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Abbreviations

<i>CMLR</i>	Common Market Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
<i>ELR</i>	European Law Review
EP	European Parliament
EU	European Union
ICJ	International Court of Justice
PCIJ	Permanent Court of International Justice

Articles in the text not followed by a reference to a Treaty or other legislation refer to the EC Treaty.

1 Introduction

“When Gregor Samsa awoke one morning from troubled dreams he found himself transformed in his bed into a monstrous insect”¹

The story of the individual in Community law is the story of a metamorphosis. From a series of International Treaties Community law emerged as an autonomous legal order of its own. Individual rights arose from Member State duties and the Treaties were interpreted as constructing a constitutional charter; a public international law regime was transformed into a legal system whose subjects are not only the Member States but also their citizens. The Treaty of Maastricht, by inserting a new part two on union citizenship into the EC Treaty, suggested that this path would be further followed.

As the spill-over effects of economic integration reached the periphery of political integration, the establishment of a supranational European political system became highly essential. In the framework of this political system, the citizens of the Union were called upon to play an important role.

Consequently, the ‘market citizen’², a reduced functionalist concept³ of the individual as a holder of economic freedoms, established in the framework of the European Community, was vested with basic Union rights and arrived at the centre of the political structure of the Union.

In modern political societies, political obligation is expressed through the citizenship construct or, in the strict sense, the right to vote, which binds the individual to a given political society in a manner unique in relation to other societies. The citizen is the legitimising cornerstone of democratic polities. Legitimacy is, however, only the one side of citizenship whose other face is sovereignty. It is the citizens who form the Nation in *“the sense of being moral title holders of sovereignty”*: citizenship locates a sovereign institution within a constitutional limited state and, essentially, demarcates one nation from another.

¹ Franz Kafka, *the Metamorphosis*.

² Stefan Kadelbach, *Union Citizenship*, Jean Monnet Working Paper 9/03, p. 5

³ *Ibid.*

On a deeper level the concept of Union citizenship, therefore, involves the questions of the sovereignty of the Member States and the popular legitimacy of the Community.

This Thesis will, for two reasons, put together perspectives of citizenship relating to positive law and philosophical theory. The first reason is methodical in nature. As the structures on the bottom of the sea can break the waves, the deep layers of the law can create tensions in the positive law. The second reason lies in the pioneer role, which Union citizenship plays in the discussion concerning a European constitution.

Accordingly, this thesis will ask: *“which rights the individual derives from the Union Citizenship, and how this citizenship affects the democratic legitimacy of the Community and the popular sovereignty of the Member States?”*

The thesis will first introduce the notions of sovereignty and legitimacy as expressed by Thomas Hobbes and John Locke respectively. This section will provide the theoretical underpinning necessary to understand both the positive law and the impact Union citizenship has on both the Community and the Member States. A definition of citizenship for the purposes of this thesis will also be attempted. Thereupon, the body of rules governing Union citizenship will be investigated in order to clarify the scope of the rights granted by this. This investigation will, furthermore, elaborate on the concept of rights against the concept of citizenship.

The thesis will end up with a discussion, which brings together the theoretical underpinnings, and positive law in order to answer, which impact the Union citizenship, has on the notions of sovereignty and legitimacy.

1.1 Method

The method employed in the thesis is principally inspired by the theory that the law consist of several layers, which influence each other⁴. Essentially, this implies that one, in order to understand the law as reflected in body of

⁴ Cf. Kaarlo Tuori, *Towards a Multi-layered View of Modern Law*, in Aulis Aarnio, *Justice, Morality and society – A Tribute to Aleksander Peczenik*, Robert Alexy & Gunnar Bergholtz, Juristforlaget i Lund, 1997, p. 432 ff.

rules and case law, must delve into its philosophical underpinnings, that is to say, the deeper layers. The structure of the deepest levels has the quality to modify the upper layers, but the upper layers can also, occasionally, affect the deep layers.

As already touched upon, the thesis will therefore make use of both political philosophy and legal interpretative methods. The starting point for the philosophical theory is constitutional liberal, in the sense that the individual is taken into account as the constitutive factor of society. More specifically, the work of Locke and Hobbes are selected to form the basis of the analyses. The principal method employed when analysing Union citizenship as a legal construct is descriptive analytical in the sense that black letter law is assessed against case law and different legal interpretative styles.

In the discussion, both the above-described methods will be employed.

1.2 Delimitations

Principally, two views can be adopted on the EU as a political entity. On the one hand, the EU can be interpreted as a grouping of sovereign states for the purposes of international cooperation. On the other hand, the EU can be understood as a new political society uniting the citizens of Europe in a political and legal community. This thesis has primarily investigated the latter understanding. This implies that, when the questions and problems relating to the sovereignty and legitimacy are assessed, principally only one side of the discussion is presented. Accordingly, the question of individual's trust in their Member States as implementers of Community law, and the view that the Member States indirectly legitimise the Community's exercise of power, are only superficially dealt with. The same is true as regards the question relating to sovereignty, where the view that the ECJ is suffering "*from a reality deficit*"⁵ when proclaiming the constitutional character of the Community is only briefly mentioned. This one sided approach has, primarily, been adopted due to limitations in space and time.

⁵ Trevor Hartley, Trevor Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999, p. 181

2 Theoretical Underpinnings

This section will introduce the elements of Hobbes' and Locke's philosophies that are central for the purpose of this thesis. The section principally serves an instrumental purpose in relation to the discussion of the impact Union citizenship has on the legitimacy of the Community and the sovereignty of the Member States and, therefore, no claim is made that the treatment of the theories is exhaustive.

2.1 Absolute Sovereignty

The true turning points in the history of political thinking are marked not so much by new things that are said, as by new questions asked. The break-up of the medieval Church, that during the Middle Ages had framed the political way of thinking and legitimised the exercise of power, was followed by numerous religious wars in Europe. Wars that made the countries' political underpinnings tremble and, consequently, implied that new questions concerning political obligation had to be asked⁶. That is to say, how ought we to define, within a political community, the connection between those who govern and those who are governed?

This is the question that Thomas Hobbes addressed with his conceptual theory of sovereignty. With the European battlefields as background (and perhaps inspiration), Hobbes located a starting point for his philosophy in something interpersonally certain and indubitable, namely man himself, thereby offering a common ground independent of religious controversies. Religion, in Hobbes view was simply an adjunct of state-power, not a coordinate base of, far less a higher source for, state authority.

2.1.1 The Contract of Society

Hobbes based the construction of his model of society on the idea of a state of nature. The state of nature represents a condition in which individuals

⁶ Jean Bodin, *Six Books of the Commonwealth*, available at: www.constitution.org/bodin, introduction

interact in the absence of a superior power. Absent a power to regulate and enforce rules, the state of nature is characterised by total freedom⁷, that is to say, that everyone has the right to everything⁸. According to Hobbes the state of nature is, due to the imperfect nature of man⁹, a state of war that most closely can be compared to virulent anarchy¹⁰. In this condition, life is embedded with physical insecurity and fear, and is on the whole “*solitary, poor, nasty, brutish and short*”¹¹.

Physical insecurity is the reason why the contract of society is adopted. The instinct that dominates throughout the state of nature is that of self-preservation. Since, in the state of nature, all men are equal in the sense that everyone has the same qualities and abilities and, hence, can overcome or kill others, the rational insight is that only by the establishment of a political society can the chances of survival be increased. All must therefore without reservation give up the freedom of the state of nature and, together with everyone else, transfer all their rights, with the exception of the right to self-preservation, to the sovereign¹². The paradox is therefore, that to preserve freedom, order must be created to restrict it¹³.

2.1.2 The Sovereign

Civil society is thus not a natural thing inherent in man¹⁴ but an artificial creation arising through a contract.¹⁵ The society, instituted to create unity

⁷ Not even notions of justice places restrictions on the individuals: “To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place” Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge University Press, 1996, ch. 13, § 14

⁸ Hobbes, Thomas, *De Cive*, in Bernard Gert, *Man and Citizen*, Hackett Publishing, 1991, ch. 1, § 10, available at: [www. Constitution.org/th.decive01.htm](http://www.Constitution.org/th.decive01.htm): “Nature hath given *every one a right to all*”.

⁹ Thomas Hobbes, *op. cite.*, note 6, ch. 13, § 7

¹⁰ Ola Zetterquist, *A Europe of the Member States or of the Citizens – Two Philosophical Perspectives on Sovereignty and Rights in the European Community*, KFS, Lund, 2002, p. 74

¹¹ Thomas Hobbes, *op. cite.*, note 6, ch. 13, § 10

¹² “I Authorise and give up my Right of Governing my selfe, to this man, or to this Assembly of men, on this condition, that thou give up thy right to him, and Authorise all his Actions in like manner”, Thomas Hobbes *op. cite.*, note 6, ch. 17, § 13

¹³ Martti Koskenniemi, *From apology to Utopia*, Helsinki, 1989, p. 52

¹⁴ Contrary to Aristotle who believed society to be the natural state of man

¹⁵ Thomas Hobbes, *op. cite.*, note 6, ch. 17

and security, is in Hobbes symbolised by a man (or a mortal God) termed Leviathan¹⁶, whose soul gives the society life and motion¹⁷, and whose will constitute its laws. By affirming the contract of society the individuals become a *people* and thereby form a part of this artificial man whose actions are the actions of all. The sovereign may not share his sovereignty with others (two souls in the same body equals schizophrenia) and must always be able to be identified as the supreme power. The sovereign is, moreover, omnipotent in relation to the citizens who against him have only the claim of unity in society. Thus, the citizens never possess the right to revolt against the sovereign.

The main purpose of the state is – not to create freedom since that already existed in the state of nature – but to create a secure and peaceful society¹⁸. It is exactly the security created by means of a superior strength that ultimately forms the moral and political obligations of the individuals towards the sovereign¹⁹.

2.1.3 The Legislative Competence

In Hobbes²⁰ sovereignty is manifested in the competence to enact laws. Laws are to be regarded as the same as commands from the sovereign. Since no one can exercise authority over himself²¹, the sovereign is exempt from the application of the law. This implies that the sovereign is not subject to his own laws but issues and abrogates them as he likes (*princeps solutus est legibus*)²². As a consequence, the validity of the law cannot be conditioned

¹⁶ Thomas Hobbes is with the term Leviathan aiming at the creature from the book of Job ch. 41, 24-25, not the creature mentioned in the book of Isaiah ch. 27, 1 or the revelation of John ch. 12, 9

¹⁷ Thomas Hobbes, *op. cite.*, note 6, introduction

¹⁸ Thomas Hobbes, *op. cite.*, note 6, conclusion

¹⁹ ” Because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him in whose power it is to save, or destroy him”, Thomas Hobbes, *op. cite.*, note 6, ch. XX, *Cf.* also Ola Zetterquist, *op. cite.*, note 10, p. 82

²⁰ Jean Bodin, *Les Six Livres de la République I-VI*, Librairie Arthème Fyard, Paris 1986

²¹ Thomas Hobbes, *op. cite.*, note 6, ch. 18, §

²² *Cf.* Jean Bodin, *op. cite.*, note 20, p. 8: “*La souveraineté est la puissance absoluë et perpetuelle d’une République*”. In Bodin, the absolute (absoluë) power of sovereignty lies in the fact that the sovereign is not subject to his own laws but issues and abrogates them as he likes.

on demands of legitimacy, established either by divine or popular intervention²³.

