

THE UNIVERSITY OF HULL

The Development of European Citizenship in E.E.C. Law

being a Thesis submitted for the Degree of  
Doctor of Philosophy

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by

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## Preface

The notion of European Community citizenship was first given prominence by Commission Vice-President Sandri in 1968. Since then, frequent references to this notion have been made by the Community institutions. In particular, in November 1977 the European Parliament passed a Resolution outlining the rights and freedoms entailed by such citizenship. They comprised freedom of expression, assembly and association, the right of residence, the right of access to public office and electoral rights. This Resolution, then, was apparently designed to provide a comprehensive list of the rights and freedoms of European citizenship. However, it was not accompanied by a definition of this notion, and no such definition may be found in any other published Community document. In fact, uncertainty arises as to the nature of European citizenship from the Communiqué issued after the December 1974 Summit Conference in Paris, where similar rights and freedoms were described as "special rights" to be enjoyed by "nationals of the Member States" and no mention was made of European citizenship. The first Chapter of the present work, therefore, will begin by seeking a definition of this new form of citizenship.

The same Chapter will then turn to the legal and political obstacles to the creation of European citizenship. A legal innovation of this kind could be expected to involve major changes in the domestic law of the Member States, including national constitutional amendments. In addition, the political implications may be considerable. Insofar as the creation of this new form of citizenship leads to individuals deriving rights and freedoms from the Community rather than from their particular Member State, they may come increasingly to identify with the former rather than their own country. Such a transfer of allegiance would constitute a major step towards the political

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unification of Western Europe at the expense of the old nation-state structure of this region. Consequently, the creation of European citizenship is likely to be a matter of some political controversy, and this controversy in itself may constitute a serious obstacle to its creation.

The second Chapter will examine what legal basis is contained in the E.E.C. Treaty for the action necessary to overcome these obstacles. Insofar as the Treaty provisions regarding the free movement of persons entail certain rights for individuals throughout the Community, they may be of some relevance for the creation of European citizenship. However, since these rights are basically concerned with economic activity, their relevance should not be overestimated. Nevertheless, several other provisions confer on the Community institutions broad powers to introduce measures for the attainment of the Community's objectives. To the extent that the creation of European citizenship is encompassed by these objectives, these provisions may offer a basis for the introduction of the rights and freedoms entailed by such citizenship.

However, the mere fact that such a basis may be found in the Treaty will not necessarily be sufficient in itself. The willingness of the Community institutions to employ the relevant provisions as a basis for the necessary action, despite the politically sensitive nature of such action, will remain decisive. Accordingly, the willingness of the Community institutions to do so will be considered in Chapter Three.

The next four Chapters will examine the progress actually achieved as regards the introduction of the rights and freedoms of European citizenship. In particular, Chapter Four will be concerned with what the European Parliament described in November 1977 as the "right of residence". This right naturally encompasses rights of entry as well as residence for beneficiaries. The

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principle difference between the rights envisaged by the Parliament and those envisaged by the Treaty provisions regarding the free movement of persons lies in the fact that the former will not apparently be limited to the economic field. In effect, then, the Parliament advocated the introduction of full freedom of movement throughout the Community of the kind usually enjoyed already by individuals within their own country.

Chapter Five will then turn to "freedom of political activity". This expression will be employed throughout the present work to denote freedom of speech, freedom of association, freedom of assembly and so on, which were mentioned by the Parliament in November 1977.

Finally, Chapter Six will be concerned with the right of access to public office and Chapter Seven with electoral rights.

The last two Chapters recognise that the full realisation of European citizenship may require not only the development of the necessary substantive law embodying the relevant rights and freedoms but also the existence of procedures to ensure that these rights and freedoms are in practice respected by the national authorities. Accordingly, Chapter Eight will consider the role of the Commission, which is required by Article 155 of the Treaty to ensure the application of Community law. To this end, the Commission is empowered under Article 169 to bring a Member State in breach of Community law before the European Court of Justice. Chapter Nine, in turn, will consider the role of the national courts. Insofar as individuals are entitled to invoke the relevant Community law before national courts, the latter will be required to review national administrative action to ensure compliance with this law. The examination carried out in these two Chapters will be directed primarily towards the United Kingdom, but references will be made to developments in other Member States

where they will assist in illustrating the legal situation in the United Kingdom. The scope of the examination, however, will be influenced by the progress so far achieved in the development of the relevant substantive law and on the nature of this law.

Treaties.

- O.E.E.C. Convention(1948), Cmnd.7388.  
 Universal Declaration of Human Rights(1948), U.N.General Assembly  
 Resolution 217(III).
- Brussels Treaty Permanent Commission Convention Concerning  
 Student Employees(1950), Cmnd.7972.  
 Brussels Treaty Permanent Commission Convention Concerning  
 Frontier Workers(1950), Cmnd.8540.  
 European Convention on Human Rights and Fundamental Freedom(1950),  
 E.T.S.5. Cmnd.8969.
- E.C.S.C. Treaty(1951), 261 U.N.T.S.140. Cmnd.4863.
- European Convention on Establishment(1955), E.T.S.19. Cmnd.4573.
- Benelux Labour Treaty(1956), 381 U.N.T.S.259.
- E.E.C. Treaty(1957), 298 U.N.T.S.4 . Cmnd.4864.  
 Euratom Treaty(1957), 298 U.N.T.S.259. Cmnd.4865.
- Convention Implementing Articles 55 and 56 of the Treaty  
 Instituting the Benelux Economic Union(1960), Euro.Ybk.8(1960)169.
- European Social Charter(1961), E.T.S.35. Cmnd.2643.
- Fourth Protocol to the European Convention on Human Rights and  
 Fundamental Freedoms(1963) E.T.S.46. Cmnd.2309.
- European Convention on the Establishment of Companies(1966),  
 E.T.S.57.  
 International Covenant on Civil and Political Rights(1966),  
 Cmnd.3220.  
 International Convention on the Elimination of all Forms of  
 Racial Discrimination(1966), U.N.General Assembly Resolution  
 2106(XX). Cmnd.4108.
- Vienna Convention on the Law of Treaties(1969), Cmnd.4818.



E.E.C. Regulations and Directives.

Regulations.

- Regulation 15/61(J.O.1961,1073).
- Regulation 38/64(J.O.1964,965).
- Regulation 1612/68(J.O.1968,L257/2).
- Regulation 1251/70(J.O.1970,L142/24).
- Regulation 1408/71(J.O.1971,L149/2).
- Regulation 312/76(O.J.1976,L39/2).

Directives.

- Directive of 16 August 1961(J.O.1961,1513).
- Directive 64/220(J.O.1964,845).
- Directive 64/221(J.O.1964,850).
- Directive 68/360(J.O.1968,L257/13).
- Directive 69/74(J.O.1969,L58/7).
- Directive 72/194(J.O.1972,L121/32).
- Directive 73/148(O.J.1973,L172/14).
- Directive 75/34(O.J.1975,L14/10).
- Directive 75/35(O.J.1975,L14/14).

Decisions of the European Court of Justice.

