discussion in Chapter 4.5.4.
[96] *Ibid.*, at para. 33-36.

deny them benefits or exclude them from that state. The Court has employed a range of techniques to achieve this, some of which could have significance for the Union's constitutional order. The Union Legislature has responded to these developments, and while it is accepted that it has not acquiesced with all aspects of the Court's approach, it will be argued in the following section that the combination of case law and legislation results in a form of citizenship which protects individual social rights and is both unified and based on equality of status.

Before undertaking this, it is relevant to note in relation to the Chalmers quote above that citizenship under the Marshallian model is not considered to be a unitary status.[97] Rather, it is described as unified, with the various aspects of this being outlined in Chapter 2. As such, Chalmers' argument on the exclusionary point is immediately compromised as his understanding of what constitutes a valid citizenship is based on a unitary form which does not adhere to the Marshallian model.[98]

New Conceptual Approach to Assessment

It was noted in the discussion of *Baumbast* in Chapter 4.3 that the manner in which the Court approached its analysis of the economic risk conditions has changed as a result of the introduction of Union citizenship. The right of residence is now regarded as being inherent to persons who are Union citizens and, though it can be limited by conditions, it is from this initial point that any investigation of their status must proceed. This new conceptual approach was applied in *Trojani*, though obviously in that case it was unsuccessful on the relevant point.[99] The significance of this changed conceptual approach has already been examined in

[97] Chalmers., above note 4, at 572.
[98] Turner also rejects the notion that citizenship has to be unitary; Turner B, *Citizenship and Social Theory*, (Sage Publications, 1993), at 10-11.
[99] *Trojani*, above note 94. at para. 31-32.

Chapter 4.6. It has allowed the Court of Justice to develop its line of jurisprudence around financial solidarity and the application of the proportionality principle.

Principle of Financial Solidarity

It is submitted that the concept of financial solidarity between Member States, first enunciated in *Grzelczyk*, is one of the strongest manifestations of the unified nature of Union citizenship and also of considerable constitutional significance. It allows the Court of Justice scrutinise the application of provisions of national law to Union citizens in a host Member State. The Court and Advocates General have shown their willingness to use the concept to strike down such national rules or administrative decisions, even though they may be in compliance with Community secondary legislation.[100]

This final point was made strikingly by AG Geelhoed in his opinion in *Bidar* when he demonstrated that the principle of financial solidarity could entitle a student studying in a host Member State for a period of time to the same type of financial assistance which nationals of that state receive, even though this was clearly in breach of the relevant legislation; Article 3 of the Student Residency Directive.[101] Even though the Advocate General stated that such a situation would only occur in "exceptional" circumstances, the principle he created had the potential to be of significant benefit to persons like those in *Bidar* or *Grzelczyk* who had a long term involvement in their host Member State but may have encountered financial difficulties.

It is submitted that the financial solidarity innovation proposed by AG Geelhoed has basically been adopted by the Court of Justice in it judgment in *Forster*. While accepting that Article 3 of the Student Residency Directive excluded a right to maintenance grants, the

[100] See generally Dougan, above note 89.
[101] Case C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119. at para. 45 of the opinion.

Court nevertheless stated that the provision did not stop a student who was lawfully living in the host Member State through Article 21 TFEU, from enjoying the protection of Article 18 TFEU.[102] This suggests that Article 18 TFEU could be used in order to achieve equality of treatment with home state nationals in obtaining a maintenance grant, despite the existence of the clear prohibition contained in the secondary legislation. While the Court made it clear that the Member State could impose conditions on this, it is argued that the decision confirms Dougan's conception of Article 21 TFEU as creating the conditions for "[...] a new balance between the public and private interests at stake in the regulation of free movement rights [...]".[103]

The relationship between this principle of financial solidarity and the proportionality principle has already been discussed in Chapter 4.6.3. While it is accepted the decision of the Court in *Forster* did not explicitly refer to the principle of financial solidarity, unlike the Advocate General's opinion in *Bidar*, nevertheless it is argued that it serves the same basic purpose. These judgments indicate that Union citizenship represents a strengthening of the position of the individual citizens vis-a-vis her host Member State in the field of seeking study finance.[104]

Protection under Article 18 TFEU for existing residents

The ability to rely on the provisions of Article 18 TFEU in all situations falling within the scope of Union law is of major significance to Union citizens in host Member States. First declared in *Martinez Sala*, it allows a citizen who moved to another Member State on non-

[102] Case C-158/07 *Forster v. IB-Groep* [2008] ECR I-8507, at para. 43-44.
[103] Dougan, above note 89, at 625.
[104] *See* Barnard C., Case C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*, (2005) 42 *Common Market Law Review* 1465, for an argument why the Court of Justice would not take such an approach. Obviously this case note was written before the *Forester* decision.

economic grounds the ability to enjoy all rights that a national of that state enjoys, including all social rights.[105] This represented a fundamental change in the approach of the Court to the position of economically inactive Community nationals living legally in Member States for reasons outside of the scope of EU law. Through one decision, all of these were given the same equal treatment rights as workers and the self-employed.

The significance of this development is demonstrated in *Trojani* where, despite rejecting the applicant's claim to residency under Article 21(1) TFEU, the Court determined that as a result of his lawful residence in the Member State under a provision of national law, he was still entitled to equal treatment under Article 18 TFEU.[106] As such, he could make a claim for the social welfare payment in question. This was so despite the fact that he was not engaged in economic activity.[107] While a Member State could decide that recourse to national social welfare meant that the Union citizen was now in breach of his residency conditions, the Court noted that it had already determined in *Grzelczyk* that this could not happen as an automatic consequence of recourse.[108] The result of the *Martinez-Sala* decision means an elevation in the status of Union citizens legally living in a host Member State and an entrenchment of their rights.

Recourse to social security does not result in automatic expulsion

It has already been shown how the economic risk conditions were implemented prior to the Maastricht Treaty in order to give host Member States some ability to control the accessibility of their markets to Community nationals. It was noted that this had the potential to be divisive in the context of a model of citizenship. However, the case law demonstrates

[105] Case C-85/96 *Martínez-Sala* [1998] ECR I-2691, at para. 61-63.
[106] *Trojani*, above note 94. at para. 40.
[107] *Ibid.*, at para. 43.
[108] *Ibid.*, at para. 45. Discussed further below.

that the Court has ruled to curb the ability of Member States to themselves limit the rights of non-economically active Union citizens within their territory. This is illustrated by the Court's decisions on how a Member State may react if a Union citizen is found to be in breach of one of the economic risk conditions.

In *Grzelczyk*, the Court determined that recourse to the social security system of the host Member State, which indicated an inability to meet the sufficient resources criteria of Directive 93/96, allowed a Member State to determine that the requirements of the directive were no longer being met. This would permit, within the boundaries of Union law, either the withdrawal of the residence permit or a refusal to renew it.[109] It is submitted that this aspect of the decision was unsurprising; a failure to meet one of the conditions justified the withdrawal of the permit, within the limits of Union law. However, the Court then went on to state that in no case could the withdrawal of residency rights of a student be the automatic consequence of making a claim on the host State's social security system.[110] The Court justified this position by making reference to the fact that Recital 6 of the Directive spoke about a person not becoming an 'unreasonable' burden on the finances of the host Member State and that that suggested a degree of financial solidarity between the nationals of the host Member State and the nationals of the other Member State.

While the wording the Court used in *Grzelczyk* referred specifically to a student, and as such could justify the point on no automatic expulsion being limited to Directive 93/96, the decision was subsequently used in *Trojani* in the context of a Union national living legally in a host Member State.[111] As will be recalled, the scale of the applicant's lack of resources was significantly greater in that case than in *Grzelczyk*, but nevertheless the tenor of the Court's

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[109] C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at 42.
[110] *Ibid*, at 43.
[111] *Trojani*, above note 94, at 45.

judgment is one that is supportive of the applicant's ability to remain within the Member State.

This final line of protection that the Court of Justice has created for Union citizens in financial difficulties has subsequently been incorporated into the Citizenship Directive in Article 14(3). Further detail on how it operates is expressed in Recital 16, where as discussed in Chapter 5.4, the legislation sets out the range of factors that the Member State should examine to determine if the financial difficulties being faced by the citizen are temporary in nature. This will lead to an assessment of whether the citizens had become an unreasonable burden. Neither the case law nor the Directive acts as a complete protection for the Union citizen. However, they do serve as a further example of how the introduction of Union citizenship has required Member States to treat Union citizens from other countries in an increasingly similar manner to their own citizens in the area of social benefits.

Further Limitations on host Member State

The primary argument against extending full social rights to all Union citizens across the EU is that there is often an insufficient connection between them and their host Member State to legitimately allow them make claims on the national finances of the country.[112] Chapter 4.4 demonstrated how Member States often tried to limit the claims that could be made by implementing national conditions mandating some link between the applicant for a social support payment and that Member State, such as habitual residency requirements or having received secondary education in the host Member State.[113] Union citizens now enjoy the

[112] De Burca G., 'Towards European Welfare', in De Burca G., (ed), *EU Law and the Welfare State: In Search of Solidarity*, (OUP, 2005), at 3 – 4.

[113] See *Bidar*, above note 100; Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191. See O'Brien C., 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity', (2008) 33 *European Law Review* 643.

protection of the non-discrimination clause under Article 18 TFEU. A consequence of this is that the Member State cannot tie receipt of a payment to the claimant's nationality.

In this way, the introduction of Union citizenship has further complicated the ability of the Member States to apply limitations. In *D'Hoop*, the requirement that a person received their secondary education in the host Member State in order to prove a link between the tide-over allowance sought and the employment market of that Member State was considered too general and exclusive and not adequately reflective of the degree of connection between applicant and job market. In *Collins*, the proportionality test was applied to a requirement that a person applying for a job-seekers' allowance had to be able to demonstrate a link to the employment market of the Member State.[114]

The impact of Union citizenship on national conditions is most clearly illustrated in *Bidar*. In its decision on British regulations for access to student loans, the Court looked at two factors. As in *D'Hoop* and *Collins*, the applicant's link to the host Member State, as demonstrated by his degree of integration there was considered. This was determined in light of the length of his residence there.[115] Secondly, the Court, citing *Grzelczyk*, also undertook an examination to ensure that whereas the host Member State did show some degree of financial solidarity to the applicant, it was entitled to protect itself from a situation where claims from Union citizens for maintenance support would become an unreasonable burden and thus reduce the overall amount of assistance that the state could afford.[116] In the view of the Court, the fact that the three year residency requirement contained in the British rules was not met if those three years were spent in education meant that it was almost impossible to prove sufficient integration into the host state. As such, the regulations were not justified in light of the legitimate objective of the Member State.

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[114] *See* O'Leary above note 23.
[115] *Bidar*, above note 100, at 58-9.
[116] *Bidar*, above note 100, at 56. The use of the terms financial solidarity and unreasonable burden here is in a somewhat different context to their use in the opinion of the Advocate General as discussed in Ch 4.6 and Ch 6.

These cases all demonstrate the significant constraints that host Member States face in attempting to implement any limiting conditions on access to social benefits. This difficulty is directly attributable to the introduction of Union citizenship. The decisions highlight the difficulty that a Member State faces in attempting to prove that an individual has become an unreasonable burden on its finances. It has been argued that it will be almost impossible to show this to the satisfaction of the Court, particularly as one extra claimant cannot be proven to move a nation's financial system from surplus to deficit.[117] Another problem arises in that while the outcome of these cases may have widespread implications for the funding of national social provision schemes, the Court of Justice generally makes its decisions on the basis of the individual claimant before it in each case. There has been little consideration by the Court of the macro-economic funding issues that flow from its judgments.[118]

7.4.4 Citizenship Directive and the exclusionary argument

The case law examined in the previous sections has highlighted the extent of the change that the introduction of Union citizenship has brought to the manner in which a Member State can treat Union citizens within its territory. The response of the Union Legislature must now be assessed to ascertain whether this has addressed or indeed increased the alleged exclusionary nature of Union citizenship. As was demonstrated in Chapter 5.3, the Directive would appear to both codify aspects of the Courts case law, but also to attempt to reduce the scope of some of the decisions to the detriment of the rights of citizens. Obviously, the impact of its most significant innovation – the introduction of the permanent right of residence – must also be examined.

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[117] Hailbronner K., 'Union citizenship and access to social benefits', (2005) 42 *Common Market Law Review* 1241, at 1261; Golynker O., 'Student Loans: the European concept of social justice according to *Bidar'*, (2006) 31 *European Law Review* 390, at 399.
[118] Nic Shuibhne, above note 45, at 222.