Unity, being the aim of society, is moreover reflected in Hobbes view on the law. To maintain unity in the law and its application, the law must be capable of being derived from a single source that holds the supreme authority to interpret the law²⁴: If different authorities have the power to interpret the law, the risk of uncertainty and, hence, the risk of anarchy is eminent. In Hobbes, it is the sovereign that holds this authority. This implies that the judiciary is to be viewed as an extension and representative of the sovereign and, as a consequence, are obliged to interpret the law in accordance with the sovereign's will²⁵.

The endeavour for unity is moreover reflected in the approach to the relationship between different legal systems. For an alien legal system to claim validity on a sovereign territory, the consent of the sovereign is obligatory.

2.2 No-Sovereignty

As Copernicus turned the centre of our solar system from the Earth to the sun, the state can be thought a creation of the law, and not the law a creation of the state. This position depends on the theory of natural law. In such a theory, law is at its deepest level a set of rational norms of conduct build into the nature of things and of people. Natural law is a moral law that whoever is found in the position of exercising governance has to make specific rules for governing it, and for securing that correct conduct is upheld and wrongdoing adequately restrained²⁶. This implies that the state is to be viewed as a mere instrument instituted to give effect to the natural rights of individuals²⁷.

²³ Ola Zetterquist, *op. cite.*, note 10, p. 93

²⁴ Thomas Hobbes, *op. cite.*, note 7, ch. XLII, p. 378

²⁵ Thomas Hobbes, *op. cite.*, note 7, ch. XXVI, p. 187

²⁶ Neil MacCormick, *Questioning Sovereignty*, Oxford University Press, 1999, p. 129, note 23

²⁷ John Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge University Press, 1989, §§ 145-147

As mentioned above, the upheavals of the religious wars led to increasing difficulties for governments to legitimise the exercise of power. As a response, social contract theories in various forms emerged. Hobbes represents one line of these thoughts. Another line associated particularly with the name of John Locke derived from the idea that individuals even in a state of nature would have rights and would owe each other corresponding obligations.

2.2.1 Basis for Legitimacy

If kings do not govern by divine right, and if government is more than the rule of the strongest, then another source for the authority of government must be discovered.

The starting-point for locating the centre of legitimacy begins, in Locke, with defining political power as the right to implement and execute laws. The reason for this definition depends on Locke's vision of the state of nature. As in Hobbes, Locke believes society to be a compact made by people who previously lived in a non-political condition²⁸. Locke did, however, not view the state of nature as darkly as did Hobbes. Rather, he says, in the state of nature men enjoy "*a state of perfect freedom [...] within the bounds of the law of nature*"²⁹. While Hobbes thinks of the state of nature in terms of war and brutishness, Locke thinks of it as a state of liberty: Liberty being understood in its positive sense as the freedom to act within the boundaries of the natural law. Thus, men have, in their quality of being persons, rights that precede the existence of the state. Absent a common legislator and a common impartial judge in the state of nature it is, however, the right of every person to uphold and enforce these rights (the natural law)³⁰.

It is exactly the judicial right to punish wrongdoings that in Locke constitutes the need to establish a society³¹. Because man, imperfect as he is,

²⁸ John Locke, *op. cite.*, note 27, II, § 4

²⁹ *Ibid.*, II, § 22

³⁰ *Ibid.*, II, § 7-8

³¹ Ole Spiermann, *Enten & Eller*, Jurist- og Økonomforbundets Forlag, 1995, p. 66

cannot judge objectively in his own case³², the risk that he will pass arbitrary judgments is prominent. As a consequence of the lack of established and promulgated law, the absence of a judge to make determinations according to this law, and lack of power to execute what is in accord with the law, political society must be instituted if the state of nature is not to degenerate into a Hobbesian state of war.

2.2.2 The Doctrine of Property

What Locke has to say about the origin of civil society is also of interest in connection with the, for Locke's political theory, essential concept of property³³. The law of nature commands one not to harm another's possessions or property. Property is understood as every object an individual has invested labour in³⁴. Possible appearances to the contrary, the concept seems not to include the individual person's life and liberty³⁵. Since life and liberty in its strict sense never belonged to the property of man, these qualities can never be renounced or transferred to society.

The construction of the doctrine of property implies that the origin of rights is decoupled from political society. By granting men rights by way of their own work they are furnished with security against the exposure of the state of nature. Property, understood in its widest sense, thereby fulfils a function similar to the Hobbesian state, namely to provide individuals with security³⁶.

2.2.3 The Lockean Constitution

According to Locke, government is a delegated power based on the trust of the people with the purpose to ensure that rights, existing autonomously of

³² John Locke, *An Essay Concerning Human Understanding*, ed. David Favrholt, Rosinante, 2000, IV, ch. 20, § 17: "All men are liable to error, and most men are in many points, by passion or interest under temptation to it".

³³ Ole Spiermann, *op. cite.*, note 31, p. 65

³⁴ Ola Zetterquist, *op. cite.*, note 10, p. 101

³⁵ *Ibid.*, p. 101

³⁶ *Ibid.*, p. 103

the state, are not infringed by others³⁷. Government, regardless its form, however constitutes a potentially greater threat to the individuals' rights than infringements by other individuals.³⁸

Due to the potential danger government represents this must be made subordinate to the (natural) law³⁹. Only by excluding the government's right to subjectively interpret the law can individuals' rights be protected from encroachments from an arbitrary exercise of governmental power. Moreover, the protection of these rights is instrumental in achieving self-government for the individual.

In Locke, self-government represents the belief that the survival of no one should be dependent on the goodwill of others, since such a relationship will lead to a state of obedience between individuals⁴⁰. A prerequisite for self-government is that the individual should be able ensure his independence by means of property. The purpose of self-government is to protect a zone for each individual, which other individuals or the government cannot encroach upon. Within this zone the individual is at liberty to define and realise his own happiness so long as it does not injure others⁴¹. The zone thus coincides with those rights that the individual has not entrusted to government.

It is the protection of every individual's right and property that constitutes the domain in which the legislature can legitimately exercise power. The legislature is in Locke thus limited by a (natural) law that regulates the power over the (positive) law⁴². The drawing of a legal boundary in a form that today would be labelled a constitution thus ensures the protection of the individual's rights.

The concept of constitutionalism reflects the idea of political society as being an entity created with limited scope. This approach implies that the Constitution must be able to be derived from the people, which in turn implies that it is the citizens collectively that constitute the ultimate power

³⁷ John Locke, *op. cite.*, note 27, II, § 89

³⁸ "He being in a much worse condition who is exposed to the Arbitrary Power of one Man, who has the Command of 100000. than he that is expos'd to the arbitrary Power of 100000. single Men." John Locke, *op. cite.*, note 27, p. 360, § 137.

³⁹ Ola Zetterquist, *op. cite.*, note 10, p. 108

⁴⁰ *Ibid.*, p. 101

⁴¹ *Ibid.*, p. 109

⁴² John Locke, *op. cite.*, note 27, II, § 151

of society. The citizens are thus to be understood as the source of the Constitution. It is from that source that all constitutional institutions derive their authority. This does however not imply that the people collectively are to be viewed as a sovereign institution, that is to say, an institution with unrestricted authority.

Legally defined limits on the power of government is, however, not sufficient to protect individual's rights. The individual must, moreover, have access to an impartial judge with competence to determine if the government (or other individuals) have overstepped their boundaries. Therefore, it is necessary that the judicial power is separated from the legislative power.

Denial of access to an impartial arbiter (*appeal on earth*) gives, according to Locke, rise to the *appeal to heaven*, that is to say, the right to various degrees of revolt.⁴³ By appealing to heaven the individual return to the state of nature in that the power to interpret and implement the law is being reinstated to each individual.

In Locke's political system it is thus the constitution and access to impartial judges that form the two fundamental attributes of society⁴⁴.

⁴³ This idea is also reflected in the American Declaration of Independence: "We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world".

⁴⁴ Locke's political society coincides with what MacCormick term a law-state, *Cf.* Neil Maccormick, *op. cite.*, note 26, p. 9

3 The Concept of Citizenship

With Locke and Hobbes' liberal theories as background it is possible to develop a definition of citizenship for the purposes of the framework of this thesis.

The individual's freedom is the nucleus of liberal theories; either as an axiom or founded in the highest normative principle, freedom is the basis wherefrom society is instituted. This in turn implies that society must be legitimised from the point of view of the individual. The question of legitimacy relates to what can be considered morally acceptable in modern political society⁴⁵.

Membership of a legitimate political society is the foundation for political obligation among the persons who make it up. Political obligation can be said to exist when a given person is in a particular relationship to a political society which distinguishes him from those who are not members of that society⁴⁶. In modern political societies, political obligation is expressed through the citizenship construct or, in the strict sense, the right to vote, which binds the individual to a given political society in a manner unique in relation to other societies⁴⁷. The citizen is thus the legitimising cornerstone of democratic polities⁴⁸.

Etymologically, the word citizen originates from the French *citoyen*, meaning a creature of the enlightenment. The word was elaborated and defined under the French 16th century *Ancien Régime* and onwards⁴⁹. It was, however, not till the French revolution in 1789 broke the feudal and monarchic tradition in proclaiming that "*le principe de toute souveraineté reside essentiellement dans la nation*"⁵⁰, the concept of citizenship became political. The idea of belonging no longer derived from a feudal tradition,

⁴⁵ Ola Zetterquist, *op cite.*, note 10, p. 286

⁴⁶ Thomas Janoski, *Citizenship and Civil Society*, Cambridge University Press, 1998, p. 9

⁴⁷ Ola Zetterquist, *op cite.*, note 10, p. 286

⁴⁸ Joseph H. H. Weiler, *The Constitution of Europe – Do the New Clothes have an Emperor?*, Cambridge University Press, 1999, p. 332

⁴⁹ Benoît Guiguet, *Citizenship and nationality: tracing the French Roots of Distinction*, p. 96 in Massimo La Torre (ed.), *European Citizenship – An Institutional Challenge*, Kluwer Law International, 1998

⁵⁰ *Ibid.* p. 98

but, instead, from the will to live according to the laws of a state before which all individuals are equal.

The citizen, as the holder of rights, liberties and obligations is a politically active being in a government that derive its legitimacy from below. Individuals are the reason why society is instituted and its ultimate source of legitimacy. But through participation in the formation of the common will, individuals are also (if the theory advocates sovereignty) forming the Nation in “*the sense of being moral title holders of sovereignty*”⁵¹. Thus, citizenship forms a part of the threefold role the individual plays in a democratic state: First, the individual, as a part of the collective *people* is creating the base wherefrom it is possible to identify a given state and its jurisdictional boundaries⁵². Second, the individual, as a *citizen*, is participating in, and thereby legitimising, the sovereign authority by way of voting and standing as a candidate in elections to the legislature of the state. Thirdly, the individual, as a *subject*, is the objective behind the laws directed to him and, in fact, the very reason for the establishment and continuation of the state⁵³. It is important to distinguish between those positions. Individuals are subjects only in the effect of the law. But as elucidated by Weiler you could create rights and judicial remedies to slaves⁵⁴. A right bestowed you by pleasure of others does not emancipate you, does not make you a citizen.