- Case 20/59 Italy v.High Authority(1960)E.C.R.325.  
 Case 7/61 E.E.C.Commission v.Italy(1961) E.C.R.317.  
 Cases 2 and 3/62 E.E.C.Commission v.Luxembourg and Belgium(1962)  
 E.C.R.425.  
 Cases 16 and 17/62 Confédération Nationale des Producteurs de  
 Fruits et de Legumes v.Council(1963)E.C.R.471.  
 Case 26/62 Van Gend en Loos v.Nederlandse Administratie de  
 Belastingen(1963)E.C.R.1.  
 Case 28,29 and 30/62 Da Costa en Schaake v.Nederlandse Administratie  
 der Belastingen(1963)E.C.R.31.  
 Case 32/62 Alvis v.E.E.C.Commission(1963)E.C.R.49.  
 Case 6/64 Costa v.E.N.E.L.(1964)E.C.R.585.  
 Case 45/64 E.E.C.Commission v.Italy(1965)E.C.R.857.  
 Case 48/65 Alphons Lutticke v.E.E.C.Commission(1966)E.C.R.19.  
 Case 61/65 G.Vaassen(née Gobbels)v.Management of the Beambtenfonds  
 vot het Mijnbedrijf(1966)E.C.R.261.  
 Case 17/67 Firma Max Neumann v.Hauptzollamt Hof/Saale(1967)E.C.R.  
 441.  
 Case 7/68 E.C.Commission v.Italy(1968)E.C.R.423.  
 Case 29/68 Milch-,Fett-und Eierkontor GmbH v.Hauptzollamt  
 Saarbrucken(1969)E.C.R.165.  
 Case 7/69 E.C.Commission v.Italy(1970)E.C.R.111.  
 Case 31/69 E.C.Commission v.Italy(1970)E.C.R.25.  
 Case 77/69 E.C.Commission v.Italy(1970)E.C.R.237.  
 Case 8/70 E.C.Commission v.Italy(1970)E.C.R.961.  
 Case 9/70 Franz Grad v.Finanzamt Traunstein(1970)E.C.R.825.  
 Case 11/70 Internationale Handelsgesellschaft mbH v.Einfuhr und  
 Verratsstelle fur Getreide und Futtermittel(1970)E.C.R.1125.  
 Case 13/70 Cinzano v.Hauptzollamt Saarbrucken(1970)E.C.R.1089.  
 Case 18/70 Anne Duraffour v.E.C.Council(1971)E.C.R.515.  
 Case 33/70 SpA S.A.C.E.v.Ministry for Finance of the Italian  
 Republic (1970)E.C.R.1213.  
 Case 7/71 E.C.Commission v.France(1971)E.C.R.1003.  
 Case 48/71 E.C.Commission v.Italy(1972)E.C.R.527.  
 Case 29/72 SpA Marimex v.Italian Finance Administration(1972)  
 E.C.R.1309.  
 Case 2/73 Riseria Luigi Geddo v.Ente nazionali Risi(1973)E.C.R.865.  
 Case 4/73 J.Nold,Kohlen-und Baustoffgrosshandlung v.E.C.Commission  
 (1974)E.C.R.491.  
 Case 152/73 Giovanni Maria Sotgiu v.Deutsche Bundespost(1974)  
 E.C.R.153.  
 Case 167/73 E.C.Commission v.France(1974)E.C.R.359.  
 Case 8/74 Procureur du Roi v.Benoit and Gustave Dassonville(1974)  
 E.C.R.837.  
 Case 12/74 E.C.Commission v.Italy(1975)E.C.R.187.  
 Case 17/74 Transocean Marine Paint Association v.E.C.Commission  
 (1974)E.C.R.1063.  
 Case 31/74 Mr Filippo Galli(1975)E.C.R.68.  
 Case 36/74 B.N.O.Walrave and L.J.N.Koch(1974)E.C.R.1405.  
 Case 41/74 Van Duyn v.The Home Office(1974)E.C.R.1337.  
 Case 63/74 W.Cadsky v.Istituto nazionale per il Commercio Estero  
 (1975)E.C.R.281.  
 Case 67/74 Carmelo Angelo Bonsignore v.Oberstadtdirektor der  
 Stadt Cologne(1975)E.C.R.297.  
 Case 9/75 Martin Meyer-Burckhardt v.E.C.Commission(1975)E.C.R.1171.  
 Case 36/75 Rutili v.Minister for the Interior(1975)E.C.R.1219.  
 Case 48/75 Jean Noel Royer(1976)E.C.R.497.  
 Case 52/75 E.C.Commission v.Italy(1976)E.C.R.277.  
 Case 65/75 Riccardo Tasca(1976)E.C.R.291.

Case 118/75 Lynn Watson and Alessandro Belmann(1976)E.C.R.1185.  
Case 51/76 Verbond van Nederlandse Ondernemingen v. Inspecteur  
der Invoerrechten en Accijnzen(1977)E.C.R.2203.  
Case 52/76 Luigi Benedetti v. Munari F.lli s.a.s.(1977)E.C.R.163.  
Case 8/77 Concetta Sagulo, Gennaro Brenca and Addelmadjid  
Bakhouche(1977)E.C.R.1495.  
Case 30/77 R.v. Pierre Bouchereau(1977)E.C.R.1999.  
Case 31/77R E.C. Commission v. United Kingdom(1977)E.C.R.921.  
Case 38/77 Enka BV v. Inspecteur der Invoerrechten en Accijnzen  
(1977)E.C.R.2203.  
Case 61/77 E.C. Commission v. Ireland(1978)E.C.R.417.  
Case 66/77 Petrus Kuyken v. Rijksdienst voor Arbeidsvoorziening  
(1977)E.C.R.2311.  
Case 106/77 Amministrazione delle Finanze dello Stato v.  
Simmenthal SpA(1978)E.C.R.629.  
Case 175/78 R.v. Vera Ann Saunders (1979) E.C.R. 1129.  
Case 131/79 R. v. Secretary of State for Home Affairs, ex p. Mario  
Santillo 1980 3 C.M.L.R. 212.  
Case 157/79 R. v. Stanislaus Pieck (not yet reported).

National Legislation.

France

Loi of 13 December 1926(J.O.R.F.15 déc.1926).  
Code du Travail, Liv.III(J.O.R.F.28 févr. and 1 mars 1927)  
Ordonnance 45-2658 of 2 November 1945(J.O.R.F.,4 nov.,p.7225).  
Décret 47-1430 of 1 August 1947(J.O.R.F.2 août,p.7553).  
 Constitution of 4 October 1958(J.O.R.F.5 oct.,p.9151).  
Ordonnance 58-1131 of 31 December 1958(J.O.R.F.30 déc.,p.12033).  
Décret 70-29 of 5 January 1970(J.O.R.F.14 janv.,p.516).  
Décret 71-393 of 25 May 1971(J.O.R.F.29 mai,p.5212).  
Loi 71-1131 of 31 December 1971(J.O.R.F.5 janv.,p.139).  
Circulaire of 24 January 1972(J.O.R.F.18 févr.,p.1790).  
Décret 74-274 of 1 April 1974(J.O.R.F.5 avr.,p.3837).  
Circulaire of 29 April 1975(J.O.R.F.2 mai,p.4471).  
Loi 75-630 of 11 July 1975(J.O.R.F.13 juill.,p.7236).  
Décret 76-260 of 18 March 1976(J.O.R.F.24 mars,p.1779).  
Loi 79-44 of 18 January 1979(J.O.R.F.19 janv.,p.163).

Germany

Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft(1969),  
 BGBl.I,927.

Netherlands

Vremdelingenwet of 13 January 1965(Stb.1965,No.40).  
Vremdelingenbesluit of 19 September 1966(Stb.1966,No.387).

United Kingdom

European Assembly Elections Act 1978, c 10.  
 European Communities Act 1972, c 68.  
 Immigration Act 1971, c 77.  
 Representation of the People Act 1949, 12 & 13 Geo.6, c 68.  
 Rules of the Supreme Court, Order 114(S.I.1972/1898).  
 Statement of Immigration Rules for Control on Entry.E.E.C. and  
 Other Non-Commonwealth Nationals,H.C.81,1972-73.  
 Statement of Immigration Rules for Control after Entry.E.E.C. and  
 Other Non-Commonwealth Nationals,H.C.82,1972-73.

National Judicial Decisions

Belgium

Corveleyn v. Etat Belge, R.C.D.I.P. (1970) 503. Pas. Belge (1969) IV. 24.

France

Syndicat Général de Fabricants de Semoules de France. Dall. 1968, J. 285. 1970 C.M.L.R. 395.

Syndicat National du Commerce Extérieur du Céréales. R.T.D.E. 6 (1970) 742.

Perregaux, A.J.D.A. 13 (1977) 154.

Hill and Holzappel, Dall. 1977, J. 155. 1978 1 C.M.L.R. 554.

Association des Marocains en France et G.I.S.T.I., Dall. 1978, J. 52.

Cohn-Bendit Dall. 1977, J. 155.

Germany

Baden-Württemberg VG, 23 December 1965, DöV 20 (1967) 352. 1971 C.M.L.R. 540.

Kassel VG, 29 September 1972, N.J.W. 10 (1973) 439.

Munster OVG, 20 December 1972, EuR 8 (1973) 246. 1974 1 C.M.L.R. 107.

BVerwG, 3 May 1973, EuR 9 (1974) 164.

BVerfG, 29 May 1974, N.J.W. 27 (1974) 1697. 1974 2 C.M.L.R. 540.

BVerwG, 2 July 1975, N.J.W. 29 (1976) 494. 1977 2 C.M.L.R. 255.

BFH, 9 July 1976, AWD 10 (1976) 600. 1977 1 C.M.L.R. 659.