The consequences of the Directive for job-seekers were previously discussed in Chapter 5.3.1. The analysis concluded that this group can perceive gains and some losses from its provisions. The gains come in the shape of the confirmation of the *Antonissen* 'window', allowing them remain in a host Member State as long as they can prove they are actively seeking work and have a genuine chance of obtaining it. Nonetheless, the application of the derogation in Article 24(2) in conjunction with the provisions of Article 14(4)(b) means that the Member State is not obliged to grant them any social welfare supports during this period, up until they can claim the permanent right of residence. However, the *Vatsouras* case demonstrated that this exclusion would not include social payments related to promoting labour market access. Looking at this from a theoretical perspective, while the Directive confirms the civil rights aspects of the case law, it does slightly roll back the availability of social benefits.

As regards students, the outcome of the Article 24(2) derogation poses a challenge for the financial solidarity/proportionality approach that has been demonstrated to stem from the case law. As discussed in Chapter 5.3.2, the outcome of the provision is that students who are in a host Member State do not have a right to claim maintenance support until such time as they have attained the permanent right of residence. As such, the student must be living in the host Member State for a five year period. The rigid nature of this provision seems to be contrary to the principle of financial solidarity, with its notions of requiring flexibility on the part of the host Member State to the needs of a student falling on temporary hardship. While the applicant in *Bidar* would have been entitled to permanent residence under the Citizenship Directive as a result of living in the UK for over five years, and therefore avoided the application of Article 24(2), the applicant in *Grzelczyk* had lived in the host Member State for just over three years. In the event, the Court decided that the minimex payment he was seeking fell under the category of a social welfare payment and thus would not have fallen

with the provision of Article 24(2). However, had Grzelczyk claimed for an actual maintenance support payment, he would not have been entitled to it under the provisions of the new Directive.

To date, the Court has only considered the relevant provisions in its decision in *Forster*. As will be recalled the facts of the case pre-dated the Directive, but nevertheless the Court felt it appropriate to comment on the potential impact of Article 24(2). In favourably comparing the five year national residency condition at issue to the five year residency requirement for permanent residence contained in Article 16 of the Directive, the Court would appear to give its blessing to the provision of the Directive.[119]

It is worthwhile to speculate about what the Court's reaction would have been to a student who had studied and lived in a host Member State for four and a half years, but then, due to a change in circumstances, had been forced to seek maintenance support for the final six months of study. In its decision in *Forster* the Court indicated that Member States should feel free to offer maintenance support to non-national students at an earlier date than the five year limit. In such a hypothetical situation outlined above, the Court could have accepted that the line had been drawn at five years by the Union legislature and, despite its arbitrary effect in this case, ruled that the student had no recourse. Alternatively, the Court could have invoked the language of the citizenship cases from *Grzelzyk* to *Forster* and sought to use the financial solidarity/proportionality principle to make an exception in such a 'deserving' case.[120]

[119] *Forster*, above note 111, at para. 55.
[120] See Dougan, above note 89; O'Gorman R., 'The Proportionality Principle and Union Citizenship', Edinburgh Mitchell Working Papers Series, 1/2009 (Europa Institute, University of Edinburgh).

Permanent right of residence

It has already been argued in Chapter 5 that the most significant aspect of the Citizenship Directive is the creation of a permanent right of residence in a host Member State.[121] By establishing this status, the Union Legislature achieved a long held goal that had been pursued at various levels across a number of decades.[122] Recital 17 describes the benefits of the new permanent right as being to strengthen the feeling of Union citizenship and promote social cohesion.

It is submitted that these various objectives are achieved by the new status. It allows Union citizens full access to all the social entitlements enjoyed by nationals of the host Member State. It eliminates the need to comply with the economic risk conditions and as such, sees the final removal of any barriers to full integration on the grounds of economic status. As such, it achieves full equality of status for Union citizens in all areas falling within the scope of Union law.

Clearly, this new right does not exist immediately, but rather evolves over a period of five years during which the Union citizen does enjoy a status, but one which is still bound by conditions. As such, enjoyment of the full citizenship rights through the permanent status comes about as a consequence of living like a citizen in the host Member State, presumably contributing somewhat to its economy and life, while at the same time not being a burden on it. This has been described as an 'affiliation model'.[123] The provision is described as creating a new concept of social solidarity which grows according to the length of the citizen's

[121] Article 16.
[122] See Chapter 3.9.1.
[123] Golynker, above note 13, at 118, citing Motomura, "Alienage Classifications in a Nation of Immigrants: Three Models of 'Permanent' Residence" in Picus (ed.), *Immigration and Citizenship in the 21st Century* (1998), at 207.

residence in the host Member State to a stage where it is regarded as creating a genuine link with the host society sufficient to require the state to provide full social support.[124]

It is argued here that this permanent right of residence is the final desired status of Union citizens living in a host Member State, outside of taking on the nationality of that state. By providing full and unconditional protection for social benefits on the same basis that these are granted to Member State nationals, the right of permanent residence has addressed the argument that Union citizenship was exclusionary on this point. Further, it manifests, in the individual social sphere, the vision of an ideal citizenship that is promoted under the Marshallian model.

7.4.5 Rejecting the exclusionary argument

It has been shown here that an overall consideration of the Treaty provisions on Union citizenship, the resulting case law and the Citizenship Directive all point to a rejection of the exclusionary argument. Despite a number of legitimate reservations, Union citizenship represents a fundamental shift away from its purely economic origin towards a model that places a value on the individual citizen.[125] It is submitted that this is being done primarily by giving a degree of recognition to each of the three rights elements of citizenship, within the institutional framework that has been created.

Arguably, it is not only legitimate, but also appropriate for Member States to require some amount of time to pass before being required to implement full social integration of migrants. During this period, real bonds of affiliation can develop. This concept that a genuine form of citizenship must be more than just based on a notion of labour market

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[124] Golynker O., 'Student Loans: the European concept of social justice according to Bidar', (2006) 31 *European Law Review* 390, at 397.

[125] Hofmann R., 'German Citizenship law and European Citizenship: Towards a special kind of dual nationality?', in La Torre (ed.), above note 2, at 154.

activity and move towards a wider concept of social contribution is something that continues to develop in academic discourse.[126] The reasoning behind this is that a community based solely or primarily on individual market contributions would be seen as "[...] primarily self-serving in nature, and [would be] unlikely to create the necessary commitment to political community traditionally associated with citizenship".[127] As such, not only should Union citizenship be aimed at getting the Community national past the situation where she enjoyed rights merely in the capacity of units of a production factor,[128] but the Union citizen's commitment to the host Member State should be demonstrated by residence and contribution (though not necessarily directly monetary) to that Member State. This in itself will lessen the argument that Union citizenship is being abused by techniques like welfare tourism etc.

Having rejected these arguments against the compatibility of Union citizenship with the Marshallian model, it is now necessary to compare the two to see if the various elements described in Chapter 2 be identified within Union citizenship; a unified form of citizenship based on the interconnection between the different strands of rights, with the theoretical underpinning of the principle of equality of status and leading to an ideal version of citizenship that includes the protection of social rights.[129]

7.5 Unified Concept

In order to prove that Union citizenship can be understood according to the Marshallian model, it is firstly necessary to demonstrate that it is a unified concept. This position is

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[126] Ackers L. & Stalford H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (2004, Ashgate), at 5.
[127] Chalmers, above note 4, at 572.
[128] *See* Mancini, G.F., 'The Making of a Constitution for Europe', (1989) 26 *Common Market Law Review* 595, at 596.
[129] Lister M., Marshall-ing Social and Political Citizenship: Towards a Unified Conception of Citizenship, *Government and Opposition*, 471 at 476-8.

important as it indicates that due to its unified nature, there is no requirement for perfect symmetry regarding the different rights protected – "[t]he precise nature of the relationship between rights is not predetermined".[130] This then gives a degree of flexibility as regards the actual level and variety of protection that the institution may provide, while at the same time allowing it to be described as citizenship. This means that the word does not actually encapsulate a prescribed set of rights that belong to each 'citizen', but rather is the name given to the sum of those rights, whatever that sum may be, which applies to all those considered to be 'members of a community'.[131]

It could be said that it is difficult to argue that Union citizenship demonstrates this unified concept in light of the fact that it is being examined in two different contexts; the rights of Union citizens in their home Member State and in a host Member State. However, since this transnational and complementary form is the reality of Union citizenship, this is the context in which the analysis must take place.

7.5.1 Applying the Practical Argument in the host Member State

Marshall's initial argument in favour of a unified citizenship involved illustrating how in practical terms, the full enjoyment of one set of rights was bound up with the availability of the others. As such, he used the example of the need for publically supplied education (a social right) to be able to enjoy wider civil rights, and the need for free legal aid (a social right) to enjoy access to the courts (a civil right).[132]

This practical need to extend the protection from one rights sphere to another can also be witnessed in the case law of the Court of Justice. In *Collins*, the Court reversed previous

[130] Lister, above note 128, at p 477.
[131] Nic Suibhne states that "... there can be versions of citizenship, within which different elements are highlighted, configured or emphasised in different ways, to explain different social and historical contexts, or to fit different ideological or philosophical perspectives". Nic Shuibhne, above note 20, at 1600.
[132] Marshall, above note 61, at 16 and 36-39.

decisions and held that the introduction of Union citizenship meant that it was no longer possible to deny access to a job-seekers allowance (a social right) to someone who was looking for a job (a civil right), on the grounds of nationality.[133] In *Trojani*, it was shown how the applicant's failure to be recognised as having a right of residence under Union law (a civil right) had resulting consequences for his ability to claim a welfare payment (a social right).[134] Obviously in cases like *Grzelczyk* and *Bidar*, the ability to gain one type of social right (a social welfare payment and a student load respectively) was necessary to avail of another social right (education). These cases illustrate on the part of the Court of Justice a comprehension about the interaction between the social, political and civil rights sphere and the extent to which the introduction of Union citizenship has brought them closer together. While none of them touch on political rights, it should be noted that Recital 3 of the Directive on the Right to Vote and Stand in Municipal Election describes the right to vote and stand in the host Member State as a corollary of the right to move and reside under Article 21 TFEU.[135] Here again, the linkage between the different rights elements is apparent.

7.5.2 Applying the Practical Argument in the home Member State

The practical argument for unified citizenship in the context of the home Member State is linked to wider arguments about legitimacy and popular responses to greater integration. One of the foremost political critiques of the EU is that it allows values maintained by the Member States to be superseded in light of Union values, primarily the fundamental freedoms. While the general public may not categorise rights in spheres such as civil, social etc, polls undertaken in Ireland after the first Lisbon Referendum demonstrate there was a

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[133] Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I -2703, at para. 63-4.
[134] Trojani, above note 94. at para.
[135] Article 12, Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L 368/38.

concern that further European integration was resulting in 'workers' rights being sacrificed for the sake of 'big business', and this formed part of the basis for the rejection of the Treaty.[136]

This illustrates a growing, if still incomplete, consciousness about the direction being taken by the Court of Justice in its rights jurisprudence as outlined in Chapter 6. Similar concerns were recorded in the wake of the defeat of the earlier Constitutional Treaty in referenda in the Netherlands and France.[137] It has been observed that public acceptance of the EU depends on a feeling that it reinforces their economic and social security in the national context.[138] The fact that worries about the perceived interference by the EU with national social rights formed so prominent a basis for the loss of these referenda, particularly in France, demonstrates that citizens of Member States require real assurance that the social rights that they value at national level will enjoy an equality of status with the civil/economic rights that that Treaties already guarantee.

7.6 Equality of Status

Within the major accounts, equality of status is seen as a key defining characteristic of citizenship.[139] Therefore it must be examined whether this common factor can be discovered as being present within Union citizenship. Equality of status is measured in the enjoyment by

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[136] MacCarthy-Morrogh J., MacCarvill B. & Moran P., *Post Lisbon Treaty Referendum Research Findings September 2008* (Millward Brown IMS), at 4.

[137] In France, 19% of 'No' voters cited 'Economically speaking, the draft is too liberal' as among the reasons for rejection the Constitutional Treaty. 16% cited 'Not enough social Europe'. Flash Eurobarometer 171, The European Constitution: post-referendum survey in France. [Fieldwork: 30/31 May 2005, Publication: June 2005], European Commission, at 18. In the Netherlands, 5% of 'No' voters cited 'Economically speaking, the draft is too liberal' as among the reasons for rejection the Constitutional Treaty. 2% cited 'Not enough social Europe'. Flash Eurobarometer 172, The European Constitution: post-referendum survey in The Netherlands. [Fieldwork: 02/04 June 2005, Publication: June 2005], European Commission, at 16.

[138] *See* De Vries CE. and Van Kersbergen K., 'Interests, Identity and Political Allegiance in the European Union', (2007) 42 *Acta Politica* 307.