⁵¹ Benoît Guiguet, *op. cite.*, note 21, p. 98

⁵² Cf. e.g. the *Nottebohm Case*, ICJ Reports [1955] 4, p. 24 and *Barcelona Traction Case*, ICJ Reports [1970] 3, para 78

⁵³ Jean Jacques Rousseau, *Du Contrat Social*, eds. Jean-Marie Fataud and Marie-Claude Bartholy, Paris, 1972, Book I, Chap. IV *in fine*: “The associates take collectively, the name *peuple*, and in particular, *citoyens* when participating in the sovereign authority, and *subjects* when subjected to the laws of the state”. See also Thomas Hobbes, *De Cive*, ch. 12, § VIII: “In the last place it is a great hindrance to Civil Government, especially Monarchicall, that men distinguish not enough between a People and a Multitude. The People is somewhat that is one, having one will, and to whom one action may be attributed; none of these can properly be said of a Multitude. The People rules in all Governments, for even in Monarchies the People commands; for the People wills by the will of one man; but the Multitude are Citizens, that is to say, Subjects”.

⁵⁴ Joseph H. H. Weiler, *op. cite.*, note 38, p. 336

4 Union Citizenship

European citizenship constitutes a dynamic institution with an evolving dimension⁵⁵. Introduced by the Maastricht Treaty, it is regarded the inevitable consequence of the completion of the Internal Market. European citizenship expresses a political relation between the citizens and the(ir) Union and, thus, indicate a shift of its democratic legitimacy. The concept of citizenship is conflated with political power. To this extent, the legitimation basis of the Union now also rests with its citizens.

The establishment of European citizenship presupposes a new sphere of rights and duties for the Union Citizens. In addition to those resulting from State citizenship, the Union citizenship has constitutionalized the pre-existing *acquis communautaire*⁵⁶ and furthered new rights⁵⁷.

Articles 17-22 give a list of specific rights connected with the status of European citizenship. No specific duty is mentioned alongside the rights, although Article 17(2) states that the citizenship implies a subjection to the duties imposed by the Treaty. Article 18 ascribes a general right to freely move and reside in any Member State. Article 19 provides for a right to vote and be elected in municipal and EP elections in the Member State of residence. Article 20 assures diplomatic protection by a Member State to citizens of other Member State's, where the citizen's Member State has no diplomatic representation. Article 21 sets down the right to raise petitions to the EP and to make recourse to the European Ombudsman. Last, Article 22 foresees the possibility for the Council to adopt provisions to strengthen the rights of Union Citizens.

⁵⁵ Article 22

⁵⁶ Andrew Evans, *Union Citizenship and the constitutionalization of equality in EU Law*, in Massimo La Torre (ed.), *op. cite.*, note 39, p. 267

⁵⁷ Although the introduction of this new section two represented the first formal constitutionalization of European citizenship, the idea of Community citizenship and the rhetoric of a 'People's Europe' had been in circulation for a long time. Cf. e.g. the report on a 'A People's Europe' following the *Fontainebleau* summit of the European Council (COM(1984)446 final) and the 1987 'Erasmus' decision of the Council concerning student exchange that, as the first legal act, referred to a "Europe of Citizens" (OJ 1987 L 166, p. 20).

The purpose of this section is to examine the positive law governing the Union Citizenship in order to establish which rights (and duties) the Union Citizen derives from this Institution.

4.1 Acquisition of Union Citizenship

Citizenship is habitually used as a synonym for nationality or even identity⁵⁸. When examining the Union Citizenship as expressed in positive law (Articles 17-22) it becomes clear that parallels to nationality are neither possible nor intended. By granting Union Citizenship to every “*person holding the nationality of a Member State*” (Article 17(1)), nationality is a precondition for obtaining the status of Union citizenship, but not a component embedded in the concept itself. Union citizenship cannot be acquired alone, nor can it be forfeited without giving up nationality. This implies that the Member State's national citizenship laws determine the conditions for acquiring and losing Union Citizenship⁵⁹. The Member States decide who is a Union Citizen and must recognise mutually such decisions⁶⁰. Union citizenship is thus a quality superimposed on national or even regional or local citizenship to be given effect on multiple levels⁶¹.

4.2 The legal Framework

Owing to the fact that the provisions containing Union citizenship rights all are subject to further implementing measures a dispute erupted whether those rights could have direct effect⁶². ECJ case law, which had deliberately

⁵⁸ Carlos Closa, *Citizenship of the Union and Nationality of Member States*, CMLR 32 (1995), p. 487

⁵⁹ See Declaration No. 2 annexed to the Treaty of Maastricht: “wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State is to be settled solely by reference to the national law of the Member State concerned”.

⁶⁰ Case C-369/90, *Micheletti*, [1992] ECR I-4239

⁶¹ Cf. Ingolf Pernice, *Multilevel constitutionalism in the European Union*, ELR 27 (2002)

⁶² Cf. Erika Szyszczak, *Making Europe More Relevant to its Citizens: Effective Judicial Process*, (1996) 21 ELR, p. 351 at footnote 7. On the distinction between vertical, horizontal and indirect horizontal effect see Jacob Skude Rasmussen and Snorre Welling, *Direkte virkning i trekantrelationer i lyset af CIA og Unilever*, Justitia No. 5, 2002

avoided this question at first, has now with the *Baumbast*⁶³ judgement decided that (at least) Article 18 has direct effect.

Moreover, many of the Union citizenship rights were prior to the signing of the Maastricht Treaty embedded in the *Acquis Communautaire*. The special symbolic value of a citizenship and the foundational place the citizenship provisions occupy in the architecture of the Treaties⁶⁴ has encouraged many legal scholars and the Commission to argue these rights to be constitutional⁶⁵.

If the Union can have a constitution or indeed already has one, is a highly disputed question that essentially deals with concepts of sovereignty, legitimacy and trust. In this section it suffices to state that it is disputable. The foundational location of the provisions does, however, even with a conservative interpretation suggest that they are to be considered as rules which cannot be derogated by other provisions of Community law unless by express wording⁶⁶. Their foundational character within the architecture of the Treaty does not allow for an interpretation of them as *lex generalis* subject to change by *lex specialis*.

4.3 Freedom of Movement and Right of Residence

Union citizenship attributes central significance to the right to move and reside freely within the Community since this forms the pre-condition for the individual to fall under the *ratione materiae* of Community law⁶⁷.

As a general rule only nationals enjoy unrestricted freedom of movement within the State borders⁶⁸. Traditionally, it is for States to decide upon who

⁶³ Case C-313/99, *Baumbast*, [2002] ECR I-7091

⁶⁴ Union citizenship is contained in the preamble to the Union treaty and figures among the main objectives of the Union (Article 2(1), litra 3) EU)

⁶⁵ Cf. e.g. Massimo La Torre, *Citizenship, Constitution and The European Union*, and Andrew Evans, *Union Citizenship and the constitutionalization of equality in EU Law*, both in Massimo La Torre (ed.), *op. cite.*, note 39. Cf. also the Commissions Report on the Citizenship of the Union (COM(1993)702).

⁶⁶ Massimo La Torre, *Citizenship, Constitution and The European Union*, in Massimo La Torre (ed.), *op. cite.*, note 39, p. 436

⁶⁷ Cf. Case C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Sociale, [2001] ECR I-6193, para. 29

may enter and reside within their territory. This is reflected in International Law where permanent population and control over the territory constitute necessary criteria for the recognition of a state⁶⁹. The state's control over its territory in the sense that it ultimately decides who may enter and take residence, furthermore, forms a necessary precondition for peoplehood, defined in its narrow sense as nationhood.

Certainly, prior to the establishment of the Union citizenship economically active nationals of Member States enjoyed freedom of movement, but the fact that the right now is guaranteed in the citizenship section is of special symbolic value. Moreover, the rights enjoyed by holders of Union citizenship, previously secured or envisaged under Community law, has, as discussed above, been “*fundamentally altered [and granted] constitutional status*”⁷⁰.

The dynamic element in the development of free movement was previously provided by market and competition requirements. Since such requirements are based on market concepts, some other dynamic has to be found to justify and control the demand for equality, if free movement is to evolve in accordance with the needs of Union citizenship⁷¹. Market rights and political rights may not be in such a relation that the former can be expected to generate the latter. Therefore, a substitute for market requirements has to be found to structure spill-over from market unification issues to politics⁷².

4.3.1 Positive Law

According to Article 18(1), every citizen of the union enjoys “*the right to move and reside freely within the territory of the Member States, subject to*

⁶⁸ Cf. Article 11(1) German; Article 5(4) Greek; Article 16 Italian; Article 44 Portuguese and Article 19 Spanish Constitutions; proviso in relation to the acquisition of real estate in § 44(2) of the Danish Constitution, which is allowed in terms of primary law by a Protocol. Belgium, Ireland, Luxembourg, the Netherlands and Sweden do not anchor national freedom of movement in constitutional law.

⁶⁹ Cf. The Montevideo Convention on Rights and Duties of States from 1933, Article I, and Ole Espersen *et. al.*, *Folkeret*, Christian Ejlers' Forlag, 2003, pp. 49-51

⁷⁰ Report from the Commission on the Citizenship of the Union (COM(1993)702), p. 2

⁷¹ Andrew Evans, *Union Citizenship and the constitutionalization of equality in EU Law*, in Massimo La Torre (ed.), *op. cite.*, note 39, p. 267

⁷² *Ibid.*, p. 268

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

There are a number of points to be made about this important provision, which must, for the sake of clarity, be distinguished. First, Article 18 is subject to restrictions contained in the treaty and secondary legislation. Where specific legislation has been enacted, movement and residency rights will be subject to the conditions laid down therein. Two years before the signing of the Maastricht Treaty, the Council adopted three directives granting rights of residence to categories other than workers. Directive 90/366 (replaced later by Directive 93/96⁷³) covered students exercising the right to vocational training. Directive 90/365⁷⁴ dealt with employed and self-employed people who had ceased to work, but without necessarily having moved to another Member State. Directive 90/364⁷⁵ was a catch-all governing those who did not already enjoy a right of residence under community law. These Directives require Member States to grant the right of residence, evidenced by a permit, to those persons and certain of their family members. This is, however, subject to the proviso that they have adequate resources not to become a burden on the social assistance schemes of the Member States and are all covered by health insurance. Thus, these Directives imply that the right of residence no longer is dependent on the exercise of economic activity. It is, however, dependent on the enjoyment of a degree of wealth or financial self-sufficiency. The limits and conditions mentioned in Article 18 include the financial and other conditions set by these Directives so that no rights of residence are conferred upon migrant Union Citizens who lack sufficient financial resources⁷⁶.

4.3.2 Case Law

The crucial issue in legal terms is the extent to which rights can be derived from Articles 17 and 18, without thereby contravening the condition that the

⁷³ OJ 1993 L 317, p. 59

⁷⁴ OJ 1990 L 180, p. 28

⁷⁵ OJ 1990 L 180, p. 26

⁷⁶ Case C-184/99, Rudy Grzelczyk v. Centre Public d’Aide Sociale, [2001] ECR I-6193

right to move and reside is subject to the limits laid down in the Treaty. ECJ case law early clarified that the citizenship was not intended to expand the scope *ratione materiae* of the Treaty to cover internal situations with no link to community law⁷⁷. In the first years following the introduction of Union citizenship, the ECJ treated Article 18 as residual and, apparently, secondary to other more specific Treaty rights⁷⁸. This trend has, however, during the last years changed dramatically and the ECJ has been willing to accord increasingly more substance to Article 18.

Of special importance is the relationship between Article 12 and Article 18. Most rights of Union citizens aim at national treatment, either expressly (Articles 19 and 20) or implicitly (Article 18). Therefore, they in effect prohibit Member States from discriminating on grounds of nationality. Thus, there exists a reciprocal relationship between the principle of non-discrimination, as contained in Article 12, and Union citizenship.