Italy

Frontini, Riv. Dir. Eur. 14 (1974) 13. 1974 2 C.M.L.R. 372.

Luxembourg

Subhani, Pas. Lux. (1975) 155.

United Kingdom

Bulmer (H.P.) Limited and Another v. J. Bollinger S.A. and Others (1974) 2 All. E.R. 1226.

Eshugbayi v. Officer Administering the Government of Nigeria and Another (1931) A.C. 662.

Giovanni v. Secretary of State for the Home Department (1977) Imm. A.R. 85.

Johnson's Will Trusts, in re. National Provincial Bank Ltd. v. Jeffrey and Others (1967) Ch. 387.

Lincoln v. Daniels (1962) Q.B. 237.

R. v. Bouchereau, The Daily Telegraph 14 November 1977.

R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi (1976) 1 W.L.R. 979.

R. v. Governor of Brixton Prison, ex p. Bloom 90 L.J.K.B. (1921) 574.

R. v. " " " " " , ex p. Sarno (1916) 2 K.B. 742.

R. v. " " " " " , ex p. Soblen (1963) 2 Q.B. 243.

R. v. Inspector of Ieman St. Police Station, ex p. Venicoff (1920) 3 K.B. 72.

R. v. Maurice Donald Henn and John Frederick Darby 1979 2 C.M.L.R. 495.

R. v. Secchi 1975 1 C.M.L.R. 383.

R. v. Secretary of State for Home Affairs, ex p. Chateau Thierry (Duke) (1917) 1 K.B. 922, C.A.: reversing (1917) 1 K.B. 552.

R. v. Secretary of State for Home Affairs, ex p. Rosenball (1977) 1 W.L.R. 766.

R. v. Superintendent of Chiswick Police Station, ex p. Sacksteder (1918) 1 K.B. 578.

Schmidt and Another v. Secretary of State for Home Affairs (1969) 2 Ch. 149.

Thrupp v. Collet(1858) 26 Beav.125.

Tumath v. Tumath(1970) P.78.

Van Duyn v. The Home Office(1974) 1 W.L.R.1107.

Wells St. Magistrates Case, The Guardian, 22 May 1979.

Abbreviations

A.F.D.I.	Annuaire Français de Droit International
A.J.C.L.	American Journal of Comparative Law
A.J.D.A.	Actualité Juridique de Droit Administratif
A.J.I.L.	American Journal of International Law
AufenthG/EWG	Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft
AWD	Aussenwirtschaftsdienst des Betriebsberaters
BFH	Bundesfinanzhof
BGBL.	Bundesgesetzblatt
BVerfG	Bundesverfassungsgericht
BVerwG	Bundesverwaltungsgericht
C.D.E.	Cahiers de Droit Européen
C.L.J.	Cambridge Law Journal
C.M.L.Rev.	Common Market Law Review.
COM	Commission working paper
Dall.	Dalloz
DoV	Die öffentlich Verwaltung
DVBl.	Deutsches Verwaltungsblatt
E.C.H.R.	European Convention on Human Rights and Fundamental Freedoms
E.I.R.R.	European Industrial Relations Review
E.L.Rev.	European Law Review
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht
Euro.Ybk.	European yearbook
H.C.	House of Commons Papers
H.C.Deb.	House of Commons Debates
H.L.Deb.	House of Lords Debates
H.R.J.	Human Rights Journal
I.C.L.Q.	International and Comparative Law Quarterly
Int.Lab.Rev.	International Labour Review
Int.Mig.	International Migration
J.B.L.	Journal of Business Law
J.C.M.S.	Journal of Common Market Studies
J.D.I.	Journal de Droit International
J.O.R.F.	Journal Officiel de la République Française
J.W.T.L.	Journal of World Trade Law
L.C.P.	Law and Contemporary Problems
L.I.E.I.	Legal Issues of European Integration
M.L.R.	Modern Law Review
N.I.L.Q.	Northern Ireland Law Quarterly
N.J.W.	Neue Juristische Wochenschrift
OVG	Oberverwaltungsgericht
P.E./E.P.Debs.	Debates of the European Parliament
P.E./E.P.Doc.	Working Papers of the European Parliament
Pas.Belge	Pasicrisie Belge
Pas.Lux.	Pasicrisie Luxembourgeoise
R.B.D.I.	Revue Belge de Droit International
R.C.D.I.P.	Revue Critique de Droit International Privé
R.D.P.S.P.	Revue de Droit Public et de la Science Politique
Riv.Dir.Eur.	Rivista di Diritto Europeo
Riv.Dir.Int.	Rivista di Diritto Internazionale
R.G.D.I.P.	Revue Générale de Droit International Public
R.I.D.C.	Revue Internationale de Droit Comparé
R.I.I.A.	Reports of International Arbitral Awards

R.M.C.	Revue du Marché Commun
R.T.D.E.	Revue Trimestriale de Droit Européen
Stb .	Staatsblad
St.Louis Univ.	St.Louis University Law Review
L.Rev.	
VG	Verwaltungsgericht





**PART ONE**

**THE NOTION OF EUROPEAN CITIZENSHIP**

Chapter One Introduction

Introduction

The notion of European Community citizenship first became prominent in 1968. When Regulation 1612/68<sup>1</sup> was enacted as part of the final stage in the implementation of freedom of movement for workers, Commission Vice-President Sandri described this freedom as "an incipient form of European citizenship"<sup>2</sup>. During the 1970s increased attention was paid to this notion. Thus in November 1977 the European Parliament passed a Resolution outlining the rights and freedoms entailed by such citizenship,<sup>3</sup> and in the following year the Parliament organised a conference in Florence to discuss a "Charter of Rights of Community Citizens"<sup>4</sup>. The present Chapter will begin with an attempt to produce a definition of European Community citizenship and will then consider the obstacles to its creation.

Definition of European Community Citizenship

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In the well-known cases of Internationale Handelsgesellschaft<sup>5</sup> and Hold<sup>6</sup> the European Court of Justice made clear that the Community legal order was based on the same fundamental constitutional principles as the legal orders of the Member States. Consequently, European Community citizenship may be expected to develop along the lines of citizenship in the Member States. National constitutional provisions usually lay down the rights and freedoms entailed by citizenship of the Member State concerned.

These include political freedoms, such as freedom of association and assembly. The sum of such freedoms represent what may be conveniently termed freedom of political activity. This freedom exists to the extent that the law prevents State authorities from interfering with the political activity of and individual.

However, an individual will only be able to play a full part in the political life of his country, if the law goes beyond merely restraining repressive State action in the face of political activity on his part and grants him electoral rights and the right of access to public office. Only with electoral rights will an individual be entitled to vote and stand as a candidate in elections to representative State institutions responsible for State policy. Moreover, only with the right of access to public office will he be entitled to be appointed to those offices of State whose holders exercise policy-making powers. Consequently, national constitutions also guarantee these rights.

Moreover, the constitutions of some Member States<sup>7</sup> expressly refer to freedom of movement. This freedom means that beneficiaries may move without formality within the national territory and may choose their place of work and residence therein.

These, then, are the rights and freedoms associated with citizenship in the Member States, and it was these which the European Parliament treated as implicit in European Community citizenship in

its Resolution of November 1977.

Naturally, the law of the Member States also defines the beneficiaries of such rights and freedoms. Generally, it is nationals, and only nationals, who benefit. However, complications may arise. Nationality is the link required at international law before a State may exercise its right of diplomatic protection on behalf of an individual. Nevertheless, international law leaves States largely free to determine for themselves those persons qualified as its nationals and treats nationality as being distinct from citizenship.

Thus the United Kingdom defines its nationality for the purposes of international law as including all Citizens of the United Kingdom and Colonies and Commonwealth Citizens without the citizenship of the United Kingdom or of any other Commonwealth country. However, the United Kingdom does not always regard such nationality as either sufficient or necessary for enjoyment of the rights and freedoms of citizenship in the United Kingdom. For example, only those United Kingdom and Commonwealth Citizens defined as "patrials" under the 1971 Immigration Act enjoy the right of abode in the United Kingdom, but all United Kingdom and Commonwealth Citizens as well as Citizens of the Irish Republic enjoy electoral rights and the right of access to public office.