[139] Lister, above note 128, at 478; Closa, above note 10, at 490.

citizens of their rights. Therefore, it will only be said to exist if a Union citizen can experience political rights to the same extent that she can experience social rights and civil rights respectively. Obviously, in light of the distinction we have made throughout this thesis between the enjoyment of rights in a home and in a host Member State, these two situations have to be examined separately.

7.6.1 Equality of Status in a host Member State

In Chapter 4 it was demonstrated that one of the principal tangible benefits of Union citizenship has been to allow Community nationals to take advantage of the prohibition against discrimination on the grounds of nationality contained within Article 18 TFEU, when residing in another Member State. This has been done through the granting of universal personal scope to all Union citizens.[140]

In order for any national of a Member State to be able to claim the benefit of Union law, she or he must fall within the personal scope of Union law while the benefit being sought must fall within the material scope of Union law. Whereas previously, Community nationals had to acquire personal scope through either the specific exercise of one of the fundamental freedoms or through secondary legislation, as a result of Union citizenship, their mere presence in another Member State may suffice.[141] This opens up the scope of the application of the Treaties to a much wider range of Community nationals. Thus, in relation to all social entitlements that fall within the material scope of EU law, Union nationals in another Member State who now enjoy personal scope because of Union citizenship and

[140] *See Martínez-Sala*, above note 104, at para. 59. This applies with the exception of the 'purely internal situation', which continues to be excluded, though this practice has been questioned. *See* Nic Shuibhne N., 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', (2002) 39 *Common Market Law Review* 731.

[141] Nic Shuibhne, above note 45, at 195.

comply with its conditions, must not be discriminated against when compared with the citizens of that state, in light of the application of Article 18 TFEU.

So, whereas the Marshallian model of citizenship holds the concept of equality of status at its core,[142] one of the key outcomes from Union citizenship is the ability to enjoy equality of status, or at least not face discrimination, on the basis of one single facet of life – an individual's nationality. While other provisions of the Treaties such as Articles 19 TFEU focus on distinct areas of discrimination, and hence inequality, these have not been given the strength of Article 18 TFEU and therefore have not played a significant role in conjunction with the citizenship articles.

One could argue that in the context of the search for an equality of status which is understood as an essential element of a valid form of citizenship, focusing solely on nationality is excessively narrow. However, it is submitted that the concentration in EU law on nationality as the key area where equality needs to manifest is both sufficient and necessary. It must be recalled that Union citizenship is operating on a different level to national citizenship, one which is not based on a shared nation state or nationality. In this context of a Union comprised of a multiplicity of states and nationalities, distinctions drawn primarily on the grounds of nationality are one of the easiest ways in which people can be treated differently. Nationality forms the most obvious dividing factor across the Member States, much as in the way that class was the primary driver of division, and therefore inequality, in Marshall's analysis of the United Kingdom.[143] As such, any attempts by the EU to inculcate an equality of status between Member State nationals should begin in this area.

The Treaties have long illustrated the importance placed on removing barriers based on nationality. The clause requiring non-discrimination on the basis of nationality, now manifested in Article 18 TFEU, has been a feature of the Treaties since their inception.

[142] For other references to the broad agreement around the role equality of status plays in citizenship, *see* Closa, above note 9, at 490.
[143] See generally Marshall, above note 64.

Complementing this, the Preamble of the Treaty of European Union speaks of "continu[ing] the process of creating an ever closer union among the peoples of Europe". In light of this goal of creating transnational links between the citizens of the Member States, achieving equality in the specific area of nationality has to be regarded as a vital initial step.

Examining the case law on non-discrimination on the grounds of nationality, it becomes clear that the Court of Justice has been prepared to interpret the principle in an expansive manner and push it beyond its textual confines. Indeed, it has been argued that within Union law, the principle of equality is incorporated in the principle of non-discrimination on grounds of nationality.[144] In *Cowan*, a tourist was considered to be a service recipient for the purposes of Community law and therefore entitled to the benefit of Article 18 TFEU. This required that "[...] persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State".[145] The Court continued in the next paragraph to speak of "the right to equal treatment".[146]

In *Cowan*, the Court also held that Article 18 TFEU can be understood as a general expression of the principle of non-discrimination, which is also articulated in respect of specific freedoms in other articles of the Treaties.[147] This position was substantiated in cases such as *Allue* and *Commission v. Italy*, where the Court held that the provisions of Article 45(2) TFEU and Articles 49 and 56 TFEU respectively were specific instances of the Court's general case law on 'the principle of equal treatment'.[148] These decisions demonstrate that the very specific Treaty focus on non-discrimination on the grounds of nationality was being broadened out and applied to a wider range of material areas.[149]

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[144] Closa, above note 10, at 505.
[145] Case 186/87 *Cowan v. Le Tresor Public* [1989] ECR 195, at para. 10.
[146] *Ibid.*, at para. 11.
[147] *Ibid.*, at para. 14.
[148] Case 33/88 *Allue* [1989] ECR 1591, at para. 11; Case C-3/88 *Commission v. Italy* [1989] ECR 4035, at para 8.
[149] It is relevant to note that in its decision in *Sayn-Wittgenstein*, the Court of Justice came close to accepting the argument of the Austrian Government that a national law banning the use of titles of nobility was a specific

Closa argued at the time of the introduction of Union citizenship that despite some expansive aspects of the Court's jurisprudence on the point, the non-discrimination on the basis of nationality principle could not be regarded as securing equality among Union citizens.[150] The prime concern expressed was the continued need for some link to the scope of Union law before the right can be invoked and the lack of any clear link between the right and the general provisions on citizenship. This led to the argument that "[...] the Treaty framers have considered it to be a principle that regulates the functioning of the Treaty rather than being part of the personal status of the individual".[151]

It is submitted that the passage of time has comprehensively addressed this concern about the link between citizenship and Article 18 TFEU. In its judgment in *Martinez-Sala*, the Court explicitly stated that Union citizens enjoyed the protection of Article 18 TFEU as one of the rights mentioned in Article 20(2) TFEU.[152] Subsequent case law has demonstrated an intrinsic link between the citizenship provisions and Article 18 TFEU and their conjoined use has delivered a range of social benefits to Union citizens living in host Member States. It is clear that at this stage in the development of Union law, Article 18 TFEU is a key aspect of the personal status of the Union citizen.

Despite the advances made by the Court of Justice in its case law on social benefits and citizenship, the existence of the economic risk criteria continued to facilitate the exclusion of certain Union citizens living in a host Member State. As long as their residence was conditional on the existence of sufficient resources and health insurance, full equality of status could not be said to exist. It is for this reason that the creation of the permanent right of residence through the Citizenship Directive was so significant. It was demonstrated in Chapter 5 how after a period of five year's residence in a host Member State, a Union citizen

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implementation of the more general principle of equality before the law in Austria, Case C-208/09 *Sayn-Wittgenstein* (Judgment of 22 December 2010), at para. 88.

[150] Closa, above note 10, at 506.

[151] *Ibid.*, at 507.

[152] *Martinez-Sala*, above note 104, at para. 62.

is entitled to full social integration into that state. While during the five year period leading up to this point compliance with the economic risk criteria must be maintained, once it has been passed the Union citizen can enjoy full reliance on the entitlements and benefits provided by that state, so long as they fall within the scope of Union law. It is argued that this marks the ultimate state of social integration that is possible within the conception of Union citizenship as a complementary form of citizenship. The permanent right of residence has achieved equality of status for Union citizens in their host Member State in the realm of social rights, and therefore realised this aspect of the Marshallian model.

'Spill-over' effect of Equality of Status

Having shown that Union citizenship provides the potential for full social integration in the host Member State, it is useful to examine whether this came about through what is described within the Marshallian model as the 'spill-over' effect. This posits that the concept of equality of status will 'spill over' from one of the rights components to the others.[153]

Prior to the Maastricht Treaty, the civil rights sphere, as represented by the fundamental freedoms, was the predominant rights sphere within the EC. Enjoyment of these was based on the principle of non-discrimination on the grounds of nationality, demonstrated above as being a manifestation of equality of status. Excluding certain groups protected under secondary legislation, enjoyment of any social rights in a host Member State was dependent on the initial exercise of the fundamental freedoms. Political rights for moving Community nationals were non-existent, outside of bi-lateral agreements between Member States.

Chapter 4 demonstrated that the introduction of Union citizenship significantly changed this situation. Union citizens who had not exercised one of the civil rights of the

[153] Lister, above note 128, at 474.

economic freedoms were now entitled to access social benefits, albeit after meeting conditions, on a basis of equality with the citizens of the host state. EU political rights were also introduced, and again, Union citizens could enjoy these on these on an equal basis with the nationals of the host Member State.[154] The application of the principle of equality of status is demonstrated even further in the context of the Citizenship Directive, where the right of permanent residence opens up full access to social right benefits in the host Member State. Equality of status has thus spread from civil rights to both social and political rights, as theorized by the Marshallian model.

7.6.2 Equality of Status in a home Member State

While Union citizenship has resulted in the potential for equality of status in each of the spheres of rights between Union citizens and nationals of their host Member States, the situation of a person in her home Member State is different. In this case, the Union citizen who has not moved finds her enjoyment of social rights guaranteed under national law to be potentially jeopardized by the rights of natural or legal persons, from either her own Member State or from another, who are exercising one of the fundamental freedoms. This threat to rights can also come from the Union itself, acting through the Commission, in taking an enforcement action against a Member State on the basis that social rights protected under national law conflict with the Treaties or Union legislation based on securing the fundamental freedoms.

If equality of status is to be understood as being measured in the enjoyment by individuals of their rights, then it is submitted that it is clear that this is not apparent in the home Member State situation. Exercise of rights associated with the fundamental freedoms is

[154] This equal enjoyment of EU political rights is on the basis of the understanding of EU political rights set out at Chapter 7.3.4.

give precedence over enjoyment those rights linked to the social sphere. When national governments put forward arguments based on the social rights belong to their own citizens, these risk being rejected, again on the basis of the fundamental freedoms.

The manner in which the Court of Justice applied the various legal norms in *Viking* and particularly in *Lavel*, as illustrated in Chapter 6.2.2, is most indicative of this lack of equality of status between social rights and the civil rights in the home state situation. The cases demonstrate that as a result of the failure to protect social rights as EU constitutional norms, either in the context of a codified bill of rights or within the general principles, when rights come into conflict with the fundamental freedoms, they will immediately be in an inferior position within the Courts analysis. This would happen even when as in *Viking* and *Laval*, the right in question guaranteed under national law was a civil right, though one of uncertain status.

The lack of equality of status has led in some instances to a change in the very conception of rights. Giubboni points to the fact that the implication of the *Viking* and *Laval* judgments is to ask trade unions:

> "[...] to incorporate, in their evaluations of the options at stake for defending the workers' interests, the 'objective' interests of market integration, that is to say the very interests of the counterparts they are acting against. The concrete collective solidarity which is at the core of industrial action (also at transnational level) is ex ante limited by this new duty to take into consideration the employers' economic freedom as protected by Articles [49 and 56 TFEU]".[155]

[155] Giubboni S. 'A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice', in Ross & Borgmann-Prebil, (eds.) *Promoting Solidarity in the European Union*, (OUP, 2010), at 195.

This correctly identifies a complete inversion of the rights of the trade union and its members when these conflict with the fundamental freedoms. Similarly in the context of healthcare, it was shown how the case law, manifest with its lack of any clear declaration of a right to healthcare, instead understands access to health in a highly individualistic fashion, as consistent with a market commodity. It has also seen healthcare provided in another Member State categorised as a service, and recent moves to treat education in the same way. The lack of equality of status between the rights spheres has thus resulted in the dominant civil rights category influencing the very interpretation of the less protected social rights.

7.8 Ideal Version of Citizenship

The final aspect of the Marshallian argument is that citizenship involves a journey towards an ideal image of the concept, and this must include social rights.[156] This element forms a crucial test for Union citizenship as without meeting it, Union citizenship would be regarded as incomplete when compared with the theoretical model.

The debate about the presence of social rights with the EU must address the argument that the introduction of these into any market system is likely to create tensions.[157] This raises the spectre of clashes between the various values; indeed Marshall was prepared to describe a "war" between the capitalist class system and social rights.[158] The existence of such tensions is arguably even more significant in the context of the EU, as the original *raison d'être* of the organisation was to create a free market system. Tensions surrounding the introduction of

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[156] Marshall, above note 64, at 18; Lister, above note 128, at 476, 482; King D. and Waldron J., 'Citizenship, Social Citizenship and the Defence of Welfare Provision', (1988) 18 *British Journal of Political Science* 415, at 423.