By means of utilizing this reciprocal link the ECJ has exploded the linkages⁷⁹ previously required for the principle of non-discrimination to apply. According to case law⁸⁰ it is today not necessary for there to be involvement in an economic activity as a worker, or service provider, nor to show preparation for a future economic activity as a student etc., for Union citizens to rely on Article 12. As confirmed in the *Grzelczyk*⁸¹ case, a European citizen, lawfully residing in another Member State, can avail himself of Article 12 in all situations within the scope *ratione materiae* of Community law⁸².

Also the Member States' exercise of reverse discrimination is restricted by the Union citizenship. In the *D'Hoop*⁸³ case the ECJ held that reverse

⁷⁷ Cases C-64/96 & 65/96, *Land Nordrhein-Westfalen v. Uecker* and *Jacquet v. Land Nordrhein-Westfalen*, [1997] ECR I-3171

⁷⁸ Case C-193/94, *Skanavi and Chyssanthakopoulos*, [1996] ECR I-929

⁷⁹ Siofra O'Leary, *The Evolving Concept of Community Citizenship*, Kluwer, 1996, p. 77

⁸⁰ Case C-184/99, *Rudy Grzelczyk v. Centre Public d'Aide Sociale*, [2001] ECR I-6193, Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [1998] ECR I-2691, case C-60/00, *Carpenter*, [2002] ECR I-6279 and Case C-148/02, *Carlos Garcia Avello*, judgement of October 3, 2003. For a thorough analysis of the *Sala* case see Siofra O'Leary, *Putting Flesh on the Bones of European Union Citizenship*, (1999) 24 *ELR*, p. 68 ff.

⁸¹ Case C-184/99, *Rudy Grzelczyk v. Centre Public d'Aide Sociale*, [2001] ECR I-6193

⁸² Cf. *mutatis mutandis* case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, (unreported) judgement of September 17, 2002

⁸³ Case C-224/98, *D'Hoop*, [2002] ECR I-6191

discrimination, grounded merely on the fact that a citizen has exercised the right of freedom of movement, is contrary to the underlying principle that Union Citizens ought to receive equal treatment when exercising their rights⁸⁴. Moreover, as recognized in the *Avello*⁸⁵ case, Article 12 can, in common with Article 17, be relied upon as support for Union Citizens' claim of receiving differential treatment. The latest development in this case law is a suggestion to interpret Article 18 as, autonomously of other Treaty provisions, containing a prohibition against *any restriction* that potentially prevent Union Citizen's from exercising free movement⁸⁶.

Thus, the introduction of Union citizenship has done away with the general criterion of economic activity. The 'internal situation' barrier has, however, not been circumvented and, hence individuals seeking relief on the basis of Article 18 still need to evidence (potential) cross-border activity⁸⁷.

Moreover, though Article 18 never mentions the relatives of Union Citizens, it is established case law that non-EC spouses derive a right from their relationship with a Union Citizen to reside within the Community⁸⁸.

4.4 Political Rights

Pursuant to Article 19, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and stand as a candidate in municipal elections and elections to the EP in that Member State, under the same conditions as nationals of that state. The bearings on Union law are different in each case. While Article 19(1) is closely connected to the right of free movement, Article 19(2) is more directly connected to the question of the legitimacy of the Union's exercise of powers.

⁸⁴ *Ibid.*, para. 35.

⁸⁵ Case C-148/02, *Carlos Garcia Avello*, unreported judgement of October 3, 2003

⁸⁶ *Cf.* Advocate General Jacobs in case C-224/02, *Heikki Pussa*, unreported opinion of November 20, 2003.

⁸⁷ Cases 35 & 36/82, *Morson & Jhanjan v. Netherlands*, [1982] ECR 3723 and Cases C-64/96 & 65/96, *Land Nordrhein-Westfalen v. Uecker* and *Jacquet v. Land Nordrhein-Westfalen*, [1997] ECR I-3171

⁸⁸ *Cf.* case C-370/90, *R. V. Immigration Appeal Tribunal and Surinder Singh*, [1992] ECR I-4265 and case C-60/00, *Carpenter*, [2002] ECR I-6279

4.4.1 Municipal Elections

The right to vote at municipal elections is regarded as facilitating the freedom of movement. It aims to compensate for the loss of political involvement at local levels caused by leaving the country of origin and to make integration easier by ensuring equal rights with nationals of the host state⁸⁹. Since decisions at the local level involve very perceptible consequences for the citizens, the opportunity to participate at this level is generally believed to facilitate Union Citizens' accommodation in other Member States.

The right to vote has, moreover, a significant constitutional aspect as its implementation in many Member States represented a break with constitutional traditions and, indeed the very organisation of the state. The implementation of the voting right as governed by Council Directive 94/80⁹⁰ (as later amended by Council Directive 96/30⁹¹), did, consequently, require amendments to the German; French; Spanish and Portuguese constitutions⁹² wherein the exercise of voting rights previously was limited to the citizen's of the state.

4.4.2 European Parliament Elections

Article 19(2) grants every citizen of the Union the right to vote and be elected to EP elections. Thus, the EP electorate is constituted by Union Citizens as opposed to Member State citizens. This exclusive link to Union Citizens is a consequence of establishing direct elections to the EP and, further, a wish to locate a direct source to legitimate the European integration process⁹³.

⁸⁹ Cf. Stefan Kadelbach, *op. cite.*, note 2, p. 22

⁹⁰ OJ 1994 L 368, p. 38

⁹¹ OJ 1996 L 122, p. 14

⁹² Cf. Stefan Kadelbach, *op. cite.*, note 2, p. 22, note 79

⁹³ Third Report from the Commission on Citizenship of the Union (COM(2001)506 final), p. 7

Like the right to vote at municipal elections, the right to vote at European elections only extends to union Citizens who reside outside their state of origin. However, Member States cannot reject citizens residing in their home State the opportunity to express their opinion in the choice of members of the EP. As established by the ECtHR in the *Matthews*⁹⁴ case the EP constitutes a legislature as envisaged in Article 3 of Protocol No. 1 annexed to the ECHR. This implies that the Member States cannot obstruct their citizens' right to express their composition of the EP without infringing the ECHR. The *Matthews* case is moreover of interest in that Article 3 of Protocol No. 1 relates only to such assemblies as derive their competence direct from a constitution. The ECtHR thereby confirms that the instrument creating the EP, namely the EC Treaty, is to be considered constitutional. The notion of the EU as a “*constitutional order*”⁹⁵ in turn necessitates an empowerment of the individual since a constitution derives its authority directly from individual citizens⁹⁶.

The election procedures are set forth in Directive 93/109⁹⁷ and gives special emphasis to the intention behind Article 19, namely universal suffrage. The Directive is limited to questions concerning the personal right to vote at elections such as the application principle and to excluding the Union citizens from voting and standing as a candidate to multiple elections.

Article 19(2) is significant in that it grants a personal component to the right to vote at European elections. Nationality is no longer a crucial factor in that respect. Thus, the Community is moving towards the notion of a *demos* in a civic sense⁹⁸ with direct democratic legitimation. More than any other component of the Union Citizenship, this provision contributes to considerations concerning the Union Citizen's role in the European multilevel system, and the impact this have on the legitimacy of the Union and the way to perceive Member State sovereignty.

⁹⁴ ECHR, *Matthews v. United Kingdom*, Rep. 1999-I, 251

⁹⁵ 294/83, *Parti Ecologiste 'Les Verts' v. Parliament*, [1986] ECR 1339

⁹⁶ Cf. John Locke, *op. cite.*, note 27, p. 353, § 131.

⁹⁷ OJ L 329, p. 34

⁹⁸ Joseph H. H. Weiler, *European Union - Democracy Without a Demos?*, Sussex Papers in International Relations, No. 1, January 1996, p. 20

As it is now, the biggest obstacle for the voting right to become significant is extrajudicial in nature. On 18 December 2000 the Commission produced a Communication on the application of the Directive to the June 1999 EP elections⁹⁹. The Communication reported that the turnout by citizens of the Union in a Member State of residence was low (9%), but higher than in 1994 (5,9%).

4.5 Non-Judicial Mechanisms for the Protection of Union Citizen Rights

Non-judicial protection of citizen's rights is a well-known concept in the majority of the Member States¹⁰⁰. The models already followed comprise either committees on petition of the national parliaments or national ombudsmen, or both. Since both institutions pursue the same objective, namely to guarantee the extrajudicial protection of citizen's rights, the functioning of ombudsman does not exclude the parallel functioning of petitioning. Accordingly, Article 21 provides the Union Citizens with a dual protection model containing both a European ombudsman (Article 21 (2)) and possibility for petitioning to the EP (Article 21(1)). In conjunction with the right to receive information in a Community language of choice (Article 21(3)), these rights were introduced with the citizenship section adopted with the signing of the Maastricht Treaty.

4.5.1 Petitions to the European Parliament

The right to file petitions to the EP contains a guarantee that performs a multiple function on the European level. On the one hand, petitioning provides a link between the Union Citizens and the EP¹⁰¹. On the other hand, it offers the opportunity to pursue individual matters outside formal legal remedies. Article 21(1) refers to Article 194 that constricts petitions to deal with areas within the Community's fields of activities. It is, however,

⁹⁹ COM(2000)843 final

¹⁰⁰ Epaminondas Marias, *European Citizenship in Action*, in Massimo La Torre (ed.), *op. cite.*, note 39, p. 301

¹⁰¹ *Ibid.*, p. 303

the practise of the EP to extend the area to the whole Union¹⁰². Thus, the substance of the petitioning guarantee is widely drawn. Article 194 is moreover requiring that the petitioning matter, to be accepted by the EP's Committee on Petitions, directly must affect the petitioner.

Despite the fact that the Committee follows a broad interpretation of this criterion, a large number of the petitions are declared inadmissible due to lack of personal interest¹⁰³.

4.5.2 Petitions to the European Ombudsman

The right to petition to the European Ombudsman underlines the protective aspect contained in the right to complain. On this procedural path, wrongs committed by Union institutions in the course of their activities are open for scrutiny. The Ombudsman serves to control the European administration, which in turn implies a claim towards the European institutions to exercise administrative powers with a certain degree of transparency.

The framework of the Ombudsman's action is laid down in Article 195. Every legal resident in the Community, whether a natural or legal person, has the right to apply to the Ombudsman, whose task it is to investigate cases of alleged maladministration by the Community institutions and bodies. The responsibilities of the Ombudsman thus extend beyond pillar one to both pillar two and three. The ombudsman is, however, restricted from investigating acts of national authorities or of other international organisations. The ombudsman himself defines maladministration as the failure of a public body to act in accordance with a principle or rule, which is binding upon it¹⁰⁴.

4.5.3 The Right to Information

Article 21(3) offers the Union Citizen the right to use any official Community language (Article 314) before the Community institutions and

¹⁰² Cf. Rule 174 of the Rules of Procedure of the European Parliament

¹⁰³ The Third Report from the Commission on Citizenship of the Union (COM(2001)506 final)

¹⁰⁴ The Annual Report of the Ombudsman, 1997

to receive an answer in the same language. The Union has specifically dedicated itself to more citizens' rights and to endorse greater transparency¹⁰⁵, which suggests an interpretation of Article 21(3) extending beyond the mere language-right. It represents a claim to receive information¹⁰⁶. The claim to receive information is closely related to the right of access to documents contained in Article 255 and further developed in the Transparency Regulation¹⁰⁷. As proper information constitutes a necessary prerequisite for citizens to control their administration, this right can be perceived as a corollary of the establishment of a European Ombudsman and the EP's Committee on Petitions.