The Community institutions have employed the expressions "European citizens" or "Community citizens" to denote the persons intended to benefit from European Community citizenship but have never explained what is meant by these expressions. If such citizenship is to develop along the lines of citizenship in the Member States, a definition of European Community nationality would seem to be necessary. In view of the problems experienced in the nationality law field by the United Kingdom during the post-war period, it is unlikely that the Community institutions intend to follow the precedent set by this particular Member State.

Therefore, European Community nationality is likely to be treated as both a necessary and sufficient condition for enjoyment of European Community citizenship.

Consequently, this new form of citizenship envisaged by the Community institutions may be defined as entailing for such persons enjoyment throughout the Community of the rights and freedoms associated with citizenship of the Member States. In effect, this means that they should enjoy the same freedom of movement, freedom of political activity and political rights throughout the Community as nationals usually enjoy within their own State under its constitution. However, action designed to introduce these rights and freedoms for individuals throughout the Community would encounter major obstacles.

#### Obstacles to the Creation of European Community Citizenship

##### 1) national immigration barriers

Although some international lawyers argue that aliens enjoy rights of entry,<sup>12</sup> the majority deny that such rights exist and hold that aliens<sup>13</sup> may only enter and reside at the discretion of the State concerned. During the twentieth century municipal law in the Member States has certainly developed on the assumption that no such rights exist.

Thus aliens, and indeed non-patrial Commonwealth Citizens,<sup>14</sup> must complete a landing card,<sup>15</sup> submit to passport control and obtain leave to enter<sup>16</sup> before they can gain admission to the United Kingdom. The grant of leave to enter is at the discretion of the administration, and Parliament and the courts have done little to check the exercise of this discretion.

Continental Member States, for their part, employ residence permit systems and exercise rather less stringent control at the frontier than the United Kingdom. Thus, for example, while an alien enjoys no right to enter France, he is usually allowed to do so, provided he is in possession of a passport and visa.<sup>17</sup> Moreover, he is usually allowed without further formality to stay for three months. On the expiration of this three months period he must either leave or obtain a residence permit (permis de séjour).<sup>18</sup> A residence permit is granted initially at the discretion of the administration. While an alien holds one, he is entitled to remain in France. These permits are of three kinds. First, there is a temporary residence permit (permis de séjour temporaire), which is valid for up to twelve months. This is the type of permit which is usually issued to aliens for their first year in France. It is also regarded as being particularly appropriate in the case of those taking up seasonal or temporary employment, and students and tourists. A worker only qualifies for this permit if he has permission to work. A student or tourist must have adequate means to support himself. Moreover, the former also needs a certificate of enrolment at an educational

establishment, and the latter must accept an obligation not to work without permission.<sup>19</sup> All applicants for any residence permit must, in addition, present a medical certificate.<sup>20</sup> Secondly, those who wish to stay longer in France may apply for an ordinary residence permit (permis de séjourn ordinaire), which lasts for three years. The applicant must again possess sufficient means to support himself, unless he intends to work. If he does intend to take up employment,<sup>21</sup> he must have permission. Finally, if a certain permanence in France is desired, an alien may apply for a privileged residence permit (permis de sejour privilégié). Its duration is ten years, but it is only/<sup>granted</sup> to those who have three uninterrupted years of residence in France and after the applicant's background has been thoroughly investigated.<sup>22</sup> This permit is often seen as a preparatory stage for obtaining French nationality. All three of these are renewable. However, it is only a privileged residence permit that is renewable as of right (de plein droit).<sup>23</sup>

The existence of such/<sup>immigration</sup> barriers means that little freedom of movement has in the past existed between the Member States. However, since the Second World War considerable progress has been achieved in the reduction of such barriers within Western Europe. Bilateral and multilateral agreements, such as those negotiated under the auspices of the Council of Europe,<sup>24</sup> have led to the reduction of documentary formalities required for travel within Western Europe. Moreover, frontier controls have been abolished completely between the Scandinavian countries,<sup>25</sup> in Benelux<sup>26</sup> and between the United Kingdom and the Irish Republic.<sup>27</sup> Given this progress, it would seem that action undertaken to secure freedom of movement for all Community nationals throughout the Community ought not to encounter insurmountable obstacles.



(ii) restriction of the political activity of aliens.

As early as the seventeenth century Hugo Grotius wrote that every State possessed the sovereign right to expel aliens who challenged its established political order and indulged in seditious activities.<sup>28</sup> Similar views were expressed by Pufendorff and Emeric Cruce.<sup>29</sup> The latter maintained that a State could expel all aliens regarded as "traistres, seditieux et assassins".<sup>30</sup> Already, therefore, the principle was established that an alien's political activity might be such as to entitle a sovereign State to expel him.

Confirmation of this principle and an indication of its broad scope of application were provided by a number of arbitral decisions given around the turn of the century. In the Ben Tillett Case<sup>31</sup> the Belgian authorities had expelled a Briton wishing to address a public meeting in furtherance of the cause of trade unionism. The arbitrator found that a State enjoyed the right to expel an alien in such circumstances and could, in the plenitude of its sovereignty, determine for itself whether the conduct of the alien concerned merited expulsion. However, the abuse of rights doctrine might affect the

manner in which a State could exercise this right. In the Boffolo Case<sup>32</sup> an Italian national had been expelled from Venezuela after publishing one newspaper article critical of the local minor judiciary and another article recommending people to read a particular Socialist newspaper. In this Case the arbitrator found that Venezuela had offered inadequate reasons for the expulsion and awarded 2,000 Bolivars compensation to Italy. Again, in the Maal Case<sup>33</sup> the arbitrator found that the expulsion of an American citizen suspected of conspiring against the Venezuelan Government had been carried out with unnecessary hardship and indignity, and compensation was duly awarded to the United States. In these Cases the right of a sovereign State to expel an alien on account of his political activity was not challenged. International law was merely taken to mean that the expelling State might have to compensate the alien's State of nationality because of the manner in which the expulsion was effected.

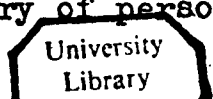
This situation has not been affected even by those treaties which might have been expected to benefit aliens. For example, Articles 1 and 2 of the European Convention on Establishment<sup>34</sup> require each Contracting Party to "facilitate" the entry and residence of nationals of other Contracting Parties, and Article 3 limits the grounds on which such persons may be expelled. Expulsion is only permitted where they endanger national security or offend against ordre public or public morality. Protocol III(a) to the Convention, however, deals with the meaning of ordre public in this context and explains that it has the effect of permitting expulsion "for political reasons". Reference may also be made to the European Convention on Human Rights and Fundamental Freedoms.<sup>35</sup>

According to this Convention, each High Contracting Party must allow all persons within its jurisdiction to exercise freedom of opinion, speech, association, assembly and so on. Thus an alien

expelled by a Party because of his views, speeches, participation in a demonstration or membership of an organisation might have been able to claim that the expulsion limited his enjoyment of these freedoms and so was incompatible with the Convention. However, such a possibility is excluded by Article 16, which provides that none of the provisions of the Convention is to be understood as affecting the right of High Contracting Parties to restrict the political activity of aliens. Both Conventions, therefore, seek to preserve the sovereign right of States to expel aliens on account of their political activity.

Contemporary writers are divided as to the precise legal character of this right. Some, like Sibert,<sup>36</sup> believe that the position of an alien in the host State depends on a balance between a number of principles of international law. On the one hand, the principles of the interdependence of States, individual liberty, equality and humanity require that aliens enjoy rights of entry and residence. On the other hand, the principle of self-preservation entitles the host State in the exercise of its sovereignty to impose certain restrictions on these rights. In particular, the State may expel a politically active alien in order to protect its established political order.

Most writers, however, take the view that as a consequence of national sovereignty an alien enjoys no right to enter and reside and may only do so at the discretion of the host State.<sup>37</sup> It is true that the exercise of this discretion is not entirely unfettered. The writer has already explained how the abuse of rights doctrine may require a State expelling an alien to compensate his State of nationality on account of the manner in which the expulsion is effected. It is also thought that the principle of humanity and prohibition of genocide would rule out certain forms of mass expulsion and the delivery of persons to acts of persecution.<sup>38</sup>



The effect of these two principles is, of course, merely to preclude expulsions which are inhumane in respect of their manner of execution or their consequences. Provided there is no such element of inhumanity in the action taken by the host State, there seems to be little to prevent a State expelling an alien for political reasons. Certainly, writers are ready to accept that expulsion for such reasons is generally lawful. O'Connell, for example, believes that an alien involved in "political intrigue" may be expelled.<sup>39</sup> Similarly, Goodwin-Gill admits that an alien indulging in "undesirable" political activity is liable to expulsion.<sup>40</sup>

Therefore, whether they regard the State's right to expel for political reasons as an exception to an alien's general right of entry and residence or as a consequence of the fact that an alien's position is dependent on the largely unfettered discretion of the host State, contemporary writers agree that international law does little to limit the exercise of this sovereign right. Thus as far as international law is concerned, a State may restrict the political activity of aliens by expelling those who engage in such activity.