[157] Marshall, above note 64, at 18-20; Lister, above note 128, at 473; Breiner P, Is Social Citizenship Really Outdated? T.H. Marshall Revisited, *Paper presented at the annual meeting of the Western Political Science Association, Hyatt Regency Albuquerque, Albuquerque, New Mexico*, (17 March, 2006)at 1.

[158] Marshall, above note 64, at 40.

social rights will manifest themselves in other contexts also. They exist between the Member States and the EU institutions regarding what the respective parties think should be the extent of the duties of the Member States towards Union citizens resident in their states. These tensions are played out in the political and judicial institutions of the EU.

7.8.1 Solidarity and the Unified Concept

One tension manifest in the case law surrounds the degrees to which Member States feel they should have to provide social benefits for nationals from other Member States. Closa argued specifically in relation to social rights, that the lack of a national identity for the EU risked undermining the potential for the development of a genuine form of citizenship.[159] In order for social rights to be supplied by the State, there needs to be a development of an identity by individuals with that State. There also needs to be a development of solidarity among the citizens which is achieved by citizens accepting duties towards each other. Citizenship proper is made up of rights and duties, whereas Closa argued that Union citizenship only regulated rights. As duties are accepted by individuals because they belong to a community to which they identify this limits the ability of the EU to impose duties directly on individuals as the nationals do not have the same identification with the Union as they do with their own Member States.[160]

Acceptance of this argument that insufficient solidarity exists upon which to base social rights would significantly undermine the position that Union citizenship is a legitimate form of citizenship. If it is felt that Member States simply do not owe a sufficient duty to Union citizens to grant forms of social aid to them, then regardless of theoretical models, the social rights element of citizenship will not be satisfied. However, it is submitted that while

[159] Closa, above note 10, at 508.
[160] Closa, above note 10, at 509.

the practice of Union citizenship in legal life has highlighted the legitimacy of this concern, it has also been comprehensively addressed.

Though by its very nature, the Court of Justice is a reactive body that can only deal with those cases coming before it, it has used the opportunity of the jurisprudence on citizenship to shape the debate on solidarity. And while it is accepted that the jurisprudence is not without contradictions, some basic concepts have emerged which moderate the relationship between the Union citizen and her host Member State.

The key theme of the Court's decisions as illustrated previously is a desire to protect the position of the long term resident Community national in a host Member State. This is demonstrated irrespective of the reason for the residence in the host Member State. As such, the principle of financial solidarity, now implicitly accepted by the Court in *Forster*, shows that actions taken by a Member State in legitimately implementing secondary legislation against someone who has exercised Union law rights may be struck down if regarded as a disproportionate impingement on a long stay resident. At the same time, a Community national who has lived legally in a host Member State for reasons outside of the exercise of Treaty rights receives the full benefit of Article 18 TFEU. The Court clearly regards residence for a certain period as demonstrating the existence of the solidarity that Closa argued might be lacking in Union citizenship.[161] Some degree of solidarity, though of a lesser magnitude, may also develop over shorter term periods. As such, the Court held that recourse to social security in the host Member State cannot automatically result in the loss of residency rights.

In this way, the Court has acted to impose solidarity. This solidarity is both of limited application, in that it only applies to some Union citizens in their host Member State, and also

[161] Chapter 4.6.5. *See* Golynker, above note 20, at 397.

variable in its extent, in that that degree of solidarity extended depends on the depth of integration into the host Member State.

The creation of this solidarity also results in the existence of a duty to meet the needs of the Union citizens. This duty has been placed on the Member States by the Court of Justice. The manner in which the duty was created – a combination of the introduction of the citizenship Treaty provisions in conjunction with what the Court regarded as the Member State's acceptance of some degree of burden so long as it was not unreasonable through existing secondary legislation, has already been examined.[162] This approach answers the concern raised earlier about the citizenship provisions only being concerned with rights. The Court of Justice has stepped in and required the Member States to meet the concurring duties. The solidarity based duties that individuals owe to Union citizens resident within their State is no different to the solidarity duties they own to their fellow nationals. They pay taxes out of which social right needs (welfare payments, free education) are met.[163]

It has been argued that this new manifestation of solidarity is not absolute and that the social rights in question are not directly redistributive.[164] As such, Irish taxpayer's money is not being sent directly to another Member State to pay for social services there. The solidarity only arises in the context of the exercise of the rights of Union citizens. At the same time, the ability to receive this money arises as a right to the individual Union citizen in the relevant circumstances and as such, cannot be merely categorised as an entitlement.[165]

7.8.2 Failure to Adequately Protect Social Rights & Values

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[162] Chapter 4.5.2.

[163] *See* also Garcia S., 'European Union Identity and Citizenship: Some Challenges', in Roche & van Berkel (eds.) *European Citizenship and Social Exclusion* (Dames, 1997), at 209.

[164] Meehan E., 'Citizenship and Social Inclusion in the European Union', in Roche & van Berkel (eds.) *European Citizenship and Social Exclusion* (Dames, 1997), at 25.

[165] See Chapter 9.2.2.

Drawing from Marshall's view that a war exists between the capitalist system and social rights, it must be acknowledged that despite the advances illustrated in the position of the Union citizen in a host Member State, the potential threats to the enjoyment of social rights by a Union citizen within her home state indicates that the market system continues to hold the upper hand. Without a constitutionalised protection of social rights and values, it is impossible to conclude that Union citizenship sufficiently meets the Marshallian model, set in an explicitly European context. A citizenship which allows social values to be predominantly trumped by market requirements cannot be described as the 'ideal'.

However, it will be argued in Chapter 8 that the changes brought about by the Lisbon Treaty offer the opportunity to resolve this gap in protection and create the equality of status between social rights and others rights at Union constitutional level which will allow Union citizenship meet the requirements of the Marshallian model.

7.9 Conclusion

It has been consistently argued throughout this thesis that in order to be valid, any version of citizenship must protect social rights. As the citizenship being discussed occurs in an explicitly European context, its protection of social rights must replicate that provided under the European social state model. Bearing in mind that Union citizenship is a transnational concept, the manner in which it protects social rights can vary in the different fields of its application. In the situation of a Union citizen in a host Member State, citizenship should ensure equal access to individual social benefits for the Union citizen, on the same basis as nationals of the Member State in which she is residing. However, Union citizenship should

also apply to a Union citizens living in her home Member State and the social rights inherent in citizenship must act to protect this person from the excessive intrusion of Union law.

One of the greatest achievements of European integration has been to facilitate individual choice for the Community nationals and subsequently Union citizens. Through the application of the fundamental freedoms, they have the option and the opportunity to move to another Member State to live, work or temporarily do business, should they feel that they would benefit from the circumstances of that state. However, it is argued that a Union citizen is also entitled to choose to stay put and enjoy the state of living in her own country. Union citizenship, and the social rights aspect of it, should ensure that such a citizen's enjoyment of the existing social rights provided within that state are not completely undermined by the application of the fundamental freedoms. To hold otherwise, whereby Union citizenship would make no difference to the whole-scale undermining of social protection, would be a deeply impoverished conception of citizenship, and it is submitted would not be valid according to the Marshallian model.

As Union law is supreme over national law, Member States are unable to protect the social rights and values that have been constitutionally enshrined, should these come into conflict with the fundamental freedoms. Therefore, Union law must provide some counterbalancing protection of social rights to make up for these no longer available under national law. The manner in which it has attempted to do this up to now has been criticised, with Katrougalos stating that the Court of Justice:

> [...] has tried to create a new sense of transnational solidarity using [Article 18] of the Treaty, instead of relying on the existing national substratum of social rights and the common European legal tradition of social state. This is not only happened on the expense of national welfare systems and against the secondary Community

> legislation, but as it is based on a concept of consumer rights instead of a genuine social citizenship it can easily benefit social tourism.[166]

While the sentiments expressed here are correct in pointing out the failure of the Court to develop the social values existing across the Member States through an innovative use of the general principles, it is submitted that they fail to recognise the limitations that are always going to be inherent in a system that fails to give constitutionalised protection to social rights. Arguably, the Court of Justice could have taken the introduction of Union citizenship and declared that this was justification for it to start protecting social rights within the general principle, on the basis that inherent in any version of citizenship was the protection of social rights. However, it is submitted that the tensions between social rights and market goals can only be fully resolved in the context of the constitutionalisation of social rights principles, particularly when the existing market aims already have a constitutional status. The next chapter will demonstrate how this can be achieved in the European context by the Charter of Fundamental Rights, which is necessary if the 'revolution' initiated by the introduction of Union citizenship is to be completed.

[166] Katrougalos, above note 14, at 43.

Chapter 8 - Creating an EU 'Social State' system: The Charter of Fundamental Rights and Lisbon

8.1 Introduction

It has been demonstrated in Chapters 6 and 7 that, despite the significant access to individual social benefits granted by Union citizenship, it has failed to sufficiently protect social rights in the specifically European context to allow it be accurately described as a version of citizenship that complies with the Marshallian model. This failure has come about as a result of the European Union lacking a social state system mirroring that found in most Member States. This absence or "invisibility" was significant, as it meant that the ethos underpinning the EU was primarily an economic one based on market integration.[1] While the introduction of Union citizenship meant that the social rights of individual citizens in a host Member State were now protected in many circumstances, Poiares-Maduro points out that:

> [t]he problem is that they arise and are defined not in reference to independent political goals associated to a social status attributed to any European citizen *vis á vis* the emerging European political community, but in reference to *ad hoc* political bargains that are aimed at binding the States but not the Union and which are legitimised via market integration.[2]

[1] Hos N., 'The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review', EUI Working Papers, Law 2009/06.
[2] Poiares Maduro M., 'Europe's Social Self: "The Sickness unto Death"', in Shaw (ed), *Social Law and Policy in and evolving European Union* (Hart Publishing, Oxford-Portland, 2000), at 340.

The result of this was that the social rights and values that were maintained in national legislation or national constitutions continued to be at risk of being trumped by the fundamental freedoms. While the successful completion of the European economic constitution had fundamentally affected the room for manoeuvre of Member States in the social field, this has been done without compensating for the undermining of national social rights values by creating similar trans-European values.[3]

This chapter will show how the passing of the Lisbon Treaty; specifically the giving of legal effect to the Charter of Fundamental Rights though Article 6(1) TEU and the addition of new objectives to Article 3(3) TEU, creates the potential for a legal system that has strong social rights values at its core. Such changes offer Member States a potential line of defence against the market orientated policies of the Treaties if these interfere with national values that are mirrored by those protected in the Charter. Further, they may provide the Union institutions with positive direction as regards the type of policies that they should be pursuing, similarly to the way that governments are directed to intervene in their own economies by national constitutions.

In undertaking this analysis, the chapter will address some of the specific criticisms made of the Charter concerning limitations on its potential effectiveness. It concludes by arguing that the Charter has the potential to fill the gap in social rights protection that was identified in Chapters 6 and 7, with particular reference being made to the approach that the Court of Justice and Advocates General have taken to it in initial judgments regarding its provisions.

[3] Joerges C., 'Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts', EUI Working Papers, LAW No.2007/25, (European University Institute), at 4.

8.2 Impact of the Lisbon Treaty

Having outlined how both the inadequate enumeration of social rights in the Treaties and the interpretive approach taken by the Court of Justice has left social rights values under-protected, it is now necessary to examine the range of changes that the Lisbon Treaty has brought to this situation. The final passage of the Treaty and the resulting amendment and reformulation of the existing Treaties were the culmination of an extended process involving the negotiation of the Constitutional Treaty through the Convention for Europe, the rejection of the Constitutional Treaty and the subsequent renegotiation period leading to the Lisbon Treaty, the rejection of the Lisbon Treaty in the first Irish referendum, and finally its eventual ratification. It will be argued throughout the rest of this chapter that a number of key changes brought about by the Lisbon Treaty offer the potential for a far greater protection of social rights values within Union law.

8.2.1 New social objectives for the EU

The initial articles of both the former EU and EC Treaties set out the objectives,[4] tasks[5] or activities[6] of the two entities. These articles are important as they are understood as laying down "an objective system of values" through which the rest of the two documents were understood.[7] The Lisbon Treaty brings about a range of changes to these provisions. In particular, the new Article 3 TEU, which amalgamates aspects of the former Article 2 EU and Article 2 EC, is of key significance.

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[4] Article 2 EU.
[5] Article 2 EC.
[6] Article 3 EC.
[7] Hos, above note 1, at 12; *See* O'Leary S., 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law', (1995) 32 *Common Market Law Review* 519, at 533,

Article 3(3) TEU speaks of aiming for full employment, rather than the previous reference to a high level of employment. It states that Europe is based on a "social market economy"; the first time this description is applied within the Treaties. The article goes on to state that the Union shall "combat social exclusion and discrimination" and also "promote social justice and protection". This is the first occasion on which the term social justice has been included in the Treaties. Social exclusion had been mentioned in the pre-Lisbon Article 137(j) EC as an area where the Union would support and complement Member State activity. However, the insertion of both terms at the very start of the TEU suggests a raising of their importance in the hierarchy of the Union's values.