4.6 Protection by Diplomatic and Consular Authorities

From Article 20 it follows that Member States' diplomatic and consular authorities must grant all Union Citizens protection in states outside the Union wherein their home state is not represented. Cooperation between diplomatic and consular authorities forms part of the CFSP¹⁰⁸. The concern to improve the position of Union Citizen's in countries outside the Community appears citizen friendly. However, the applicability of this right is burdened with uncertainties that mitigate its effectiveness.

First, it is unclear exactly what kind of protection the Member States' is obligated to provide. According to International law practise, consular protection primarily embraces administrative activity that can be directly performed by other states acting in a representative capacity¹⁰⁹ such as the issuing of passports, support in matters relating to family and inheritance law, legal aid, etc. By contrast, diplomatic protection principally refers to situations where a state is supporting its nationals in relation to breaches of

¹⁰⁵ Cf. Article 1(2) EU and Article 255

¹⁰⁶ Stefan Kadelbach, *op. cite.*, note 2, p. 27, note 98

¹⁰⁷ Regulation no. 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43

¹⁰⁸ Cf. Article 20 EU

¹⁰⁹ Article 5 and Article 8 of the Vienna Convention on Consular Relations of 24th April 1963.

international law by another state¹¹⁰. This activity focuses on taking up compensation claims of individuals. According to the PCIJ and ICJ it is an elementary principle that a state is entitled to protect its subjects¹¹¹. When doing so the State is, however, according to international law “*in reality asserting its own rights*”¹¹². This implies that once a State provides diplomatic protection the conflict shifts level and, in reality, also parties. A case in which a state is providing diplomatic protection is between states only¹¹³. Moreover, if a third party state wish to pursue this claim, the consent of the claimant and the defendant state is required¹¹⁴. Article 20 cannot therefore *strictu sensu* guarantee a right to diplomatic protection to Union Citizens.

Article 20 is thus limited in substance, which furthermore is reflected in the fact that transposition law thus far only deals with consular protection¹¹⁵.

4.7 Interim Evaluation

The assessment of the citizenship rights contained in Articles 17-22 provides a fragmented picture, which suggests that a homogeneous legal analysis of Union citizenship is not possible unless measured against predefined visions of the role of citizens in Europe. Each of the rather unrelated rights must, despite their common orientation towards images of political rights, be examined individually.

The fundamental idea underlying the introduction of the Union citizenship were, first, that citizenship would reinforce and render more tangible the

¹¹⁰ Peter Malanczuk, *Akehurst's modern introduction to International law*, Routledge, 1997, 7th revised edition, p. 263

¹¹¹ *Mavrommatis Case*, PCIJ series A No. 2 (1924), p. 12.

¹¹² *Mavrommatis Case*, PCIJ series A No. 2 (1924), p. 12. See *mutatis mutandis* *Serbian Loans Case*, PCIJ series A No. 20 (1929), p. 17, *Panevezys-Saldutskis Railway Case*, PCIJ series A/B No. 76 (1937), p. 16, *Nottebohm*, ICJ Reports [1955] 4, p. 24 and *Barcelona Traction Case*, ICJ Reports [1970] 3, para 78

¹¹³ *Cf.* Ole Espersen *et. al.*, *op. cite.*, note 59, p. 207 and Peter Malanczuk, *op. cite.*, note 111, p. 257

¹¹⁴ *Barcelona Traction Case*, ICJ Reports [1970] 3

¹¹⁵ Decision 95/553 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ 1995 L 314, p. 73 and Decision 96/409 on the establishment of an emergency travel document, OJ 1996 L 168, p. 4 and the General Secretary of the Council Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries, (Doc. 7142/94, PESC 161, COCON 2)

individual's sentiment of belonging to the Union and, secondly, that citizenship would confer on the individual rights that tie him to the Union¹¹⁶. As pointed out by Weiler¹¹⁷ and demonstrated in this section, the Union citizenship adds very little in substance to the rights existing previously to its establishment. It is telling that most legal analyses either focus on the lack of added value, or on the future perspectives of a Union citizenship in the making.

As illustrated by the very low turnout at the elections to the EP, the Union Citizens' interest in their Union is extremely low. It has been suggested that the introduction of the Union citizenship must be understood on this background and, consequently, perceived rather as a public relations stunt to bring the Union closer to the citizens than a political empowerment of the European individuals¹¹⁸. On this reading, the rights attached to, and conflated with, the citizenship are commodified and represent just another bonus with which to placate a disaffected consumer of European integration. If the problem of the Union is described as alienation, the question is, however, if the granting of more rights to individuals is the answer. Without political involvement by the Union Citizens, rights are something that the Union *grants* and individuals, as subjects, *receive*. As we recall, a right bestowed you by pleasure of others does not emancipate you, does not make you a citizen¹¹⁹.

Moreover, rights, for most parts, are divisive in nature as they entail what Hohfeld terms 'immunities'¹²⁰, that is to say, that they set "*walls of liberty*"¹²¹ around the individual against the exercise of power by public authority. Psychologically, such rights might have the opposite effect to making the individual closer to his Union. Every time a new right is added to the list, or a new list of rights added, it is implicitly declared that those

¹¹⁶ Cf. Joseph H. H. Weiler, *op. cite.*, note 38, p. 333

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Cf. section 3, p. 16 in this thesis.

¹²⁰ According to Hohfeld's classic analysis of "fundamental jural relations", a statement of rights may contain four elementary types: right (claim); privilege (freedom); power (competence); and immunity. Cf. Wesley Newcomb Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning", *Yale Law Journal*, (1913-1914) vol. 23, p. 16-59. Cf. Supplement A.

¹²¹ Joseph H. H. Weiler, *op. cite.*, note 39, p. 355

rights are needed for, that is to say, that the Union pose a threat towards the individual. Moreover, every time a right (immunity) is bestowed the individual this is done at the expense of democracy. Democracy and immunities is in a relationship that reciprocally excludes the other.

In this discussion it is of the utmost importance to distinguish between the rights offered, as not all rights create walls between the individual and society. Rights of participation, ‘powers’ in the Hohfeldian terminology, are on the contrary of a nature to create a relation between society and individuals. Rights of participation, principally the right to vote, establish a process in which the individual can express his consent to government. In both Hobbes and Locke, consent form the basis of the political obligation, that is to say, the connection between those who govern and those who are governed. The principle of consent implies that government is conducted only with the consent of the governed¹²² and that this consent is necessary if the exercise of power is to be legitimate¹²³. In Locke, legitimacy is moreover qualified as it rests on the basic principles of political society, that is to say, that those who govern should be duly responsible for their exercise of power (the principle of *trust*), that they should respect the fundamental moral rights of individuals and that they should be subject to the law common to all with its impartial judge as guarantor¹²⁴.

A basic feature of the Community is that the trust construction is not well developed, particularly as regards the Council as legislature. The idea of closeness to the people is therefore not present in the sense that there are no people to judge the Community legislators (the power to hire and fire). The exercise of power in the Community power primarily exists in areas outside influence of the electorate. The introduction of the Union citizenship has not altered this condition since the problem deals with the horizontal allocation of powers on the European level. A genuine political empowerment of the

¹²² ”The consent principle is not synonymous with the veto principle, according to which all must consent to all measures in political society. Instead, individuals give their consent to certain procedures, for example the majority principle, for taking decisions by which they are subsequently bound” Ola Zetterquist, *op. cite.*, note 10, p. 324

¹²³ “*The Liberty of Man, in Society*, is to be under no other Legislative Power, but that established by consent, in the Common-wealth, nor under the Dominion of any Will [...]”, John Locke, *op. cite.*, note 27, II, p. 283, § 22.

¹²⁴ Ola Zetterquist, *op. cite.*, note 10, p. 223

European citizens' requires a change in the Union's institutional framework towards transparency and accountability¹²⁵. Without facilitating decisive political power for European citizens' broad public engagement remains utopian and citizenship of the Union, in the political sense of the word (as opposed to people and subjects), nothing but a "*nice blue ribbon around scattered elements of a general notion of citizenship*"¹²⁶.

In this connection it is interesting to note that the most developed and discussed provision is Article 18, which deals with the right to move and reside and freely. This right functions as an immunity (a shield) bestowed the individual to facilitate the employment of political powers (a sword). As long as the political powers remain sheathed the Union citizen will have a hard time to impact the Community.

Despite the fact that Union Citizens' today¹²⁷ lack political empowerment, the symbolism of a citizenship, and, especially the voting rights included, has a significant impact on the traditional state-oriented notion of sovereignty. As touched upon, the right to vote at the municipal- and European level have implications on the state-oriented notion of sovereignty. These rights mitigate the rigid perceptions of popular sovereignty as an undividable concept rooted in the nationality of the Member States citizens.

In the following section, Union citizenship's impact on the sovereignty of the Member States will be analysed together with the already anticipated question: if the citizenship, after all, contributes to, or indeed ever can contribute to, the democratic legitimacy of the Union.

¹²⁵ Cf. e.g. Weilers proposed "European legislative ballot", Joseph H. H. Weiler, *op. cite.*, note 39, p. 350

¹²⁶ Hans Ulrich Jessurun d'Oliveira, *European Citizenship: Its Meaning, Its Potential*, p. 139, in René Dehousse (ed.), *Europe after Maastricht – An Ever Closer Union?*, Law Books in Europe, München, 1995

¹²⁷ The concept is dynamic, see Article 22

5 Discussion

This section will discuss which impact the rights contained in the Union citizenship have on the legitimacy of the Community and the popular sovereignty of the Member States. As argued above, rights bestowed by the pleasure of others do not conceptually belong to the citizen construct, but rather to subjects. Therefore, the rights employed in the discussion will primarily be what Hohfeld would term powers, rights of participation.

The legitimacy discussion will, as its principal theoretical underpinning, use the philosophy of Locke, while the discussion concerning Sovereignty will draw on Hobbes, but also Rousseau and Hegel.

5.1 Union Citizenship and Legitimacy?

The discussion of European legitimacy pleads the question of the normative authority of Union institutions: why, if at all, should individuals regard Community regulations as morally binding on their conduct, imposing on them a moral obligation to comply?

The answer to this question depends on the political and philosophical view adopted on the EU. If the EU is perceived as a grouping of sovereign states for the purposes of international cooperation¹²⁸, typically the answer will refer to the normative legitimacy of Member States as signatories of the treaties¹²⁹.

If this explanation, however, is discarded and the label of Union Citizenship accepted as indicating that the European order must satisfy basic democratic principles, a trust relationship between the Union and its citizens must be constructed. Equal treatment, a core concept of citizenship, necessarily requires that those subject to laws should also have an equal say in legislation and other European matters.

¹²⁸ Cf. the German Bundesverfassungsgericht in its Maastricht case, 2 BvR 2134/92 & 2159/92, *Brunner v. European Union Treaty*, [1994] 1 CMLR p. 86, § 39.

¹²⁹ Frederico Mancini, *Europe: The Case for Statehood*, *European Law Journal* 1998, p. 29-42

Community-level institutions increasingly shape the lives, circumstances and aspirations of Europeans. Union regulations enjoy status as a new legal order, exercising legal authority through the doctrines of Supremacy¹³⁰ and Direct Effect¹³¹. The Union is not a state but in its powers it is close¹³².