Municipal law occasionally contains express constitutional provision regarding the political activity of aliens. For example, Article 25 of the Nicaraguan<sup>41</sup> Constitution states that aliens are prohibited from intervening directly or indirectly in the country's political affairs. Violation of this prohibition renders the alien concerned liable to prosecution and expulsion. Such express constitutional provisions are, however, rare. It is more common for constitutions by implication to allow for restriction of political activity by aliens. While freedom of opinion and speech are usually guaranteed to all persons, only citizens are guaranteed equality before the law. Thus the way is left open for discrimination between citizens and aliens as regards the exercise of these freedoms. As for collective freedoms, such as freedom of association and assembly, these are usually guaranteed only to citizens. Thus constitutions are careful not to preclude the

restriction of exercise of such freedoms by aliens.

The absence of constitutional guarantees means that ordinary legislation may be enacted specifically to restrict the political activity of aliens. For example, Article 6(2) of the West German Ausländergesetz<sup>42</sup> allows for the limitation or prohibition of such activity by aliens on grounds of public safety or öffentlich Ordnung or for the protection of the political process in West Germany or other particularly important interests of the Federal Republic. Similarly, in the United Kingdom section 3(2) of the Aliens Restriction (Amendment) Act 1919 provides that any alien who promotes or attempts to promote industrial unrest in any industry in which he has not been bona fide employed for at least two years immediately preceding in the United Kingdom shall be liable on summary conviction for up to three months imprisonment. Little use has been made of this provision, though it did lead to a prosecution in April 1921.<sup>43</sup> Since it has been so rarely used, commentators generally regard section 3(2) as obsolescent.<sup>44</sup> Nevertheless, the Immigration Act 1971, which repealed much of the 1919 Act, carefully preserved this provision. Thus the authorities presumably regard the power conferred by this provision as sufficiently important to wish to retain it.<sup>45</sup> Given the fact that international law permits the expulsion of aliens because of their political activity, the imposition of criminal sanctions for the same reason would not seem incompatible with international law. Certainly, Article 16 of the European Convention on Human Rights seeks to preserve the sovereign right of High Contracting Parties to "restrict" the political activity of aliens. This provision would seem to assume that the action which a State may take in the face of political activity is not limited to expulsion but may also include other forms of repression, such as the imposition of criminal sanctions.

Normally, however, States deal with politically active aliens through the application of their legislation regarding the entry and residence of aliens. Sometimes such legislation provides expressly for their expulsion for political reasons. For example, the United States Code states that the categories of aliens who may be expelled include: anarchists, those teaching or affiliating to organisations advocating or teaching opposition to all organised government, members and affiliates of the Communist Party and others advocating world communism, including world dictatorship, or dictatorship in the United States.<sup>46</sup>

Rather than compiling such lists, most States prefer to confer broad discretionary powers on national authorities. For example, the United Kingdom administration is empowered under the Immigration Act 1971 and the accompanying Immigration Rules to exclude or expel an alien whenever such action is "deemed conducive to the public good".<sup>47</sup> Commentators have frequently criticised the breadth of this power and described its use for political reasons.<sup>48</sup> Indeed, the 1971 Act itself makes clear that the power may be exercised on grounds of "the relations between the United Kingdom and any other country or other reasons of a political nature".<sup>49</sup> The most well-known example of an alien being expelled for political reasons was effected under a similar power contained in the 1920 Aliens Order,<sup>50</sup> when Rudi Dutschke, the left-wing student from West Germany, was expelled in 1970 for failing to abstain from political activity altogether. A recent example of the power contained in the 1971 Act being employed for political reasons occurred in 1978, when David Duke, the American Ku Klux Klansman<sup>51</sup> was expelled from the United Kingdom.

In the face of such action against aliens, the United Kingdom courts have shown extreme judicial restraint. Dicta exist to the effect that they would be prepared to annul an expulsion order made against a British subject,<sup>52</sup> or one that is vitiated by a procedural defect<sup>53</sup> or made for an improper purpose.<sup>54</sup> The last-mentioned ground might seem to offer considerable scope for intervention by the courts. On one occasion, in 1917, the High Court did annul a deportation order in the Chateau Thierry Case because the real purpose of the order had been to effect the extradition of a Frenchman to his native country so that he could be required to perform his military service there.<sup>55</sup> This judgement, however, was reversed by the Court of Appeal.<sup>56</sup> In subsequent cases the courts have repeatedly emphasized that an applicant challenging an order on the ground that it was made for an improper purpose would have to satisfy a very heavy burden of proof indeed.<sup>57</sup> The difficulty of making a challenge on this ground was illustrated by Lord Denning in Schmidt v. The Home Secretary. His Lordship stated that in his view the administration could exercise its powers for any purpose considered to be for the public good or in the interests of the people of this country.<sup>58</sup> As a result, therefore, of broadly-worded legislation combined with extreme judicial restraint, the United Kingdom administration enjoys considerable discretion as regards the expulsion of aliens for political reasons.

The position is similar in France, where the concept of ordre public rather than that of "the public good" is employed as the basis for such action against aliens. Many French commentators have attempted to encapsulate the meaning of ordre public in broad definitions. For instance, Marty and Reynaud suggest that it covers that which can be regarded as indispensable to the maintenance of organised society.<sup>59</sup> Similarly, Vedel believes that it consists of the minimum conditions required for a decent ("convenable") social life.<sup>60</sup> Bernard, on the other hand, wishes to emphasize the dynamic quality of ordre public. He argues that it requires not only the absence of threats to the public peace but also positive action to balance the competing interests within society.<sup>61</sup> Such definitions, however, do little other than illustrate the breadth and imprecision of this concept.<sup>62</sup> Certainly, it is these two qualities which characterise the application of ordre public in the context of French immigration law.



Prior to the grant of a first residence permit an alien has no right to enter or reside in France. This fact has two consequences. The first consequence is that an alien may only enter at the discretion of the administration. This discretion is exercised on ordre public grounds so as to exclude any alien who is regarded as being "undesirable".<sup>63</sup> The term "undesirable" is broad enough to cover a wide range of aliens, such as those with criminal convictions or those with insufficient resources to support themselves during their stay in France. However, there has also been a particular tendency to exclude aliens from France for political reasons. For example, in March 1972 Bernadette Devlin, who had arranged to address a meeting in Bordeaux, was refused entry.<sup>64</sup> In the following month a group of British trades unionists and three Labour M.P.s., who wished to visit France in order to protest about British accession to the European Community, were similarly excluded.<sup>65</sup> In 1975 three West German Amnesty International officials, who had attended a conference in their native country, tried to enter France for a restaurant meal. The French immigration officials, however, refused their permission to enter.<sup>66</sup> The reason for exclusions such as these became evident in January 1976, when ex-general Spinoza was admitted to France only on condition that he respected an obligation to maintain "political neutrality" (neutralité politique).<sup>67</sup> The meaning of this obligation is far from clear. However, it appears in practice to require an alien to refrain from political activity. In the three cases of entry refusal mentioned above the administration presumably felt that the aliens concerned

would not respect this obligation. Ordre public, then, has been interpreted so as to permit the exclusion of any alien who, the administration believes, will not remain politically "neutral" in France.