Taken together, it is argued that these new provisions form a basis on which the Court of Justice can give stronger consideration to social rights values and be more forceful in balancing these against the fundamental freedoms contained within the Treaties.[8]

8.2.2 Social Market Economy

Considerable debate has been generated by the introduction of the objective that the Union will work for 'a highly competitive social market economy', regarding both its meaning and potential impact. The term is generally understood as coming from German constitutional law.[9] However, views have diverged as to whether it will improve social rights protection. Sajo, speaking in the context of the same phrase in the Constitutional Treaty, argued that the term was hugely important as the similar "[...] reference to the social welfare state combined with dignity resulted in a high level of constitutional social rights protection in Germany".[10]

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[8] See Katrougalos G.S., 'European 'Social States' and the USA: An Ocean Apart?', (2008) 4 *European Constitutional Law Review* 225, at 250.

[9] Sajo A., 'Social Rights: A Wide Agenda', (2005) 1 *European Constitutional Law Review* 38, at 39; Joerges C. and Rodl F., '"Social Market Economy" as Europe's Social Model', EUI Working Paper LAW No. 2004/8 (European University Institute), at 3.

[10] Sajo, above note 9, at 39.

While recognising that there was a difference between a social welfare state and a social-market based economy, he argues that the latter would support social welfare considerations in the operation and regulation of the market, particularly in light of existing Court of Justice decisions where it held economic goals were secondary to social goals that express fundamental human rights.[11]

Joerges and Rodl are considerably less positive about the addition of the 'social market economy' objective. While accepting that its inclusion in the EU Treaty could provide a "constitutional principle" which would guide the overall application of the Treaties, they are nevertheless unhappy that this is the term that has been chosen.[12] This concern is based on the understanding of what the expression meant in the German constitutional setting. The authors argue that rather than being equivalent to the 'social state', as some members of the Convention of Europe believed, it actually represents the accommodation reached in the German legal order between the need to be a social state and the economic freedoms which were enshrined in the Germany Constitution.[13] Within such a system, "[...] all social state policies were subordinated to the functionality of market mechanisms. Social policies which threaten to distort market competition and its core, the price mechanism, are excluded from the socio-political agenda".[14] As such, they argue that working towards a social market economy cannot be described as an objective, but rather as a restriction on social objectives.[15] The pessimistic approach of the authors is summed up in their pithy remark that while the term 'social market economy' emerged from a desire among member of the Convention on

[11] On this point, Sajo references Case C-50/99 *Deutsche Telekom v. Schroder* [2000] ECR I-743.
[12] Joerges and Rodl, above note 9, at 9-10.
[13] *Ibid.*, at 11.
[14] *Ibid.*, at 16.
[15] *Ibid.*, at 20. Joerges and Rodl also argue that the very term 'social market system' is unsuited to being described as an 'objective' as it is under Article 3 TEU. They describe it at best as a model or strategy, *Ibid.*, at 19-20.

the Future of Europe "to get at least something social in", the model that has been chosen will mean that "[...] we won't get anything social out at all".[16]

If fully substantiated, the concerns expressed above would be of significant detriment to the thesis articulated here that the changes made to the Treaties at Lisbon bring the EU closer to the social state model. However, it is submitted that the fears outlined are misplaced or at worst overstated. Irrespective of the origin of the term 'social market economy', the Court of Justice is under no obligation to interpret it exactly as it may have been by the German Constitutional Court. Nor indeed, is it likely to. The Court has always emphasised the importance of giving a Union interpretation to the meaning of terms in the Treaties or secondary legislation, particularly when there are alternative national interpretations of the same phrases.[17]

It is suggested that the Court is particularly unlikely to mechanically apply the term in the same way as the German courts as it is being added to the Treaties at the same time as the new references to social justice and social exclusion. This, combined with the giving of legal effect to the Charter of Fundamental Rights, is indicative of a wider change in direction of the Union's relationship with social rights. In light of this, it is submitted that the Court of Justice would be wrong not to understand and interpret the new objective in this wider context.[18]

Joerges and Rodl propose two alternatives to the option adopted at Lisbon. They suggest that it would have been better to use phrases such as 'social European legal order' or 'social Union'.[19] It is submitted here that while these may have avoided the interpretative legacy associated with the meaning of 'social market economy' and are better designed to function as objectives, undoubtedly they too could have encountered criticism for being

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[16] *Ibid.*, at 21.
[17] Case 283/81 *CILFIT* [1982] ECR 3415, at para. 19.
[18] Indeed, Joerges and Rodl do subsequently countenance such an approach, asking "Why not trust that this Court will now be able to establish a "social Europe", to shape a "European social citizenship" and thereby give new meaning to the notion of a "social market economy", Joerges and Rodl, above note 9, at 22.
[19] Joerges and Rodl., above note 9, at 12.

excessively focused on social values, at the expense of the market. In the context of the delicate balancing act involved in securing unanimous agreement on Treaty amendments, this could have proved equally problematic.

As a further alternative, Joerges and Rodl suggest that reliance could have been placed on the term solidarity in Article 2 TFEU.[20] It has been argued elsewhere that that the position of this concept has been explicitly enhanced at Lisbon to the extent that it now represents a constitutional value.[21] Ross notes that while there are concerns that these changes could be no more than feel good rhetoric, he suggests that it offers the Court of Justice "considerable creative opportunities for interpretation" as the introduction of Union citizenship did previously.[22]

As a side note, even if Joerges and Rodl are correct in asserting their concern about the new provision, it is submitted that the model emerging from the German approach could not be any less conscious of social rights and values than was the existing situation in Union law prior to Lisbon, as illustrated in Chapter 6.

8.2.3 Legal status for the Charter of Fundamental Rights and the European Convention on Human Rights

The primary changes that the Lisbon Treaty introduced regarding fundamental rights in general and the Charter in particular is the new Article 6 TEU. This addresses a number of issues. It recognises the Charter and states that the rights, freedoms and principles contained within it would have "the same legal values as the Treaties". The provision is clear in that giving legal effect to the Charter does not extend the competences of the Union as set out in

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[20] Joerges and Rodl., above note 9 at 12.
[21] Ross M., 'Solidarity – A New Constitutional Paradigm for the EU?' in Ross & Borgmann-Prebil (eds.) *Promoting Solidarity in the European Union*, (OUP, 2010), at 36.
[22] *Ibid.*, at 44.

the Treaties. Significantly, Article 6(1) TEU also gives recognition to explanatory documents as aids to the Charter's interpretation, along with the provisions of Title VII - 'General Provisions Governing the Interpretation and Application of the Charter'.

Article 6(2) TEU states that the Union "shall" accede to the ECHR. Again, such accession is stated not to increase the competences of the Union.[23] Finally, Article 6(3) TEU states that the fundamental rights contained in the ECHR, along with those which result from the common constitutional traditions of the Member States, form the general principles of Union law. Again, the failure to include reference to the *Nold* category of international treaties that the Member States had cooperated in drafting is worthy of note and has been lamented by some authors.[24] The concern is that as the ECHR dates from the early 1950s, and the rights contained in national constitutions are usually deeply entrenched and inflexible, new international treaties offer the best source of updated views on existing rights, or indeed new rights which were not contemplated before, which could be considered by the Court of Justice. However, while it has been argued earlier that this absence significantly limited the freedom of the Court of Justice to incorporate social rights within Union law, this issue has less significance now due to the fact that social rights are contained within the Charter itself. Nevertheless, it is disappointing that the Court does not have as wide a range of sources as possible to canvass from.

8.3 The Charter of Fundamental Rights: New Protections for Social Rights

[23] Official negotiations between the EU and the Council of Europe on the modalities of accession began on 7 July 2010 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906&format=HTML&aged=1&language=EN&guiLanguage=en.

[24] *See* Chalmers et al, *European Union Law* (2nd Edition, Cambridge University Press, 2010), at 236.

The Charter of Fundamental Rights of the European Union is a clear codification of the range of rights that the European Union seeks to protect.[25] In undertaking a review of its potential impact on the protection of social rights, it is relevant to note that the document departs from the traditional movement based rationale for protection, which was the norm for Union law. As such, the rights contained within it are not contingent on the exercise of one of the fundamental freedoms. This suggests a new rights-based approach to the guarantees which it contains.[26]

8.3.1 Preamble

The treatment of the four freedoms in the Preamble to the Charter, when compared to the Treaties, demonstrates this change in emphasis. After repeating the traditional phrases about ever closer union of the peoples of Europe and a peaceful future, Recital 2 of the Preamble describes the EU as being "founded on the values of human dignity, freedom, equality and solidarity". The individual is placed at the heart of the Unions activities, "by establishing the citizenship of the Union and by creating an area of freedom, security and justice". It is only in the next paragraph that the Preamble notes that the Union "ensures free movement of persons, goods, services and capital, and the freedom of establishment".

It is significant to note that the ideal of solidarity is given a more prominent place in this introduction than the four freedoms. Indeed, the EU is described as being 'founded' on *inter alia*, solidarity, while it merely 'ensures' the four economic freedoms. Admittedly, the EU is also 'founded' on freedom, but it is argued that freedom understood in this sense is something much broader the economic freedom meant by the four freedoms. This point is

[25] OJ [2000] C 364/01.
[26] Ackers L. & Stalford H., *A Community for Children? Children, Citizenship and Internal Migration in the EU,* (2004, Ashgate), at 8.

reinforced through the use of the term 'Freedom' as the heading for Title III which covers diverse issues such as freedom of thought, conscience and religion and freedom of speech.

While the same point could be raised regarding the reference to solidarity within the Preamble – does it represent a wider meaning of solidarity than merely social solidarity – it is submitted that this is not the case as in the body of the Charter, the title with the heading 'Solidarity' refers primarily to aspects of social rights.

8.3.2 Key provisions related to social rights

The primary section of the Charter relating to the protection of social rights is the aforementioned Title IV on Solidarity. It contains a range of provisions, many of which are addressed solely at the rights of workers. This focus on employment related issues in a solidarity chapter has been the source of some criticism.[27] The relevant rights are; those guarantying workers information and consultation within their undertaking,[28] the right of employees and workers to conclude collective agreements and enter into collective action including strikes,[29] a worker's right to protection against unjust dismissal,[30] and the right to fair and just working conditions, including pay, health and safety, work hours and annual leave.[31]A guaranteed right of access to placement services is listed.[32] Significantly, this right is stated as being vested in "everyone", rather than in 'workers' as was the case with those listed previously.

[27] Sajo, above note 9, at 40-1.
[28] Article 27.
[29] Article 28.
[30] Article 30.
[31] Article 31.
[32] Article 29.

Article 32 prohibits child labour and protects young people at work while Article 33 addresses the family, stating it has legal, economic and social protection[33] and that maternity leave and pay and paternity leave are rights following the birth or adoption of a child.[34]

The Charter also addresses issues which relate to significant social spending within the Member States. Article 34 contains a number of provisions dealing with social security and social assistance.[35] Of particular note is the guarantee in 34(2) that everyone living and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Union law and national law and practices. Article 35 deals with access to preventative health care and securing a high level of human health protection in the definition and implementation of all Union politics and activities. It states that everyone has the right to access preventative health care and medical treatment, under national conditions and practices. It is interesting to note that the limitation phrase is slightly different here and that there is no reference to EU law conditions.

Article 36 recognises and respects access to services of general economic interest provided for under national law, "in accordance with the Treaties". Here again there would appear to be a difference in the usual limitation phrase which in this case seems to place extra conditions on the right. It is suggested that this provision is to ensure that the article will not be allowed undermine the liberalisation of services of general interest which has already been undertaken.

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[33] Article 33(1).
[34] Article 33(2).
[35] Art IV – 34 (1) The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
(2) Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
(3) In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Social rights are not solely addressed within the Solidarity title. Most notably, education is dealt with in the title on Freedoms, where Article 14 guarantees the right to education and access to vocational and continuing training. This includes the possibility to receive free compulsory education. Here the right to education sits alongside a range of primarily civil rights.