As polities, according to both Hobbes and Locke, are to be understood as artificial creations arising through a contract between free individuals, their legitimacy must derive from the interest of separate individuals (methodological individualism), and not to be sought in collectivistic social values (methodological holism). It is the citizens' *consent* to the contract establishing society, which essentially establishes the basis of political obligation. This implies that government should be conducted only with the consent of the governed. Essentially, the principle that all power is exercised on behalf of, and with the consent of, individuals, constitutes one of the most important basic principles in modern Western democracies.

5.1.1 Trust in the Union

As touched upon, the EU can, dependent on the view adopted, be perceived either as an international organisation or a political society. The introduction of a Union citizenship compared with ECJ case law and the EU's increasing capacity to assume powers traditionally belonging within the domain of the nation-state suggest an interpretation aiming towards the latter perception.

According to Locke, individuals have, prior to the formation, of society rights and owe each other corresponding obligations. Political society is, as discussed above, only instituted to protect and give effect to the natural law and thus, limited in scope. Moral obligations exist directly in regard to other individuals. In relation to government, moral duties, that is to say political obligation, can arise only as a result of the consent of the individual. It is only with their own consent men become members of a political society.

¹³⁰ Cf. case 106/77, *amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629 and case c-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, [1990] ECR I-2433

¹³¹ Cf. case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1

¹³² Cf. Joseph H. H. Weiler, *op. cite.*, note 39, p. 336

Consent is a necessary condition for the existence of legitimate government. Legitimacy, in addition, requires the political society not to be subordinated to any sovereign outside or above the law¹³³ and to respect the moral rights inherent in man. Consent (*trust*) and rights (*property*) thus constitute the balancing elements in the Lockean political society and, essentially, the political obligation of individuals.

Political obligation takes as its correlative political power. The term political power embraces the rights the individuals through the social contract have delegated to government, that is to say, the right to execute and implement the natural law. Political obligation is therefore a reflection of the obligations individuals owe each other manifested in (state) institutions¹³⁴.

The principle of trust moreover implies a strong opposition to indirect representation as a source of legitimacy. Since state institutions function as agents of the people, their principal, they must be appointed by and work under continuous control by the governed¹³⁵.

Indirect trust is, though, in principle not illegitimate: A political society can contain a number of different elements that do not need each to be directly under the control of the electors (those are instead controlled by the rule of law). The agency or trusteeship relation between government and the governed do, however, require permanent organs that enable the governed to link political responsibility to those exercising power, particularly legislative power¹³⁶. Another consequence of a direct trusteeship is that when trust no longer exists, it must be possible to dismiss those exercising state power. As the agency of government is not a reciprocal contract there, moreover, need be no objective reasons for the individuals to withdraw the commission of trust¹³⁷.

Essentially the principle of trust, that is to say the electorate's possibility to hire and fire those participating in the legislative power, constitutes a

¹³³ Cf. Neil MacCormick, *op. cite.*, note 24, p. 129

¹³⁴ John Locke, *op. cite.*, note. 27, II, p. 381f, § 171.

¹³⁵ Cf. Ola Zetterquist, *op. cite.*, note 10, p. 294

¹³⁶ Ole Spiermann, *op. cite.*, note 31, p. 77, note 6

¹³⁷ John Locke, *op. cite.*, note. 27, II, p. 367, § 149.

safeguard that those governing exercise power in the interest of all¹³⁸. The doctrine of power-sharing is moreover complementing the principle of trust in that power-sharing ensures that no-one holds adequate power to oppress minorities (or majorities) within the electorate.

As already touched upon, the ECJ has been author of a long line of decisions that have effectively asserted the constitutional character of the foundation Treaties. Moreover, the Community possesses true legislative, executive and judicial powers, which directly affect the Union Citizens. Within the community law system, the Member State functions as an intermediary that, by means of implementing Community law, create a link between the Union citizens and the Community. From a civic constitutional angle it therefore seems reasonable to consider the Community as an organisation exercising state power in relation to individuals. In Lockean theory, the Community is thus to be termed a Commonwealth, the basic Treaties of which form the second contract of society, that is to say its constitution¹³⁹.

This perception of the Community implies that the question concerning legitimacy on the European level is separated from the Member States. As discussed above the principle of trust is intimately connected with the doctrine of division of powers; the sharing of power between various institutions to protect individuals' rights imply that citizens, as a corollary, must have various direct channels to the different parts of government. This creates a system of multiple entries that enables the individuals to affect several institutions at different levels. It is the direct channels, built on trust, to the citizens that are vital for an institution's ability to balance other institutions.

¹³⁸ "...[the Representatives of the People] might always be freely chosen, and so chosen freely act and advise, as the necessity of the Commonwealth, and the publick Good should upon examination, and mature debate, be judged to require. This, those who give their Votes before they hear the Debate, and have weighed the Reasons on all sides, are not capable of doing." John Locke, quoted from Ola Zetterquist, *op. cite.*, note 10, p. 151, note 704

¹³⁹ "Those who are united into one Body and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, *are in Civil Society* one with another." John Locke, *op. cite.*, note. 27, II, § 87.

It is a renowned criticism that European decision-making processes are unresponsive to democratic pressures¹⁴⁰. Within the EU, legislative power is divided between the Council, Commission and EP, whereof only the EP is directly elected by Union Citizens (Article 19(2)). The nature of the EP legislative powers is, despite gradual improvements¹⁴¹, at the best co-decisive¹⁴² and still characterized by strong inter-governmental elements. Article 19(2)'s safeguarding of Union Citizens' influence on the composition of the EP through direct elections will not, therefore, necessarily lead to any perceptible shift in European policy. Nor have the EP influential controlling-powers against the Commission or Council; the EP can only dismiss the entire Commission *en bloc*; a threat so close to mutual destruction as to be politically futile.

This lack of direct connection between government and the governed conditionally implies that the only direct channel, besides the EP, to influence the institutions and European policy is through the judiciary, which in that way becomes "*the last frontline for trust*"¹⁴³. The access to an impartial judge is, however, not even *direct* as it requires either the goodwill of national courts¹⁴⁴ or the individual to fulfil the difficult criterion of direct individual concern¹⁴⁵.

A necessary precondition of legitimate and accountable government is, moreover, that its structure is transparent to the citizens. For individuals to link political responsibility to government transparency in the daily work is a prerequisite. The opacity of the present political system of the EU therefore raises immediate doubts about its legitimacy. The Union citizenship have tried to do away with some of the problems connected thereto by means of introducing Article 21(3), interpreted broadly as the right to receive information.

¹⁴⁰ Cf. Trevor Hartley, *op. cite*, note. 5, p. 19

¹⁴¹ Cf. Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials*, 3rd ed., Oxford University Press, 2003, p. 80

¹⁴² Article 300

¹⁴³ Ola Zetterquist, *op. cite.*, note 10, p. 299

¹⁴⁴ Cf. Article 234

¹⁴⁵ 25/62, *Plaumann & Co. v. Commission*, [1963] ECR 95

The Council, the principal legislator of the Community, however operates according to a perplexing set of procedures involving majority, unanimity, qualified majority and so forth - as well as co-decision procedures specifying how authority is shared with the Parliament. More important, most of the Council's work takes place behind closed doors as opposed to the Parliamentary open-debated model. The introduction of Article 207(3), which establishes that conclusions and explanations of votes must be accessible, has to some degree assuaged this problem. But the minutes of the Council are still secret and, as a rule, issued exterior to other control than the one offered by ECJ *a posteriori*.

Moreover, many technical, but important, regulations are made by committees established pursuant to a delegation of power to the Commission. Technocrats and national interest groups have dominated this sphere of decision-making to the exclusion of the more regular democratic channels, such as the EP or even the Council¹⁴⁶.

The European decision-making processes are thus suffering from severe legitimacy imperfections deriving from the organisation of legislative powers within the Community. To truly empower the Union Citizens politically, the establishment of universal suffrage is inefficient as the institutional framework and the decision-making processes related thereto lack direct channels built on trust. The creation of a direct link to the EP is, in other words insufficient so long as this is not backed up by a reformation of the institutional framework and/or the decision-making processes.

The offices and institutions of the EU are to be assessed by the democratic normative ideals of constitutional law and political philosophy concerning polycentric governance. As of yet, the Union institutions fall far short of such criteria. Insofar as Union Citizenship highlights the legitimacy lacunae in the Union, it may serve to reduce, rather than enhance the support Europeans exhibit towards each other and their common institutions. As the individuals' possibilities to influence European decisions, or at least access the arguments behind those, are weakened, the danger increases that

¹⁴⁶ John Peterson and Michael Schackleton, *The Institutions of the European Union*, Oxford University Press, 2002, pp. 108-109

prejudice or arguments based on belief will form the basis of the public attitude towards the Community.

Niklas Luhmann has, moreover, argued that self-referential systems, that is to say systems that differentiate themselves from other systems by acquiring and employing autonomous criteria of validity, when exposed to situations beyond their complexity react with turning back to previous acknowledged and accepted norms, they, so to say, close up around themselves¹⁴⁷. Self-referential systems are to be understood as both political societies as well as the individual's constituting those. The system corresponds to complexity by means of regression. Applied on the European level this theory suggests that the lack of transparency, and the complexity, of the decision-making processes ultimately have a perverse effect on the individuals' affiliation to the Community¹⁴⁸. If the decision-making processes are incomprehensible, citizens become less informed, as they cannot participate in the totality of the reasons that have led to decisions. This implies that the public more readily falls victim to populist prejudices concerning the objectives and powers of the Community¹⁴⁹

5.1.2 Demos

Whether a reinforcement of the direct channels between Union Citizens and the Community, e.g. by means of empowering the EP through a change of decision-making processes, in fact would contribute to the democracy on the European level is a highly disputed question¹⁵⁰. Essentially, the question deals with the *demos* of the EU. Democracy understood as the rule of the

¹⁴⁷ Nassehi Kneer, *Niklas Luhmann – Introduktion til teorien og sociale systemer*, Hans Reitzels Forlag, 2000

¹⁴⁸ Cf. also Weiler's discussion of Ernst Nolte's study of fascism that bears resemblances to the idea of regression as a correspond to complexity, Joseph H. H. Weiler, *op. cite.*, note 39, p. 330 ff.

¹⁴⁹ Cf. e.g. the Third Report from the Commission on Citizenship of the Union (COM(2001)506 final), p. 18 : "The high proportion of petitions declared inadmissible is the result of a lack of information about the powers of the Union and each of its institutions"

¹⁵⁰ Cf. e.g. Allan Dashwood, *States in the European Union*, (1998) *ELR*, vol. 23, p. 216 and Trevor Hartley, *op. cite.*, note 5, pp. 18-21

majority necessarily poses the question: What majority; a majority of whom?¹⁵¹

The group of people that constitutes a given political society as distinct from others is usually termed the *demos* of society after the Aristotelian model¹⁵². In this sense citizenship is not only about the politics of public authority. It is also about the social reality of peoplehood and the identity of the polity. On this reading, citizenship is a quality that enables the political society to differentiate between those who belong, and those who do not. If a category of individuals, endowed with certain rights is created or defined, then, by the same token, other individuals are excluded. The inclusion of certain groups implies the exclusion of others. Citizenship takes as its corollary non-citizens.

How to separate those who belong to a given *demos* from those who do not, essentially depends on what is considered necessary for democracy with respect to pre-existent factors of a social nature. In this connection the *demos* can be defined in the sense of either ‘thin’ or ‘thick’.

The ‘thin’ *demos* is purely legal in nature and express the view that the law itself can structure the relationship between a political society and its members, that is to say, the relationship of individuals to common institutions (especially the constitution)¹⁵³.