The second consequence of the absence of a general right to enter and reside in France is that an alien without a first residence permit may only remain in France at the discretion of the administration. The administration may, therefore, request such an alien to leave at any time if his presence is regarded as being contrary to ordre public. The procedure whereby an alien is requested to leave in this way is known as "refoulement". It may be noted that except in an emergency the administration is not empowered to employ physical coercion to ensure compliance with such a request. Nevertheless, this procedure has proved an effective means of curtailing the stay of aliens who have not been granted a first residence permit. Thus during the initial three months period when an alien is usually allowed to remain without a residence permit he may be subjected to refoulement. For example, in March 1976 Kaid Ahmed, an Algerian opposition leader, was requested to leave after he had held a press conference critical of his government. Again, in August 1977 Mr. Agee, the American journalist deported from the U.K., was detained at Boulogne after spending three weeks in France. He was then driven to Lille and told to board a train to Belgium. The Minister of the Interior justified this action by saying that Agee's presence in France was considered "undesirable" because of his past activities and because of the consequences that some of his present ones were likely to involve for the relations maintained by France with certain

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friendly countries".<sup>70</sup>

If an alien wishes to stay for more than three months, he must, as mentioned above, apply for the grant of a residence permit. However, the grant of a first residence permit is discretionary and may be refused on ordre public grounds. For example, in September 1975 the Prefect of Alpes de Haute Provence refused members of the agricultural commune of Longo Mai first residence permits because of their alleged political extremism.<sup>71</sup> Aliens refused a first residence permit in this way must leave France before the date specified by the administration. If they fail to do so, they may be punished under Article 27 of Décret 58-1303 of December 23 1958.<sup>72</sup> The penalties provided are ten days to three months imprisonment and a fine of Fl,000-2,000.

Similarly, an alien who does not apply for a residence at all must leave at the end of the three months period. Again, failure to do so may be punished under Article 27 of the 1958 Décret. In practice, many aliens who do not comply with the obligation to leave remain undetected.<sup>73</sup> However, if they take part in political activity, the administration may act against them on the basis of ordre public. Thus in February 1975 Paul Dijoud, the Immigration Minister, stated that such illegal residents would not be allowed to organise hunger strikes or other forms of protest.<sup>74</sup> If they do so, they normally suffer refoulement. It seems, therefore, that an alien without a first residence permit may be requested to leave in circumstances similar to those in which he may be refused entry. In fact, ordre public has been interpreted so as

to render the entry and residence of an alien prior to the grant of a first residence permit dependent upon his maintaining "political neutrality".

An alien who has obtained a first residence permit is in a rather different position. He is entitled to remain in France for as long as he holds a residence permit. His permit may only be lost in two ways. First, the administration may withdraw or refuse to renew it. The alien concerned must then leave. Failure to do so will render him liable to punishment under Article 27 of the 1958 Décret. This procedure is again known as refoulement. Secondly, the administration may serve an alien with a deportation order. As a consequence of such an order his residence permit must be surrendered, and he will be required to leave France. Each of these procedures may, however, only be carried out in circumstances laid down by law.

Under earlier law contained in Article 2 of Décret 38-<sup>75</sup> of May 2, 1938 a residence permit could be withdrawn at the discretion of the administration. The current law, however, only allows for withdrawal in specified circumstances. A temporary residence permit may now only be withdrawn where the holder ceases to satisfy the conditions of its issue.<sup>76</sup> This might occur, for instance, where a student terminates his studies, a tourist becomes destitute or a worker loses his job. It is established that withdrawal is not possible in other circumstances.<sup>77</sup> The question of the renewal of a temporary residence permit is rather more problematic.

It may only be renewed where the conditions of its issue are satisfied.<sup>78</sup> This does not, however, necessarily mean that

it must be renewed in such circumstances. As a result, some commentators believe that its renewal may be refused on ordre public grounds.<sup>79</sup> As for an ordinary residence permit,

it may only be withdrawn where the holder has spent six consecutive months away from France without good reason or becomes unemployed and destitute "of his own act" for the same period.<sup>80</sup>

It is renewable provided that the conditions of its issue are satisfied as regards financial resources and employment.<sup>81</sup> Finally, a privileged residence permit may only

be withdrawn or its renewal refused, where the holder spends six consecutive months abroad or by arrêté of the Interior Minister following a hearing before a special commission.<sup>82</sup>

However, if this does take place, the alien concerned must be given a temporary or ordinary residence permit as a replacement.<sup>83</sup> Accordingly, he is not required to leave.

Instead, he is entitled to remain there subject to the rules applicable to temporary or ordinary residence permit holders. Therefore, neither withdrawal nor refusal to renew a residence permit, except perhaps in the case of a refusal to renew a temporary residence permit, represents a procedure whereby the administration may act against an alien on ordre

public grounds.<sup>84</sup> If the administration wishes to do so, resort must be had to the deportation procedure.

Under Article 23 of the 1945 Ordonnance the Minister of the Interior or in frontier departments the Prefect, who is accountable to the

Minister, may deport an alien who constitutes a "threat" (menace)  
to ordre public.<sup>84</sup> No definition of ordre public is offered by  
Article 23, and no guidance is laid down as to the circumstances  
in which this concept allows for deportation of an alien. In  
fact, this provision does not require an infringement of ordre  
public but merely a "threat" to it. As a result, the  
administration is left with considerable discretion in deciding  
whether or not to deport an alien.<sup>85</sup> Often aliens are deported  
for political reasons. For example, in 1973 an Algerian<sup>86</sup>  
discovered in possession of left-wing papers and a Swiss  
clergyman, Pastor Perregaux,<sup>87</sup> who was working with North African  
immigrants in Marseilles, were both deported. In the same year  
the Tunisian Secretary-General of the Comite de Defense des Droits  
et de la Vie des Travailleurs Immigrés<sup>88</sup> and a militant left-wing  
Syrian at Marseilles University<sup>89</sup> suffered the same fate. More  
recently, in December 1977, a Moroccan<sup>90</sup> and a Spaniard<sup>91</sup> were  
deported because of their involvement in the controversy  
regarding the future of Western Sahara. The Interior Minister  
usually defends such deportations on the grounds that the aliens  
concerned have failed to maintain "political neutrality".<sup>92</sup>  
Therefore, aliens who have been granted a first residence  
permit risk deportation because of their political activities in  
the same way as those without such a document are liable to  
refoulement. Consequently, aliens enjoy little freedom of  
political activity in France.<sup>93</sup>

In the face of such action by the administration the French  
courts, like those in the United Kingdom, have shown considerable  
judicial restraint. For the first half of the nineteenth  
century the Conseil d'Etat regarded the deportation of an alien  
as an acte du gouvernement.<sup>94</sup> Thus no review at all before the  
Conseil was possible.<sup>95</sup> However, in 1884 in Morphy the Conseil  
was confronted by a case where a deportee challenged a deportation  
order on the grounds that he was French. Since he was not an

alien, the applicant argued, the administration could not deport him. His application was rejected, because on the facts Morphy was a British subject. However, the Conseil did accept by implication that review for excess of power (excès de pouvoir) was in principle available.

Subsequently, the Conseil developed its case law so that review in such cases is now possible on four grounds. First, a deportation must be carried out in accordance with the procedure laid down by law. If it is not, it may be annulled for procedural irregularity (vice de forme)<sup>96</sup>. Secondly, a deportation order may only be served on an alien. If it is served on a Frenchman, it may be annulled.<sup>97</sup> Thirdly, the Conseil will hear applications based on a claim that there has been an abuse of power (détournement de pouvoir)<sup>98</sup>. Thus, for example, a deportation order made not to uphold ordre public but for vengeance or pecuniary advantage could be annulled. Such an argument would, however, be difficult to prove. Moreover, the Conseil might be reluctant to impute such base motives to the administration. Consequently, review for abuse of power is now becoming less prominent.<sup>99</sup> Instead, attention has been increasingly focused on the factual basis for a deportation order. It is with these facts that the last of the four grounds is concerned. The Conseil is now prepared to examine whether the facts alleged against a deportee are accurate (matériellement exact)<sup>1</sup>. Thus, for example, if an alien is alleged to threaten ordre public because of his participation in a demonstration, the Conseil will require proof that he did actually participate. However, the effectiveness of review on this ground is limited by the tendency of the administration to offer<sup>2</sup> only the most generalised facts in justification of their action. Moreover, none of these four grounds enable the Conseil to question the administration's assessment or appréciation of the facts. In particular, the Conseil declines to examine whether the facts

alleged against a deportee are of the sort or qualifié to permit  
 deportation. Even less, is the Conseil prepared to assess the  
 facts for itself and decide whether the administration's  
 conclusion was actually justified by these facts. Because the  
Conseil's review of the facts was so limited, commentators described  
 this field as one where only contrôle minimum of administrative  
 action was possible.