It is noteworthy that the manner in which social rights are enumerated in the Charter differs from the manner in which they are protected in either the Council of Europe system or the International Covenant on Economic Social and Cultural Rights, in that they are listed amongst civil and political rights, not in a separate document. This harks back to the Universal Declaration of Human Rights, where rights were all protected together. This is important as unlike the Social Charter and the ICESCR, the Charter does not create a separate and weaker stream for the protection of these rights through reporting and review mechanisms. The social rights protected within the Charter will be equally justiciable before the Court of Justice as the civil and political rights, bearing in mind those qualifications or limitations to the Charter discussed below. The fact that the final draft of the Charter reflects this unity of rights is important as during the drafting process, there was significant pressure to exclude social rights completely from the document's scope, or downgrade them to the status of programmatic rights.[36]

Citizen's Rights

In light of the extensive discussion of Union citizenship in this thesis, it is relevant to examine the content of Title V of the Charter, which addresses Citizens' Rights. It covers much of the content of Articles 20 – 25 TFEU, including the right to vote and stand in

[36] Bercusson B., 'Social and Labour Rights under the EU Constitution', in De Burca G. & De Witte B (Eds), *Social Rights in Europe*, (OUP, 2005), at 170.

European and local elections,[37] diplomatic protection[38] and the right to petition the European Parliament.[39] The Charter also protects the important substantive right to move to and reside in other Member States.[40]

It is submitted that the fact that the citizenship rights are addressed in a separate title to that on solidarity is further evidence of the dual application of social rights. The rights protected in Title V are the individual citizenship rights which spring from Articles 20 – 25 TFEU, as interpreted by relevant case law,[41] and the addition of the new provisions on good administration and access to documents, which came from other Treaty provisions. As such, these rights are all relevant to the individualistic protection regime that sprung from the case law on citizenship.[42]

While arguably this could be a continuation of what has been described as an approach of isolating fundamental rights from the language of citizenship,[43] it is submitted that this division is in fact important as it makes clear that the social rights listed under the Charter are not explicitly linked to the requirements of individual citizens. They are values themselves, and as such may be claimed by Member States when they are in a legal dispute before the Court of Justice.

8.3.3 Limitations on the Charter

Now that the Charter has been incorporated into Union law, the focus must be turned to its potential effectiveness. The document has been the subject of extensive commentary as to

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[37] Articles 39 and 40.
[38] Article 46.
[39] Article 44.
[40] Article 45.
[41] *See* 'Explanation on Article 45', Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 29.
[42] See 'Explanation on Article 41', 'Explanation on Article 45', *Ibid.*, at 28.
[43] O'Leary S., above note 7, at 520.

whether it will make a substantive different to human rights protection.[44] Both the substantive limitations set out in the document and its internal emphasis must be examined in determining an answer to this question.

A vital element which will impact on the potential effectiveness of the Charter will be the interpretation that the Court of Justice places on its final provisions. These are set out in Title VII; 'General Provisions Governing the Interpretation and Application of the Charter'. Article 51 deals with the field of application of the Charter. This states that the Charter is addressed to the institutions, bodies, offices and agencies of the Union and also to the Member States when they are implementing Union law – Article 51(1). Article 51(2) is explicit in confirming that the Charter neither extends the field of application of Union law nor grants it any new power or modifies any existing power. The first of these provisions has been criticised on the basis that it ensures that the Charter cannot apply to the myriad of interactions between citizens and their national government, in situations outside the scope of EU law.[45] This has particular relevance to the area of social rights, where as has been demonstrated, the EU's competence is highly limited. This leads on to a criticism of the second provision; if the Charter neither creates new powers nor modifies existing ones, does its introduction bring about any real change.

The interpretation of the individual rights is addressed in some detail in Article 52. This states that any limitations on the rights must be provided for by law and respect their essence. Further, limitations must comply with the principle of proportionality and must only be necessary to meet objectives of general interest of the Union or in order to protect the

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[44] Ashiagbor D., 'Economic and Social Rights in the European Charter of Fundamental Rights', (2004) *European Human Rights Law Review* 63; Young A., 'The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?', (2005) 11(2) *European Public Law* 219; Engle C., 'The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences', (2001) 7 *European Law Journal* 151; Lenaerts K & Foubert P., 'Social Rights in the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing', (2001) 28(3) *Legal Issues of Economic Integration* 267; Joerges and Rodl., above note 9.

[45] Ashiagbor, above note 44., at 70.

rights and freedoms of others.[46] Where rights in the Charter are the same as rights in the ECHR, their 'meaning and scope' shall be the same, but this does not prevent Union law providing more extensive protection.[47] Rights in the Charter which result from common constitutional traditions shall be interpreted in harmony with those traditions.[48] Full account must be taken of national laws and practices, as it stated throughout the Charter.[49] The explanatory document setting out a more detailed understanding of the rights is referred to and is to be given due regard by the Court.[50]

It has been noted that while Article 52(3) grants a special position to the ECHR within the Charter, the same treatment is not accorded to the Social Charter.[51] Nor are all the rights set out in the Social Charter replicated in the Charter of Fundamental Rights. It is possible that this leaves the Court and the Union institutions with more discretion in its interpretation of these rights. This could result in these rights being applied in manner more protective of market policies than might have been the approach of the bodies charged with interpreting the Social Charter. Both the Social Charter and the Community Charter are referenced in the Preamble to the Charter. The two documents also are referred to as the basis of or having been drawn upon in creating a significant number of the articles in the Charter.[52]

Article 53 states that the Charter cannot be understood to restrict or adversely affect human rights and fundamental freedoms recognised elsewhere in Union law, international law, international agreements to which the Union or all the Member States have signed up, or Member State constitutions. It is interesting to observe the recurrence of the reference to international agreements which the Member States signed up to, in light of that fact that it

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[46] Article 52(1).
[47] Article 52(3).
[48] Article 52(4).
[49] Article 52(5).
[50] Article 52(6).
[51] De Schutter O., 'Anchoring the European Union to the European Social Charter: The Case for Accession', in De Burca G. & De Witte B (eds), *Social Rights in Europe*, (OUP, 2005), at 120.
[52] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17. The relevant articles are Art 12(2). Art 14(1), Art 15, Art 23, Art 25 and Arts 26 – 35.

was already noted in Chapter 8.2.2 above that this source was excluded from the Treaties proper. Finally, Article 54 forbids the abuse of rights.

8.3.4 Rights versus Principles Distinction

One source of controversy regarding the degree of protection afforded by the Charter centres around the distinction between rights and principles that exists within the text of the document.[53] In the Preamble, three categories of content are listed in Recital 7; rights, freedoms and principles. Certain articles clearly set out which of these three categories they can be classified under. As such, Article 2(1) deals with the "right to life", Article 14(3) outlines the "freedom to found educational establishments" and Article 49 addresses the "Principles of legality and proportionality of criminal offences and penalties".

Article 52(5) sets out the practical implications of the distinction between rights and principles.

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Undoubtedly, this limits the applicability of those provisions which are understood as principles. It would appear that they can only be used in circumstances where legislative or executive acts based on these articles are being undertaken. As such, Charter provisions that

[53] De Witte B., 'The Trajectory of Fundamental Social Rights in the European Union', in De Burca G. & De Witte B (Eds.), *Social Rights in Europe*, (OUP, 2005), at 160.

are understood as principles cannot form the basis for a positive claim.[54] They merely serve as a shield against actions of the institutions, bodies, or the Member States when implementing Union law. Their application is seen to be reserved to the purview of the Court. This is confirmed by the explanatory document to the Charter.[55] However, both the Charter and the explanatory document fail to give a clear explanation on how to differentiate the separate categories.[56]

It is submitted that from the point of view of protecting social rights values, this distinction in treatment outlined by Article 52(5) is not of major significance. The thrust of this chapter has been to highlight concerns that social values protected by Member States are at risk to being struck down in light of Treaty based economic freedoms, due to the lack of any counterbalancing social values contained within the Treaties. Article 52(5) will not prevent the use of the social value principles contained in the Charter being used in this way. Rather, it stops them being used to force the Union institutions into a particular form of action. As this is not what this thesis argues for, Article 52(5) does not undermine the central point.[57]

Furthermore, it is relevant to note that many of the provisions listed earlier in this chapter as relevant to social rights values are actually described as rights rather than as principles. This means that any limitation to the effectiveness of provisions that is caused by Article 52(5) would not apply to these, as it only affects 'principles'. According to the Explanation, of those articles that deal with social rights in the Solidarity Title, only Article 33 on Family and Professional Life and Article 34 on Social Security and Social Assistance fall within the category of 'principles', and even both of these contain some elements of

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[54] Bercusson, above note 36, at 173.

[55] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 35.

[56] Dougan M., 'The constitutional dimension to the caselaw on Union citizenship', (2006) 31 *European Law Review* 613, at 665. Dougan also suggests that the Court may eventually allocate Charter articles between the categories of "rights" and "principles" on a case-by-case basis.

[57] Ashiagbor argues that this lack of positive obligations in the area of social rights is a negative. Ashiagbor, above note 44, at 71.

rights.[58] As such, the majority of Charter provisions that promote social values are unencumbered by any restrictive effect that the Court of Justice may derive from Article 52(5).

National Laws and Practices

Another potential limitation of the provisions contained in the Charter is the regular use of the phrase "[...] in accordance with [...] national laws and practices". It has been highlighted that this clause is particularly prevalent in the Solidarity Title, and indeed outside of this only occurs in one other substantive provision, Article 16 on the Freedom to Conduct a Business.[59] Article 52(6) states that "full account" will be taken of national laws and practices in considering the provisions in which the phrase is mentioned. This is stated in the official explanation as being based on the spirit of subsidiarity.[60]

This emphasis on the subsidiarity basis to the 'national laws and practices' proviso suggests that its purpose was to reassure Member States that the Charter provisions would not be used as a basis to dramatically interfere with national rights. As such, this proviso should not detract from the ability of the Member States to use the Charter rights to defend national practices in the event that they clash with a fundamental freedom contained within the Treaties.

8.3.5 Judicial treatment of the Charter pre-incorporation

[58] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 35.
[59] Triantafyllou D., 'The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference ', (2002) 39 *Common Market Law Review* 53, at 61.
[60] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, at 35.

Despite the legal limbo in which the Charter existed due to the refusal by some Member States to allow it be incorporated into the Treaties during the Nice round of discussions, it nevertheless gradually began to seep into the jurisprudence of the Union courts. Following its initial mention in opinions of the Advocates General,[61] the first reference in the General Court was seen in *Max.mobile Telecommunikation* where the Court noted that the rights to both good administration and effective legal remedies were protected under constitutional traditions of the Member States and were 'confirmed' by the Charter.[62] Similarly in *Jégo-Quéré*, the Court stated that the Charter "reaffirmed" the right to an effective remedy.[63]

The Charter was subsequently referred to in a number of judgments of the Court of Justice. These were more precise in setting out the nature of its legal standing, or lack thereof. In *Parliament v. Council (Family Reunification Directive)*, the Court noted that the Charter had actually been referred to in the preamble of the contested directive and that this acknowledged the importance of the Charter. However, the Court also made clear that the Charter "was not a legally binding document".[64] This argument had been made strongly by the Council in the pleadings before the Court, when it stated "[n]or should the application [of the directive] be examined in light of the Charter given that the Charter does not constitute a source of Community law".[65] In *Unibet*, the Court determined that the Charter "reaffirmed" the existence of a right to an effective remedy in Community law, while the same term was used in *Mono Car Styling* regarding the right to effective judicial protection.[66]

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[61] Case C-173/99 *R v. Secretary of State for Trade and Industry, ex parte BECTU* [2001] ECR I-4881, Opinion of AG Tizzano.
[62] Case T-54/99 *Max.mobile Telekommunikation Service GmbH v. Commission* [2002] ECR II-313, at para's 48, 57.
[63] Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365, at para. 40.
[64] Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, at para. 38.
[64] De Witte B, above note 53.
[65] Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, at para. 34.
[66] Case C-432/05 *Unibet v. Justitiekanslern* [2007] ECR I-2271, at para. 37; Case C-12/08 *Mono Car Styling v. Odemis* [2009] **C-12/08**, at para. 47.

However in other cases such as *Promusciae*, the Court can be seen making extensive references to the Charter without any acknowledgement of it being merely a reaffirmation or confirmation of previous rights.[67] Indeed in this judgment, the Court does nothing to highlight its lack of legal status. Similarly in *Koehler*, the Court merely states that the right to a fair hearing is "contained" within Article 47 of the Charter, along with Article 6 of the ECHR. No difference in the substantive legal value of either document is acknowledged.[68] This process has led one commentator to suggest that enumeration in the Charter "[...] if a right is contained in the Charter, this acts as an irrebuttable presumption that it is already protected under the general principles".[69] It is argued here however that it is difficult to substantiate such a claim in light of the analysis of the general principles, undertaken at Chapter 3.5, which clearly demonstrates that they were never found to protect any of the social rights that are now listed within the Charter.