The ‘thick’ *demos* definition, on the other hand, requires the people of a society to, besides from a common political and legal system, be united by a common denominator¹⁵⁴. Usually, the common denominator is composed by objective, organic conditions; namely the belonging to a community that share in common territory, language, ethnicity, religion, myths and historical memories¹⁵⁵. These objective components condition the

¹⁵¹ Neil MacCormick, *op. cite.*, note 24, p. 184

¹⁵² Elisabeth Rumler-Korinek, *Kann die Europäische Union demokratisch ausgestaltet werden – Eine Analyse und Bewertung aktueller Beiträge zur "europäischen Demokratie-debatte"*, *Europarecht*, vol. 2, 2003, p. 332

¹⁵³ Neil MacCormick, *op. cite.*, note 24, p. 144. Cf. also Cicero: "[...] a republic is the property of the public. But a public is not every kind of human gathering, congregating in any matter, but a numerous gathering brought together by legal consent and community of interest" quoted from Ola Zetterquist, *op. cite.*, note 10, p. 303, note 1252

¹⁵⁴ Ola Zetterquist, *op. cite.*, note 10, p. 303

¹⁵⁵ See Joseph H. H. Weiler, *The State "über alles" – Demos, Telos and the German Maastricht Decision*, EUI Working Paper RSC No. 95/19, p. 8-11

individuals' subjective sense of social cohesion and collective self-identity¹⁵⁶. Thus, the subjective sense of belonging is preconditioned by objective criteria necessary for the establishment of a demos. This ethnical community, often termed '*Volk*', must according to the 'thick' *demos* concept, exist prior to the establishment of a political society since the political society is the highest expression of this "*Volk*". Politics and ethnicity are thus bound tightly together.

In both Hobbes and Locke, the establishment of society is conditioned on no pre-existing organic factors: An individual becomes a member of a given society only on the basis of his own consent. Thus, both Hobbes and Locke advocate what today would be termed 'thin' *demos*.

The 'thick' *demos* theory is, however, intimately connected with the theory of absolute sovereignty. Constitutional theories are as a rule concerned essentially with one or other of the antitheses *unity* opposed to *anarchy*, respectively *freedom* opposed to *oppression*¹⁵⁷. Hobbes' theory departs from the former and Locke's from the latter. As discussed above, in the theory of sovereignty, absolute state-power - absolute sovereignty - is the only alternative to anarchy. In the modern democratic state sovereignty is believed to be vested in the people that, simultaneously, form the basis of state itself¹⁵⁸. Thus, citizens (the will of the sovereign) and the nation-state, that is to say, the people (the soul of the sovereign), are two sides of the same coin¹⁵⁹. To maintain *unity* within the nation-state it is rational to ensure that the institution comprising the sovereign share a sense of social cohesion and collective self-identity, which, arguably will result in decisions both the minority and majority of the sovereign can accept. A criterion of ethnicity thus functions as a guarantee against conflicts within the sovereign institution, the people¹⁶⁰.

¹⁵⁶ *Ibid.*, p. 9

¹⁵⁷ Ola Zetterquist, *op. cite.*, note 10, p. 299

¹⁵⁸ Cf. case *Nottebohm Case*, ICJ Reports [1955] 4, p. 24

¹⁵⁹ Cf. in particular Rousseau's collective will (*la volonté générale*) and Merle L. Perkins, *Jean-Jacques Rousseau – On the Social Contract and Society*, The University Press of Kentucky, 1974, pp. 100-102

¹⁶⁰ The 'thin' and 'thick' *demos* concepts are also reflected in the rules granting citizen status to newborns. *Jus Sanguini* represents the 'thick' *demos* while *Jus Soli* represents the 'thin'. For an analysis of citizenship laws and *demos* see Ayelet Shachar, *Children of a*

The theory of absolute sovereignty is, moreover, reflected in the general democratic argument behind the ‘thick’ *demos*, namely that only if the entire electorate share a sense of belonging to “*one nation*”¹⁶¹ will the minority be willing to accept decisions of the majority on particular points of disagreement. The importance of this argument is very much dependent on the view on the nature of law as reflected in the constitution of the given polity, that is to say, if the law is dependent on the state, or the state dependent on the law. If Locke’s view that individuals is endowed with inalienable rights independent of the state is adopted, the majority’s exercise of power is, as a consequence of the rule of law and the doctrine of division of powers, restricted and, hence, the possibility to oppress minorities limited. The exercise of government is, in Locke, also restricted by the corollary of inalienable rights, namely the obligations individuals’ owe each other.

There is yet another point to be made about this discussion. Usually, citizenship is taken as the repository for the relationship between individuals’ self and the political society. There is, however, an embedded dimension in citizenship: it also implies an interaction between the selves that form the human substrate of a community¹⁶². Individuals do not exist independent of their surroundings; individuals are ‘contextual’¹⁶³ in the sense that their identity evolves from interactions with other individuals. But, also the dialogue between formal and substantive conditions demonstrates a capability from the former to shape the latter, that is to say, a capability of constitutional forms to shape preferred forms of life. The existence of institutions, such as citizenship, has the value of a referential point to modulate identities in the permanent dialectic process between identity-institutions-identity¹⁶⁴. Identity is a dynamic and shifting concept not necessarily territorially rooted. Moreover, the identification process is

Lesser State: Sustaining Global Inequalities Through Citizenship Laws, Jean Monnet Working Paper 2/03, especially ch. III

¹⁶¹ Trevor Hartley, *op. cite.*, note 5, p. 20

¹⁶² Cf. Carlos Closa Montero, *Between EU Constitution and Individuals’ Self: European Citizenship*, Law and Philosophy, 2001, vol. 20, p. 347

¹⁶³ Neil MacCormick, *op. cite.*, note 24, p. 173

¹⁶⁴ Carlos Closa Montero, *op. cite.*, note 152, p. 349

not exclusive: in the evolution of individuals' self, different reference points are utilized, also simultaneously. The plurality of self-referents enables us to construct the concept of multi-level identities and multi-level citizenship¹⁶⁵, that is to say, that individuals can be a part of several *demos* provided that the polity possesses the necessary institutional framework.

On this understanding, nations are not real entities, but, at best, an idea emerging from partially overlapping consensus about a polity structured by individual consciousness¹⁶⁶. This subjective explanation liberates the concept of a nation from collectivistic objective criteria and replace it with what MacCormick terms 'personal nationalism'¹⁶⁷. 'Personal nationalism' implies that the *demos* is fragmented into a large number of overlapping minorities, something which, arguably, reinforce the democratic legitimacy of the polity. Heterogeneity promotes democratic stability as it prevents the emergence of homogeneous groups or factions, the characteristic of which is that they put their own interests above that of the whole¹⁶⁸.

The more profound philosophical objection to including questions of a socio-cultural nature in the political agenda is that typically they concern the individual's right to *self-government*¹⁶⁹. If a polity presupposes and/or prescribe religious and cultural behaviour, these rules fall within Locke's concept of *property*, that is to say outside the domain entrusted to government.

It thus seems that the strong *demos* theory is a reminiscence of the theory of absolute sovereignty fashioned around nostalgic collectivistic ideas of a polity. A pluralistic approach to the concept of *demos*, on the other hand, allow us to create democracy on several levels, in the EU context this implies that democracy is a possibility on both the (municipal), national and European levels.

¹⁶⁵ *Ibid.*, p. 361

¹⁶⁶ Neil MacCormick, *op. cite.*, note 24, p. 172

¹⁶⁷ *Ibid.*, p. 172

¹⁶⁸ Ola Zetterquist, *op. cite.*, note 10, p. 313

¹⁶⁹ *Ibid.*, p. 314

5.2 Sovereignty of the Member States?

The introduction of a Union citizenship, not only raises questions concerning legitimacy on the European level, but also questions concerning the sovereignty of the Member States. Since Rousseau, the nation-state has functioned as a synonym for democracy; democracy in the sense of popular sovereignty¹⁷⁰. It was the doctrine of the sovereign state, perceived as the property of *its* people that, together with Hegel's *Volkgeist*, essentially led to the romantic perception of people and state as organically intertwined concepts, that is to say, 'thick' demos.

The doctrine of popular sovereignty can be employed as a democratic argument to satisfy Locke's criterion of *trust*, where individual's of a society act as individual moral agents for government. On the other hand, popular sovereignty can also be employed as an argument to satisfy the criterion of an identifiable sovereign, the existence of which according to the theory of absolute sovereignty preconditions the existence of a polity. This section will delve into this aspect of the concept of popular sovereignty.

The concept of sovereignty is understood as the competence to enact and abrogate laws, the validity of which is subject to the consent of none (*princeps solutus est legibus*).

Every Member State is based on *inter alia* the principles of liberty, human rights and the rule of law¹⁷¹, that is to say, principles that restrict the exercise of power. Constitutionally limited governance is, however, not *per se* incompatible with the concept of sovereignty. Within the ordering of a *Rechtsstaat* all power-holders must be subject to legal and political checks or controls. Dependent on the view of law, that is to say, if the law is perceived as dependent on the state or the state dependent on the law, it can be asserted that the electorate, on Election Day, possess the sovereign power in the sense that no other institution or norm can place itself above them or

¹⁷⁰ Neil MacCormick, *op. cite.*, note 24, p. 125

¹⁷¹ Cf. Article 6(1) EU

discard their decisions¹⁷². The electors can theoretically change the constitution and, thereby, the internal ordering of powers within the state¹⁷³.

The Parliament in a parliamentary system is therefore not sovereign, but rather to be considered as the agent of the sovereign¹⁷⁴.

Popular sovereignty can, however, also be explained in less straightforward terms. As discussed above, political society can be perceived as giving expression to an underlying emotional connection between the nation and its people.

This perception is conflated with Hegel's anti-enlightenment thought of a *Volkgeist*¹⁷⁵ realized within the framework of the nation-state. Rather than celebrating the Enlightenment ideas of rights of man, German philosophers rejoiced the idea of subordinating individuality to the common good as realized through the collective will, of which the individual is a subordinate part¹⁷⁶. This teaching was already present in Rousseau. In fact, despite its universalistic pretensions the French Revolution itself provided the first expression of nationalism, by making the sovereignty of the nation-state a prerequisite for the doctrine of rights of man¹⁷⁷. Sovereignty was made the vehicle of the liberty desired so ardently: its domain the nation-state, and its subject the people.

Hence from the outset the French Revolution served pre-eminently to activate an enthusiastic patriotism and nationalism¹⁷⁸. In fact, it is the attempt to couple the individual's freedom with absolute sovereignty that ultimately forces Rousseau to identify the people – expressed in a construct of the accumulation of each individual's personal will into a common will¹⁷⁹ – as the ultimate possessor of the sovereignty of the state¹⁸⁰. Here, the common-will functions as a melting-pot, which simultaneously contains the

¹⁷² Ola Zetterquist, *op. cite.*, note 3, p. 233

¹⁷³ Thomas Hobbes, *op. cite.*, note 8, ch. VI, p. 188, § 18

¹⁷⁴ Thomas Hobbes, *op. cite.*, note 7, ch. XIX, p. 135

¹⁷⁵ Ole Spiermann, *op. cite.*, note 31, p. 93 ff.