In the 1970s, however, the Conseil seems to have become  
 somewhat more interventionist. In 1975 a Case came before the Conseil  
 involving a Bulgarian refugee named Pardov. He had received a  
 deportation order after residing illegally in France and becoming  
 destitute. The Conseil decided that the Minister of the  
 Interior had committed a clear error of assessment (erreur  
manifeste d'appréciation) in concluding on the basis of the above  
 facts, which had not been fully proved anyway, that Pardov's  
 presence constituted a threat to ordre public. In principle, this  
 ruling represents a significant development in the Conseil's  
 attitude towards review of the factual basis for a deportation  
 order. The Conseil will now review not only the accuracy of the  
 facts but also the administration's assessment of these facts.  
 However, two points should be made. First, in this ruling the  
Conseil expressed a certain doubt as to the accuracy of the facts  
 alleged by the administration. Thus it is not yet established  
 whether in deportation cases the Conseil will review the  
 administration's assessment of the facts for erreur manifeste  
 unless there is some doubt as to the accuracy of these facts.  
 Secondly, commentators believe that the Conseil will only annul  
 administrative action on the basis of erreur manifeste where the  
 the administration's assessment of the facts is very clearly and  
 very seriously erroneous. Therefore, the degree to which the  
Pardov ruling has in practice advanced the Conseil's review of the  
 factual basis for a deportation order is at this stage open to



question.

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A second development occurred in January 1977 in Dridi. Here a deportation order had been served on a Tunisian following his conviction for a criminal offence. Although his application was rejected, the Conseil did refer to the doctrine of error in law (erreur de droit). The Conseil implied that if it had been shown that the administration had failed to consider all the relevant facts,<sup>11</sup> the deportation order would have been annulled for error in law. As a result, the administration may now be called upon to put forward all the relevant facts. The Conseil will then be able to examine the accuracy of these facts and by this means render its review of the factual basis for a deportation order more effective.

Both rulings suggest a certain willingness on the part of the Conseil d'Etat to reconsider its tradition of restraint in this field. However, their precise significance, particularly in connection with political cases, is uncertain. The Conseil's attitude in Perregaux,<sup>12</sup> also in 1977, is notable. It will be recalled that the administration served an expulsion order on the clergyman on the ground that his failure to maintain "political neutrality" constituted a threat to ordre public. When he challenged this order, the Conseil remarked that "political conduct" alone did not necessarily represent a threat to ordre public and referred to the doctrines of erreur manifeste and erreur de droit. However, the Conseil declined to annul the order on the basis of either doctrine. Consequently, the French administration, like the British, would seem for the moment at least to retain broad discretion as regards the expulsion of politically active aliens.

Therefore, the approach of international and municipal law has been such that only nationals in their own country are guaranteed freedom of political activity. Thus action designed to secure this freedom for Community nationals in a Member State other than their own would represent a major legal innovation.

( iii) denial of political rights to aliens.

As early as the eighteenth century van Bynkershoek observed that aliens were usually prohibited from holding public office and said nothing to suggest that such a prohibition was incompatible with international law.<sup>13</sup> In more recent years writers have accepted with equal readiness that aliens may<sup>14</sup> be denied electoral rights.

Some contemporary writers believe that aliens are in principle entitled to equality of treatment with nationals of the host State. However, in the interests of self-preservation the State is said to retain the sovereign right to make certain exceptions to

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this equality. In particular, aliens may be prohibited from participation in elections or holding public office.<sup>15</sup>

Again, however, most writers take national sovereignty as their starting-point. In their opinion, aliens may only enter and reside at the discretion of the host State, and the latter is under no obligation to treat them equally with their own nationals, least of all in respect of electoral rights and the right of access to public office.<sup>16</sup> Therefore, whichever premise they adopt, contemporary writers agree that the denial of such rights to aliens is compatible with international law.

This situation too is unaffected by international legal instruments which might be expected to benefit aliens in this field. As a reaction to the atrocities of the Second World War, several instruments have been drawn up to safeguard basic human rights. Such instruments, however, employ restrictive formulas when dealing with political rights. For example, Article 21 of the Universal Declaration of Human Rights<sup>17</sup> envisages no more than that an individual enjoy the right to take part in the government of "his country", directly or through elected representatives, and the right to have equal access to public service in his "country". More explicitly, Article 25 of the International Covenant on Civil and Political Rights<sup>18</sup> limits the enjoyment of such rights to citizens in their own countries.

Other instruments are directed specifically towards establishing equality of treatment. For example, Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination<sup>19</sup> requires that all persons are treated equally as regards participation in elections and holding public office. However, Article 1(2) of the Convention provides that its terms are not applicable to distinctions or exclusions, restrictions or preferences made by a State Party between citizens and non-citizens.

Again, the European Convention on Establishment obliges Contracting Parties to treat nationals of other Contracting Parties equally with their own nationals as regards employment. However, Article 13 of this Convention allows for a Contracting Party to reserve for its own nationals the "exercise of public functions", i.e. the holding of public office. All these instruments, then, carefully preserve the sovereign right of States to deny aliens political rights. Consequently, the question of whether aliens should be granted such rights has been left to be determined by municipal law.

<sup>7</sup> restrictive  
 Its approach to the political activity of aliens

would suggest that municipal law would be reluctant to grant any political rights to aliens. In the United Kingdom the position was originally governed by the common law. In the Monmouth Election Case <sup>20</sup> of 1624 an alien was found ineligible to be a Member of Parliament. This prohibition was subsequently confirmed by a Resolution of the House of Commons in 1698 <sup>21</sup> and by the Act of Settlement 1700. <sup>22</sup> The first recorded instance of an alien being

barred even from voting in Parliamentary elections was in 1660. The present position is governed by the Representation of the People Act 1949,<sup>28</sup> as amended by the Representation of the People Act 1969. By virtue of this legislation, all aliens are denied the right to participate in Parliamentary elections. It is true that citizens of the Irish Republic are entitled to participate. However, while such persons are obviously not United Kingdom citizens, section 32(1) of the British Nationality Act 1948 makes clear that they are not aliens either. In fact, they occupy a somewhat anomalous intermediate status between the two. Similar rules apply to local elections under section 79(1) of the Local Government Act 1972. As for the holding of public office, the Act of Settlement excluded aliens from holding any "civil or military place of trust". Moreover, section 6 of the Aliens Restriction (Amendment) Act 1919 now provides that no alien may become a civil servant. However, the Aliens Employment Act 1955 permits an alien to be specially authorised to do so where there is no suitable British applicant for the job or where the alien possesses exceptional qualifications or experience. Apart from this exception, the common law and modern legislation have seen to it that aliens enjoy no political rights in the United Kingdom.

Most States prefer to deal with many of these matters in their written constitutions. For example, the Constitutions of Belgium,<sup>29</sup> Denmark,<sup>30</sup> Eire,<sup>31</sup> Italy,<sup>32</sup> Luxembourg<sup>33</sup> and the Netherlands<sup>34</sup> all reserve electoral rights at the national parliamentary level for citizens. In addition, these countries, excluding the Irish Republic, make express constitutional provision for reserving the right of access to public office for citizens. However, constitutional provisions regarding local electoral rights are much less common. Of the above countries only the Netherlands makes

express constitutional provision for reserving the right to vote and stand as a candidate in <sup>such</sup> elections for nationals. Indeed, the Irish Republic has gone so far as to enact legislation granting resident aliens the right to participate in local elections. 31 Apart from this exception, however, no Member State in the European Community grants political rights to aliens.

Conclusion

In view of the progress being achieved as regards the reduction of immigration barriers in Western Europe, it would seem that action to secure for Community nationals freedom of movement throughout the Community is unlikely to encounter insurmountable difficulties. On the other hand, action to secure for them freedom of political activity and political rights in a Member State other than their own would affect aspects of national sovereignty which have in the past been carefully preserved by international law and jealously guarded by municipal law. Clearly, therefore, the full realisation of European citizenship would entail major legal innovations.

In addition, major political consequences would be involved. The cohesion of the nation-state depends on the maintenance of a close relationship between nationals and their State. This close relationship has in the past been ensured by the fact that nationals have enjoyed exclusive responsibility for the determination of State policy. However, if freedom of political activity and political rights are secured for Community nationals throughout the Community, nationals of each Member State will have to be prepared to share responsibility for determination of policy in that State with Community nationals from other Member States. Thus the close relationship between nationals and their State will be weakened. Moreover, as individuals realise that they derive rights and freedoms from European citizenship, they may tend increasingly to identify with the Community itself rather

than their own Member State. For these two reasons, the creation of European citizenship may lead to fundamental changes in the political structure of Western Europe.