Even though the evidence points towards the Court of Justice moving in the direction of using the Charter as a source of rights without qualification, a continuance of this approach would undoubtedly have resulted in an eventual challenge to its legitimacy, particularly if it was used to support a right that was not previously referenced in the ECHR or in national constitutional traditions; possibly indeed, a social right. It is submitted that the Court was correct in its initial cautious approach to the use of the Charter. The potential vulnerability to challenge of the Court's later decisions on the Charter emphasises why the action of granting it legal effect is so important.

8.4 Significance of the Incorporation of the Charter

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[67] Case C-275/06 *Promusciae v. Telefonica de Espana* [2008] ECR I-271.
[68] Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfakbrik Koehler v. Commission*, Judgment of 3 September 2009, at para. 80.
[69] Dougan M., 'The Treaty of Lisbon 2007: Wining Minds, Not Hearts', (2008) 45 *Common Market Law Review* 617, at 662.

It is argued here that the changes resulting from the Lisbon Treaty offer the opportunity to create a new sense of constitutional parity between social rights and the rights of economic freedom. By granting legal effect to the social rights values in the Charter and through the addition of new objectives via Article 3 TEU, Union law has taken an essential step in the development of true social rights protection. The Court will now be in a position to balance these values against the fundamental freedoms. The necessity of this development has already been demonstrated in light of the insufficient protection of social rights values in Union law prior to the Lisbon Treaty. During this period, the focus on economic integration as the objective of European integration created a situation of "constitutional asymmetry" where all national social goals had to be undertaken within the framework of European law focused on the fundamental freedoms.[70] The counteracting forces of the social state, present in most European countries, are absent in the context of the European Union. What is therefore necessary is a move to "[...] re-establish the constitutional parallelism of economic (market making) and social protection (market correcting) interests and policy purposes [...]" at the European level.[71] Further, the Charter will allow the EU develop its own coherent theory of social rights;[72] one based on a real concept of Marshallian citizenship and upon the European social state model.

The desirability of constitutional parity is even more obvious if one accepts the argument that the tendency of Court of Justice to strike down or undermine national social provisions was not a result of a neo-liberal vision which the Court sought to impose, but rather a result of its obligation to engage in market integration, and thus invalidate contrary

[70] Scharpf F., 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies* 645, at 647.
[71] Scharpf, above note 70, at 649.
[72] Lenaerts K and Foubert P., above note 44, at 272.

national rules.[73] The idea that the threat to social rights across Europe resulting from judgments of the Court is a consequence of the neglect by the Union to develop for itself a codified set of social rights, rather than as the outcome of a nefarious capitalist agenda, is still indicative of a failure to comprehend the necessity for social rights in a legitimate polity. Despite the positive benefits of Union citizenship, its advent did not address this lacuna in the constitutional protection of social rights.

It has been suggested that the Charter will not give Union citizens the right to take actions against either the Member States or the Union, but instead will provide a "touchstone" against which to assess the Member States or the Union.[74] It is submitted that it is certainly likely that the majority of the litigation surroundimg the Charter will fall into the latter category. In particular, it is suggested that the Charter will be of significant benefit to Member States in allowing them articulate new arguments when actions they have taken in the area of social rights are challenged by the Union on the grounds of clashing with the fundamental freedoms. Significantly however, it is argued that it is not impossible that the Charter will also form the basis, or at least be an element of, individual actions that may be taken under the reformulated Article 263 TFEU.

One benefit that it has been argued will result from the adoption of the social rights values in the Charter is that a non-retrogression obligation will fall on the Union.[75] This would limit the ability of the Union to pass legislation that interferes with social rights already available. This could apply both in terms of individual social rights that Union citizens benefit from through secondary legislation, but also to social rights that are protected under national legislation that may sometimes come into conflict with the fundamental freedoms.

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[73] Poiares Maduro M., above note 2, at 329.
[74] Lenaerts K and Foubert P., above note 44, at 271.
[75] De Schutter O., above note 51, at 129; De Witte B., above note 53, at 164.

On this latter point, the social rights values contained within the Charter can act to "[limit] the deregulatory impact of EU law on national labour and welfare policies".[76] Such an impact is clearly demonstrable in the *Viking*, *Laval* and *Watts* cases, and is something that is of concern to advocates of the social state system.[77] As was demonstrated earlier in the discussion of *Viking* and *Laval*, having these values explicitly mentioned in the Treaties is the crucial step to ensure that the Court of Justice will take them seriously. While it cannot be ascertained for definite the extent to which the increased mention of social rights values brought about by the Lisbon Treaty will prompt the Court to rebalance its approach in future rulings, now at least a firm basis for such a change exists within the Treaties.

Undoubtedly, there is the possibility that the Court will take a narrow approach to its interpretation of the social rights values, as evidenced by its earlier view of these rights outlined in cases such as *Bergemann* and *Albany*. Nevertheless, some commentators suggest that by their very nature, the addition of the social rights values will "[...] require an openness on the part of the European Court, and other Community institutions, to changing understandings of what these rights mean in practice".[78] This is the kind of shift in the legal reasoning of the Court of Justice that is needed in order for the European Union to be able to exhibit the features of a social state system.

8.4.1 Assessing Substantive Change Occasioned by the Charter

The key question arising from the granting of legal effect to the Charter is whether its introduction will actually bring about any substantive change in the protection of social rights. Three cases give us some indication of the approach that may be taken to the new provisions; the first looking at the interpretation given to some of the limitation clauses; the

[76] De Witte B., above note 53, at 162.
[77] Eklund R., 'A Swedish Perspective on Laval', (2008) 29 *Comparative Labour Law and Policy Journal* 55.
[78] Ashiagbor D., above note 44, at 64.

other two focusing on the substantive levels of protection stemming from the Charter. While one of the cases was handed down before the incorporation of the Lisbon Treaty, and in two it is the opinion of the Advocates General that is focused upon, they nevertheless provide a useful initial insight.

Limitation Provisions

In *J.McB v. L.E.*[79] the Court was dealing with a reference from a national court regarding the compatibility of Irish family law legislation on custody rights with the provisions of the Regulation on the recognition and enforcement of family law judgements.[80] The applicant was seeking to have the term 'rights of custody' in the Regulation interpreted in accordance with the provisions of the Charter on Fundamental Rights, specifically Articles 7 on family life and Article 24 on the rights of the child. This would involve scrutinising the national law for compatibility with the Charter.

The aspect of the judgment dealing with the interaction of national law with the Charter was particularly cautious. The Court stressed that Article 51(2) made it clear that the Charter had not extended the application of EU law beyond the competences of the Union, nor did it create any new power or task for the Union.[81] The Charter could only be used to interpret Union law – the Regulation in this context. There was to be no assessment of the provisions of national law.[82] Therefore, if the Court were to accede to the applicant's request and read the Regulation in accordance with the Charter in a manner that gave the natural

[79] Case C-400/10 *J.McB v. L.E.* (Judgment of 5 October 2010).
[80] Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.
[81] Case C-400/10 *J.McB v. L.E.* (Judgment of 5 October 2010), at para. 51.
[82] *Ibid.*, at para. 52.

father custody rights in respect of his child, a right that was not provided for under Irish national law, this would be a breach of the requirements of Article 51(2).[83]

The judgment clearly indicates that at this initial stage at least, the Court considers itself strictly bound by the limitations included in Article 51 and 52 of the Charter. At no stage in the decision does the Court contemplate acceding in any way to the applicant's request to read national law in accordance with Charter provisions. While this approach is a cautious one, it is submitted that it is not in any way incompatible with this thesis as at no stage has it been suggested here that the Charter should provide means for the Court to interfere with national rights protection.

Substantive Changes to the Protection of Social Rights

It will be recalled how the analysis of the healthcare cases in Chapter 6.3.1 revealed that the Court of Justice failed to make any reference to a right to healthcare in the course of its decisions.[84] It would appear that the advent of the Charter could allow for a more comprehensive approach to be taken in cases related to the health services. This potential is apparent in *Stamatelaki*.[85] The case involved a provision of national law refusing reimbursement to persons registered in the national social security institution who had incurred costs as a result of treatment received in a hospital in another Member State. In his opinion on the case, AG Colomer made a brief reference to Article 35 of the Charter, stating in relation to the earlier healthcare cases:

[83] *Ibid.*, at para. 59.
[84] Katrougalos, above note 8, at 249.
[85] Case C-444/05 *Stamatelaki* [2007] ECR I-3185.

> [a]lthough the case-law takes as the main point of reference the fundamental freedoms established in the Treaty, there is another aspect which is becoming more and more important in the Community sphere, namely the right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union, since, being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties. This right is perceived as a personal entitlement, unconnected to a person's relationship with social security and the Court of Justice cannot overlook that aspect.[86]

As such, the Advocate General acknowledges the existing case law and the significance that the fundamental freedoms play within it. However, it is submitted that through his reference to Article 35, he has elevated the patient's right to health to the centre of its approach. However, this does not clarify the extent to which the market based freedoms are determinative in providing the right. Possibly, the reference to social expenditure and latent economic difficulties is a reference to issues such as waiting lists and the overall funding of health care systems, which were a common feature of the pre-Lisbon healthcare cases. Clarification is needed regarding whether the approach to the right to healthcare will still follow the highly individualistic model that was demonstrated in these earlier cases, or whether Article 35 of the Charter is to be understood as a separate entity. Further cases will need to be heard before it is understood whether Article 35 supports or interferes with a national government's choice in the context of the health policies that it pursues.

A Free-Standing Right to Rely on Fundamental Rights

[86] *Ibid.*, at para. 40.

The opinion of Advocate General Sharpston in *Ruiz Zambrano* has already been considered in Chapter 7.3.2 in the context of her views about the relationship between Union citizenship and the requirement for movement.[87] However, the Advocate General also made some interesting and potentially radical observations about the impact on Union law of the Lisbon Treaty.

The issue came up in the third of the questions the Advocate General proposed answering in the case; whether an individual could rely on a free standing fundamental right against a Member State without any other link to Union law.[88] Having reviewed the existing approach of the Court to fundamental rights application, the Advocate General proposed that "[...] provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*".[89] However, while outlining in some detail four different reasons why such an approach would be a good one,[90] the Advocate General concluded that to undertake the move she suggested would mean bringing an excessively federal element into the Union's legal and political system.[91]

At that point, the Advocate General made an interesting equivocation. She stated that the relevant time for assessing the applicants rights was the date of the birth of his second (Union citizen) child, in September 2003.[92] AG Sharpston continued by stating:

> *[a]t that stage*, the Treaty on European Union had remained essentially unchanged since Maastricht. The Court had clearly stated in Opinion 2/94 that the European Community had, at that point, no powers to ratify the European Convention of Human

[87] C-34/09 *Ruiz Zambrano* (Opinion of 30 September 2010).
[88] *Ibid.*, at paras. 151-2.
[89] *Ibid.*, at para. 163 (emphasis is Advocate General's own).
[90] *Ibid.*, at paras. 165-70.
[91] *Ibid.*, at para. 172.
[92] *Ibid.*, at para. 174.

> Rights. The Charter was still soft law, with no direct effect or Treaty recognition. The Lisbon Treaty was not even on the horizon. *Against that background, I simply do not think that the necessary constitutional evolution in the foundations of the EU, such as would justify saying that fundamental rights under EU law were capable of being relied upon independently as free-standing rights, had yet taken place.*[93]

By drawing specific attention to the absence of the Lisbon Treaty changes – particularly the legal recognition of the Charter – at the time of Mr. Ruiz Zambrano's claim, as the basis for her refusal to recognise the existence of a free-standing fundamental rights competence, the Advocate General is clearly implying that these subsequent developments could warrant such a change in Union law. Obviously this would be a highly significant increase in the Court's human rights jurisdiction, broadening this out far past the traditional headings of human rights application; actions of the Union institutions,[94] actions of the Member States in applying Union law[95] and Member States derogating from Treaty provisions.[96] The result would be a radical increase of the status and importance of social rights if they could now be deployed in any issue relating to an area in which the Union has shared or exclusive competence.