¹⁷⁶ *Ibid.*, p. 88

¹⁷⁷ John Hizinga, *Patriotism and Nationalism in European History*, in James S. Holmes and Hans van Marle, *Men and Ideas: History, the Middle Ages, the Renaissance*, Princeton University Press, 1984, pp. 132-133

¹⁷⁸ *Ibid.*, pp. 132-133

¹⁷⁹ Ole Spiermann, *op. cite.*, note 31, p. 71

¹⁸⁰ Cf. MacCormick's discussion of popular sovereignty: Neil MacCormick, *op. cite.*, note 24, p. 131

individual and the collective¹⁸¹. On this emotional reading of popular sovereignty, the individual (subject) bestows the nation (people) with sovereignty through participation in the common will (citizen)¹⁸². The citizenship thereby makes it possible to identify the holders of sovereignty and, essentially to demarcate the nation from other nations.

Union citizenship, especially Article 19, has influential impact on both the straightforward (Hobbes) and romantic (Hegel/Rousseau) perception of popular sovereignty.

Article 19(1) include nationals from other Member States in the municipal electorate of the Member State of residence without them having to renounce the right to participate in elections on state levels in their State of origin, while Article 19(2) grants every citizen of the Union the right to vote and be elected to EP elections.

As explained above, citizenship expresses a bond between the state and the people functioning to distinguish nations. The sovereignty of the nation can be perceived as the Common Will in which the citizens participate by means of voting, or, as the mere exercise of voting rights. Ultimately those who are allowed to vote are, therefore, on both the discussed perceptions of popular sovereignty, to be termed sovereign. According to both Hobbes¹⁸³ and Rousseau¹⁸⁴ sovereignty is undividable, that is to say, that there can be only one sovereign within a polity. Divided sovereignty will essentially, due to the frailty of society, lead to a state of nature. A corollary of the claim of one sovereign is the criterion that individuals always must know whom to obey; the sovereign must always be identifiable.

Article 19(1) grants the right to vote, that is to say, to exercise sovereignty, to Union Citizens conditioned on the renunciation of none voting rights in their State of origin. The Union citizen is thus embraced by one sovereign institution without leaving another. It can therefore be claimed that Article

¹⁸¹ "Cette personne publique qui se forme ainsi par l'union de toutes les autres prenait autrefois le nom de Cité, et prend maintenant celui de République ou de corps politique, lequel est appelé par ses membres État quand il est passif, Souverain quand il est actif", Jean-Jacques Rousseau, *op. cite.*, note 43, I, p. 6

¹⁸² *Ibid.*, I, ch. IV *in fine*

¹⁸³ Ole Spiermann, *op. cite.*, note 31, p. 62 ff.

¹⁸⁴ Jean-Jacques Rousseau, *op. cite.*, note 42, II, ch. II

19(1) generates an overlap, and thus a mixture, of the different Member States' sovereignties.

Article 19(1) is, however, only allowing Union Citizens to vote at municipal elections. As most municipalities are subordinated the state level, which remains unreachable by the Union Citizens, the problem of Article 19(1), as regards sovereignty, can be resolved by reference to the people's power to, through a change of constitution, ultimately transfer municipal powers to the state level. Article 19(1) can, however, according to the romantic notion of popular sovereignty, involve both practical and theoretical problems.

The practical problem is that in certain electoral systems, like the French¹⁸⁵, one chamber of Parliament is elected among representatives from municipalities. Article 19(1) grants both passive and active electoral rights, which implies that a Swede in fact could be represented in the French Senate without having renounced his right to vote at the Riksdag. In France, this practical problem has been resolved by means of a constitutional change¹⁸⁶. The theoretical problem, on the other hand, relates to the idea of sovereignty as being expressed by the Common Will, where under the individuality is subordinated. As the Common Will express the 'average' of each participants personal will, the inclusion of non-nationals essentially pervert the feature of the Common Will that it must express the Hegelian link between individual, people and nation.

Article 19(2) creates problems similar in structure, but more perceptible. Union citizenship creates a direct link between the Community and the individuals by means of direct suffrage, regardless of residence, to the EP. The problem discussed below existed prior to the adoption of the Maastricht Treaty but was highlighted by the introduction of the Union citizenship. As citizenship describes a link between the individual and the polity to which he belongs, Union citizenship necessarily describes the individual's adherence to the Community. Citizenship, does, however, as discussed above also describe sovereignty. Every man is, according to Hobbes, "*supposed to promise obedience, to him, in whose power it is to save, or*

¹⁸⁵ Cf. Georges Burdeau, *Droit Constitutionnel*, 23rd ed., Libraire generale de Droit et Jurisprudence, 1993, p. 181

¹⁸⁶ Art. 3 of the French Constitution

*destroy him*¹⁸⁷”. The political obligation arises from the display of obedience in exchange for security, which in turn implies that the individual must know whom to obey. The sovereign must be identifiable.

Both the Community and the Member States are exercising legislative powers. As discussed in section 2.1.3, for an alien legal system to claim validity on a sovereign territory, the consent of the sovereign is obligatory. In the framework of popular sovereignty the consent of the sovereign is expressed by means of voting. By establishing a direct link between the Community and the individuals, the people is so to speak established as sovereign on the European level. This is of course, due to the very limited powers of the EP and, especially the intergovernmental method of Treaty (constitutional) amendments, not entirely true. The individuals’ cannot directly change the Treaties. But, as mentioned above, the symbolism of Article 19(2) is obvious.

If the Community is perceived as a political society - not subordinated the Member States – the problem is either that no sovereign exists, or that the Union Citizens are considered sovereign. If the Community is considered to possess sovereignty¹⁸⁸ recurrent conflicts between parallel political societies, that is to say the Community and the Member States, the sovereigns of which are overlapping but not identical, is constantly latent. The problem lies in that there, on this reading of the symbolic value of Union citizenship, today are two sovereign societies in the Community. The solution would be either to subordinate the Community to the Member States or *vice versa*¹⁸⁹. As long as the Community lacks coercive power to place behind its laws, the Hobbesian interpretation will, however, always subordinate the Community to the Member States¹⁹⁰.

¹⁸⁷ Thomas Hobbes, *op. cite.*, note 7, ch. XX, p. 140

¹⁸⁸ ”The establishment of institutions endowed with sovereign rights, the exercis of which affects the Member States and also their citizens”, 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I

¹⁸⁹ Cf. The German Bundesverfassungsgericht in the case, *Brunner v. European Union Treaty*, BvG 2BvR 2134/92 & 2159/92. Also reported in *CMLR* [1994] 1, p. 57-108

¹⁹⁰ Cf. Trevor Hartley, *op. cite.*, note 5, especially at p. 181. Cf. Also Thomas Hobbes, *op. cite.*, note 7, XVIII, p. 123: “*The opinion that any Monarch receiveth his Power by Covenant, that is to say on Condition, proceedeth from want of understanding this easie*

6 Conclusion

As citizenship presupposes political rights, the term Union citizenship necessarily indicates an empowering of the individual on the European level. The reality behind the term Union citizenship, however, provides a fragmented picture of different unrelated rights whereof none, due to the allocation of powers on the Community level, truly politically empowers the individual. Insofar as the Union citizenship contributes with no new political powers, it may serve to highlight the ‘democratic deficit’ of the Community and, consequently, reduce, rather than enhance, the support Union Citizen’s exhibit towards their common institutions.

If democracy is at all possible on European level, is, however, in itself a disputed question. As democracy locates its ultimate source in a group of individuals whereof the majority generally rules the minority, the introduction of a Union citizenship draws attention to the question of a European *demos*. This thesis has argued that institutions, especially the constitution, can structure a relation between the governed and government. A view that seeks the foundation of democracy in pre-legal identities is, in fact, a reminiscence of the theory of absolute sovereignty fashioned around nostalgic collectivistic ideas of a polity.

Despite the Union Citizen’s lack of political powers the concept itself has a symbolic value which emphasize Europeans adherence to more than one polity, and consequently, more than one sovereign. Whether this is perceived in positive or negative terms essentially depends on the eye of the beholder, that is to say, whether one advocate sovereignty or power-sharing. As stated in the introduction, the law is comparable to the sea where the structures at the bottom determine if the surface is calm or vehement. Occasionally, a strong and durable current in the surface can, however, modify the appearance of the bottom. The question is if a dynamic Union Citizenship has the qualities of a strong current that in the future will force us to re-conceptualize the notion of absolute sovereignty?

truth, that Covenants being but words and breath have no force to oblige, contain, constrain, or protect any man, but what it has from the publique Sword [...]”

Summary

This thesis will ask the question: “*which rights the individual derives from the Union Citizenship, and how this citizenship affects the democratic legitimacy of the Community and the popular sovereignty of the Member States?*”

This question is answered by, firstly, an assessment of the notions of sovereignty and legitimacy as those are conceptualised by Thomas Hobbes and John Locke respectively. Thereupon, the EC Treaty provisions and case governing the Union citizenship will be investigated. It will be demonstrated that the right granted Union Citizen’s add little in substance to the pre-existing *acquis communautaire*. It will, however, be concluded that the rights connected to the citizenship has a special constitutional, or quasi-constitutional character, due to their place in the framework of the Treaty and the symbolism of a citizenship.

A distinction between rights will be offered to distinguish between rights offered the individual in his character of subject or citizen. Citizenship rights are rights of participation that allow the individual the influence the society he participate in. Subject rights, on the other hand, are rights bestowed the individual, essentially, to create a zone in which the society cannot intervene. Most of the Union citizenship rights have the latter quality.

Thereafter, it will be discussed if the Union citizenship contributes to the democratic legitimacy of the Community. The discussion revolves around Locke’s concept of trust, which requires a political society to meet certain criteria. Special emphasis will be given to the criterion that individuals’ – for trust to exist – must be able to hire and fire those governing. A look into the allocation of powers on Community level reveals serious flaws in the trust construction. The concept of trust is, on a modern reading connected with democracy. Democracy understood as the rule of majority, necessarily pose the question: What majority?

The group of people that constitutes a given political society as distinct from others is usually termed the *demos* of society. In this sense citizenship is a quality that enables the political society to differentiate between those who belong, and those who do not. How to separate those who belong to a given *demos* from those who do not, essentially depends on what is considered necessary for democracy with respect to pre-existent factors of a social nature.

This thesis will argue that the law itself can structure the relationship between a political society and its members, that is to say, the relationship of individuals to common institutions (especially the constitution). Moreover, the idea a dialogue between formal and substantive conditions can demonstrate a capability from the former to shape the latter, that is to say, a capability of constitutional forms to shape preferred forms of life, will be presented. The existence of institutions, such as citizenship, has on this reading the value of a referential point to modulate identities in the permanent dialectic process between identity-institutions-identity.

Finally, the thesis will demonstrate that the Union citizenship highlights the Europeans adherence to more than polity, something that according to the theory of sovereignty, imply a condition of latent anarchy.

Supplement A

Hohfeld's Fundamental Legal Conceptions

Jural Opposites

Right	Privilege	Power	Immunity
No-right	Obligation	Disability	Liability

Jural Correlates

Right	Privilege	Power	Immunity
Obligation	No-right	Liability	Disability

Opposites Paraphrased

X has a claim against Y that p	X has a privilege regarding Y and whether p	X has a power with regard to Y and whether p	X is immune to Y determining whether p
Y has no claim against X that p	Y has no claim against X that not-p	Y is liable to X as to whether p	Y has no power, with regard to X, to determine whether p

Correlates paraphrased

X has a claim against Y that p	X has a privilege regarding Y and whether p	X has a power with regard to Y and whether p	X is immune to Y determining whether p
Y has an obligation to x that p	Y has no claim against X that not-p	Y is liable to X as to whether p	Y has no power, with regard to X, to determine whether p

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