It is suggested that the Advocate General was correct in taking a cautious approach to such a development, and not calling for it in an individual situation where it could have been legitimately argued that the scale of constitutional change necessary to justify such an approach had not yet occurred. At the same time, the arguments she makes about a free standing right to rely on human rights are both detailed and compelling. Even though in its decision the Court did not address the approach hypothesised by AG Sharpston, it is

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[93] *Ibid.*, at para. 175 (emphasis added).
[94] Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat v. Council* [2008] ECR I-6351.
[95] Case 5/88 *Wachauf v. Germany* [1989] ECR 2609.
[96] Cases 60 and 61/84 *Cinetheque v. Federation Nationale des Cinemas Francais* [1985] ECR 2605; Case C-260/89 *ERT* [1991] ECR I-2925.

submitted that she is correct in her concluding paragraph when she states that the Court will not be able to put off answering this question for much longer.[97]

8.5 Conclusion

Despite the success of Union citizenship, it has been demonstrated that its introduction did not create a social state model for the protection of rights within the EU. As such, Union citizenship could not be described as a valid form of citizenship, due to the insufficient protection of social rights in the home Member State. It has been shown in this chapter how the changes brought about by the Lisbon Treaty have the potential to address this and thereby bring about the most significant evolution in the protection of social rights within the European Union since beginning of European integration in 1951. The view has rightly been expressed that the addition of the provision on the 'social market economy' combined with the provisions of Article 6 TEU giving legal effect to the Charter, are significant steps in moving towards the social state principle within the European Union.[98] This will allow for a constitutional parity between social rights and values and the fundamental freedoms, mirroring that which is present in many national constitutions. This will potentially fill the gap in the social rights protection which was found in Chapter 7 to disqualify Union citizenship from fulfilling the requirements of the Marshallian model.

Clearly, the potential effectiveness of the Charter is predicated on the approach the Court of Justice takes to its interpretation. It is submitted that it is unlikely that the Court can take as activist an approach to each individual Charter provision on social rights, as it did to the Treaty provisions on Union citizenship. This is primarily because of the various explicit

[97] *Ibid.*, at para. 177.
[98] Katrougalos, above note 8, at 250.

barriers contained within the Charter which have already been outlined. At the same time, AG Sharpston makes a convincing argument why the overall impact of the Charter and new Treaty objectives should be understood as a major shift in the constitutional structure of the Union. This thesis argues that in order for the social state model to be satisfied it is necessary that the Court of Justice is robust in its interpretation and application of social rights values contained in the Charter, when the fundamental freedoms come into conflict with similar social rights protected within the legal systems of the Member States. Undoubtedly the fundamental freedoms will still prevail in many cases, but this is acceptable as what is sought is constitutional parity, not constitutional dominance.

Chapter 9 – Conclusion

9.1 Union Citizenship, the Marshallian Model and Social Rights

Union citizenship as introduced by the Maastricht Treaty was not a version that met with all the requirements of the Marshallian model. Nevertheless, its establishment had significant impacts for the protection of social rights in the EU. The most radical of these was the decision by the Court of Justice that its creation granted to all Union citizens the ability to come within the personal scope of the Treaties.[1] The magnitude of this development is best assessed when a comparison is made with the situation that existed prior to the introduction of the articles on citizenship. A key substantive change that has resulted from this extension of personal scope is that economic activity is no longer required in order for a person to be able to claim the benefit of Union law. The Union Legislature has taken this development further by providing for full social integration of a Union citizen into a host Member State through the application of the right of permanent residence in the Citizenship Directive.

Without a constitutionalised protection of social rights values however, these developments on their own were not enough. This was demonstrated as being particularly relevant in the context of Union law, where the Treaties give priority to the civil right market freedoms over conflicting social rights values. The creation of the possibility of constitutional parity between social rights and civil rights occasioned by the Lisbon Treaty means that this gap in rights protection can be addressed. If the Court of Justice adopts an affirmative approach to the interpretation of social rights, it will be possible to describe Union citizenship

[1] C-85/96 *Martínez-Sala* [1998] ECR I-2691, at para. 61. *See* Chapter 2.4.2.

as protecting social citizenship to a sufficient extent to validly term it a version of 'citizenship' according to the accepted Marshallian model.

9.1.1 Some Themes in the Development of Union Citizenship

In the analysis of the development of citizenship generally in Chapter 2 some themes were identified as being key drivers in bringing about change in the range of protection that citizenship provides.[2] In the context of Union citizenship, it is interesting to consider the role of the various actors in its formation. It was noted in Chapter 3.7 how the Court of Justice was vigorous in extending the definition of the term worker, but eventually had to set limits on this as a device to increase protection. While Union citizenship was introduced by the Member States through a Treaty amendment, it was clear that they did not consider the concept to be of major significance. Again it was the Court of Justice which drove the interpretation of the term to become so meaningful. The next step in the development of citizenship came within the competence of the Union Legislature, where national interests in the Council had to be balanced against citizens' interests in the European Parliament. The resulting Citizenship Directive curbed certain aspects of the Court's case law, but gave legislative confirmation to most of it. Significantly, it also went further and created a permanent right of residence for Union citizens and the resulting status of full social integration.

The vigour of the Court of Justice in its approach to the concept of Union citizenship can be contrasted with its unwillingness to use the general principles of Union law to give social rights constitutional status, despite this option being open to it. Indeed, the Member States and the institutions, barring perhaps the Parliament, have all demonstrated

[2] Chapter 2.2.5.

considerable unwillingness to give meaningful consideration to the position of social rights. This is typified by the lapse of a full eight years between the original solemn proclamation of the Charter and its eventual incorporation into primary Union law.

One significant difference between the development of Union citizenship and the processes recorded in Chapter 2 is that the changes have come about through an incremental process, rather than as a response to any crisis. While the Charter of Fundamental Rights was linked to addressing concerns surrounding democratic deficit, it took a long time to be implemented. This is not to say that there were not 'crises' in the Union context during this period. The failure of the Constitutional Treaty was a significant blow, but it was already addressing the status of social rights through the Charter. As such, the eventual Lisbon Treaty made no major differences on this point. It is appropriate to consider whether the current financial crisis being experienced across Europe and the resulting threat to the stability of the Euro will occasion any major constitutional reforms. It has already been proposed that amendments should be made to the Treaties to give legal validity to any 'bail-out' mechanism that is created.[3] On the face of it, this is not directly linked to Union citizenship, though the argument has been made there is a connection between it and the wider macro-economic policies and monetary policy pursued by the Union.[4]

9.2 Recommendations

Having examined Union citizenship and its relationship with social rights in this thesis, recommendations are submitted on how these issues could best be treated into the future.

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[3] European Council, Brussels 16-18 December 2010 Conclusions, CO EUR 21.

[4] See generally on this point, Amtenbrink F., 'Europe in Times of Economic Crisis: Bringing the Union Closer to its Citizens?', *Empowerment and Disempowerment of the European Citizen: The Citizen's Policy Agenda?* (University of Edinburgh, 10 December 2010).

9.2.1 Ambitious Approach to the Interpretation of Social Rights

The first recommendation is that the Court of Justice should take an ambitious approach to its interpretation of the social rights laid down in the Charter and the new values inserted into the TEU. If the changes brought about by the Lisbon Treaty are to genuinely create a social citizenship, then the Court will need to interpret the new provisions in the light of the European social state model. Recalling the early case law of the EEC where the Court would cite the 'spirit' of the Treaties in creating significant doctrines, it must now acknowledge that EU law has been infused with a spirit of social rights and values, and rule accordingly.[5] To give these new provisions a weak or an inconsequential interpretation would not only be contrary to the intention of inserting them within the Treaties, but would increase the perception that the European Union follows excessively liberal economic policies and is a threat to social rights values.

A vigorous approach to the interpretation of the social right provisions would not mean that there would be a monumental change in the Court's approach to the fundamental freedoms. This thesis does not argue for the reversal of the free market. As such, social rights would not automatically prevail in every court case in which they were at issue. However, what is vital is that in future, the manner in which decisions are reached pays sufficient attention to social rights and values, and that in light of their newly established constitutional parity, these are balanced fairly against the fundamental freedoms. Such an approach would recognise the significant change that this thesis argues has been occasioned by the Lisbon amendments. It would also be more honest than certain other attempts at balancing competing social and economic interests. For example, while the final version of the Services Directive

[5] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belgastingen* [1963] ECR 1; Case 6/64 *Costa v. ENEL* [1964] ECR 585, at 3.

had the controversial 'country of origin' principle removed, it has been argued that this was resurrected in the text by the phrase 'freedom to provide services'.[6] The need for such parsing of words would be removed if it were felt that the Treaties, as interpreted by the Court, contained comprehensive protection of social rights and values.

9.2.2 Clarifying the Status of Solidarity and Social Justice

Throughout this thesis, the word solidarity has regularly appeared, but without any clear indication of what its Union meaning is. Article 2 TEU states that solidarity is one of the common prevailing factors across the Member States, while Article 3(3) TEU calls for solidarity between generations and between Member States. The term is also referenced in Recital 6 TEU regarding solidarity between peoples.

The word has featured extensively within the case law. In *Grzelczyk* and *Bidar*, 'financial solidarity' was used to undermine limitations contained in secondary legislation, to the benefit of individual citizens. In *Albany*, the concept formed the justification for the non-application of competition rules to industrial relations agreements. In *Sodemare*, it was defined as the "uncommercial act of involuntary subsidization of one social group by another".[7] At no stage has a definitive interpretation of the word been provided. This lack of clarity regarding its meaning is deeply problematic, particularly considering the importance the same word has in the context of social rights in many of the Member States. It is vital that the Court gives clarification on this point.

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[6] Directive 2006/123/EC of the European Parliament and Council on services in the internal market [2006] OJ L 376/36. *See* Craufurd Smith R., 'Old Wine in New Bottles'? From the 'Country of Origin Priniple' to 'Freedom to Provide Services' in the European Community Directive on Services in the Internal Market', Edinburgh Mitchell Working Paper Series 6/2007, (Europa Institute, University of Edinburgh); Barnard C., 'Employment Rights, Free Movement under the EC Treaty and the Services Directive', Edinburgh Mitchell Working Paper Series 5/2008, (Europa Institute, University of Edinburgh).

[7] Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I-3395, at para. 29 of the opinion.

In contrast to solidarity, the term 'social justice' is a wholly new feature of the Treaties, which must be promoted by the Union. Obviously, its recent appearance in the Treaties means that there are no Court judgments setting out its meaning.[8] Arguably, this offers the Court the opportunity to give the term an expansive interpretation, particularly if it follows the recommendation above at Chapter 9.2.1 about giving an ambitious interpretation to terms that further the protection of social rights.

9.2.3 Possible Development of Transnational Social Welfare

Although it has only been touched upon to a certain extent in this thesis, it is submitted that the long term challenge for the European Union is to determine whether it seeks to deepen integration to such an extent that transnational social welfare becomes a reality. This thesis has proceeded on the basis that a citizenship that operates across 27 different social welfare systems is legitimate. However, this has not been to suggest that a time will, or indeed, must come when the Union will have to seriously examine the need to harmonise its approach to social welfare provision.

Presently, other than structural funds, social payments and the CAP, there is a lack of Union wide distributive competences, much as there is a lack of Union wide revenue raising powers. Transnational social welfare would have the advantage of compensating those Member States who have experienced large scale immigration and resulting pressure on their resources. However, it must also be acknowledged that this would be a major federalising step.[9] If introduced, the case for a common set of European social values, taking precedence

[8] Golynker suggests that some decisions of the Court reflect a wider EU conception of social justice. See Golynker O., 'Student Loans: the European concept of social justice according to Bidar', (2006) 31 *European Law Review* 390.

[9] Scharpf suggests that the difficulty in achieving agreement on such harmonisation makes it almost impossible to achieve, Scharpf F., 'The European Social Model: Coping with the Challenges of Diversity', (2002) 40 *Journal of Common Market Studies* 645, at 651-1.

over those in national constitutions in a way the Charter currently prohibits, would become stronger.[10] It would almost certainly have to be backed up by common European taxes, which would presumably fall on wealthier nations to fund. States such as Germany have made known their strong reservations about a 'transfer union' developing on a Union wide scale.[11]

The observation that public acceptance of the EU depends on a feeling that it reinforces their economic and social security in the national context has already been noted.[12] This fact was particularly evident in the French rejection of the Constitutional Treaty, as discussed in Chapter 7.6.1. At this stage, transnational social welfare provision is probably too great a step, in light of the lack of a common European consciousness. However, this evolution of the general theory of citizenship outlined in Chapter 2 shows that full social rights inevitably develop as a consequence of citizenship. This thesis has shown how Union citizenship swiftly developed an extensive bundle of civil, political and social rights for its citizens. It is submitted that while a full transnational social welfare system is not a short or medium term prospect; the trajectory of the development of Union citizenship suggests that it is an inevitability.

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[10] Poiares Maduro M., 'Europe's Social Self: "The Sickness unto Death"', in Shaw (ed), *Social Law and Policy in and evolving European Union* (Hart Publishing, Oxford-Portland, 2000), at 342-3.
[11] Amtenbrink F,, above note 4, at 10-1.
[12] Van Kersbergen K., 'The Politics of Solidarity and the Changing Boundaries of the Welfare State', (2006) 5 *European Political Science* 377, at 382.

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