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- 1 Case 11/70 (1970) E.C.R.1125.
- 2 Case 4/73 (1974) E.C.R.491.
- 3 D.M.Walker, The Oxford Companion to Law, Clarendon Oxford, 1980 220.
- 4 Kahane v. Parisi and the Austrian State (A.D.P.I.L.C., 1929-30, 213).
- 5 Section 2 (1).
- 6 See section 32(1) of the British Nationality Act 1948, which confers on such persons an anomalous status between that of aliens and British subjects.
- 7 D.M.Walker, *op.cit.*, 900.
- 8 W.Stewart, Employment Conditions in Europe, Gower, London, 1976 (2nd edn), 172.
- 9 Ordonnance 58-1300 of 29 December 1958, Article 7 (J.O.R.F. 5 janv., p.12033).
- 10 For example, probation orders may involve restrictions on movement under section 2 of the Powers of the Criminal Courts Act 1973.
- 11 Article 11 of the Grundgesetz (A.J.Peaslee, Constitutions of Nations, Nijhoff, the Hague, 1968, 361(vol.3)) and Article 16 of the Italian Constitution (Ibid., vol.3, 500).
- 12 M.Sibert, Traité de Droit International Public, Dalloz, Paris, 1951, vol.1, 575.
- 13 Oppenheim's International Law, ed. H.Lauterpacht, Longmans, London, 1968 (8th edn), vol.1, 675.
- 14 Immigration (Landing and Embarkation Cards) Order 1972(S.I.1972, No.1666).
- 15 Immigration Act 1971, Schedule 2, section 4 (2) (a).
- 16 Immigration Act 1971, section 3 (1) (a).
- 17 Article 5 of Ordonnance 45-2658 of November 2, 1945 (J.O.R.F., 4 nov., p.7225) and Article 1 of Arrêté of 1 June 1953 (J.O.R.F., 2 juin, p.4939). However, under Article 2 of this arrêté the visa requirement may be dispensed with on a reciprocal basis by international agreement.
- 18 Article 3 of décret 46-1574 of June 30, 1946 (J.O.R.F., 3 juill., p.6169). However, there is a limited exception in favour of those holding a tourist card under a Décret of 23 February 1936 (J.O.R.F., 24-25 févr.).
- 19 Articles 10 and 11 of the 1945 Ordonnance and Article 7 of the 1946 Décret.
- 20 Article 4 of the 1946 Décret and Arrêté of 13 February 1950 (J.O.R.F., 19 févr., p.2008).
- 21 Articles 14 and 15 of the 1945 Ordonnance and Article 6 of the 1946 Décret.
- 22 Article 16 of the 1945 Ordonnance as amended by Articles 1 and 3 of Décret 76-56 of January 15, 1976 (J.O.R.F., 22 janv., p.595).
- 23 Article 16 of the 1945 Ordonnance.
- 24 See, for example, the European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe, E.T.S.25.
- 25 See 198 U.N.T.S.37, 47; 199 U.N.T.S.29.
- 26 374 U.N.T.S.3.
- 27 By virtue of arrangements for the common travel area (Immigration Act 1971, sections 1 (3) and 11 (4)).
- 28 H.Grotius, De Jure Belli ac Pacis Libri Tres, Apud Joannem Janssonium, Amsterdam, 1651, Bk II, Ch.II, xvi.
- 29 S.Pufendorff De Jure Naturae et Gentium Libri Octo, Apud Andream ab Hoogenhuysen, Amsterdam, 1688, Bk III, Ch.III, para.10.
- 30 The New Cyneas of Emeric Cruce, with translation by T.W.Balch, Allen, Lane & Scott, Philadelphia, 1909, 151.
- 31 Papers Relating to the Arbitration in the Case of Mr Alderman Ben Tillet, C.9235(1899).
- 32 10 R.I.I.A.(1903) 528.
- 33 Ibid., 730.
- 34 E.T.S.19.



35 E.T.S.5.

36 M.Sibert, *op.cit.*, vol.1, 577.

37 Oppenheim's International Law, *op.cit.*, vol.1, 675-6.

38 I.Brownlie, Principles of International Law, Clarendon, Oxford, 1973 (2nd edn), 506.

39 D.P.O'Connell, International Law, Stevens, London, 1965, vol.2, 709.

40 G.S.Goodwin-Gill, International Law and the Movement of Persons Between States, Clarendon, Oxford, 1978, 255.

41 A.J.Peaslee, *op.cit.*, vol.4, 959.

42 BGBI. I, 353.

43 142 H.C.Deb.5s.c.819, 31 May 1921.

44 See, for example, D.M.Kloss, 'Strikes and the Criminal Law', 115 *So:J.* (1971) 455-7.

45 T.Young, Incitement to Disaffection, Cobden Trust, London, 1976, 30 points out that this provision "effectively excludes foreigners from union activity unless they have been engaged in one particular industry in the United Kingdom for two years." See also P.O'Higgins, Censorship in Britain, Nelson, London, 1972, 35.

46 8 U.S.Code 1251.

47 Section 3 (5) (b) of the Act and Statement of Immigration Rules for Control After Entry. EEC and Other Non-Commonwealth Nationals, H.C.82 (1972-73), rule 40.

48 See, for example, J.M.Evans, Immigration Law, Sweet and Maxwell, London, 1976, 70.

49 Sections 14(3) and 15 (3).

50 Aliens Order 1920, Article 12 (6) (c) (S.R.&O.1920, No. 448). On this case see B.A.Heppele, 'Aliens and Administrative Justice: The Dutschke Case', 34 *M.L.R.* (1971) 501-519.

51 The Times 4, 8 and 14 March 1978.

52 See R.v.Secretary of State for Home Affairs, ex p. Chateau Thierry (Duke) (1917) 1 K.B.922, 930 and Asugbaya Aleko v. Officer Administering the Government of Nigeria (1931) A.C.662, 670.

53 See the remarks of Lord Widgery in R.v.Secretary of State for Home Affairs, ex p. Hosenball (1977) 1 W.L.R.766, 775.

54 See R.v. Governor of Brixton Prison, ex p. Sarno (1916) 2 K.B. 742; R.v. Superintendent of Chiswick Police Station, ex p. Sacksteder (1918) 1 K.B.578, 586-7; R.v. Governor of Brixton Prison, ex p. Bloom 90 L.J.K.B.(1921) 574, 576; R.v. Governor of Brixton Prison, ex p. Soblen (1963) 2 Q.B.243, 302; ex p. Hosenball (note 53 *supra*).

55 R.v. Secretary of State for Home Affairs, ex p. Chateau Thierry (Duke) (1917) 1 K.B.522.

56 R.v. Secretary of State for Home Affairs, ex p. Chateau Thierry (Duke) (1917) 1 K.B.922.

57 See ex p. Sarno (note 54 *supra*) 749 and 752 and ex p. Sacksteder (note 54 *supra*) 587.

58 (1969) 2 Ch. 149.

59 G.Marty and P.Kaynaud, Droit Civil, Sirey, Paris, 1972, vol.1, 175.

60 G.Vedel, Droit Administratif, P.U.F., Paris, 1973, 23.

61 P.Bernard, La Notion d'Ordre Public en Droit Administratif, L.G.D.J., Paris, 1963, 252. Cf. L.Rolland, Précis de Droit Administratif, Dalloz, Paris, 1934 (9th edn), 642, where ordre public is described as no more than a "state opposed to disorder".

62 M.Waline, Droit Administratif, Sirey, Paris, 1963 (9th edn), 642 describes ordre public as a concept that is "extremely broad and vague".

63 See the statement of the Minister of the Interior of 11 March 1955, which is quoted in A.C.Kiss, Repertoire de la Pratique Française en Matière de Droit International Public, Eds du Centre National de la Recherche Scientifique, Paris, 1962, vol.4, 415.

64 Le Monde 15 March 1972.

65 The Times 17 and 18 April 1972. This affair was raised in the House of Commons by Mr Russell Kerr (835 H.C.Deb.5s.c.36-7, 17

- April 1972). The Foreign Office, however, declined to intervene.  
 66 See written question 213/75 by Messrs Giraud and Schmidt (O.J. 1975, C242/3).
- 67 Le Monde 11-12 January 1976.
- 68 See the ruling of the Conseil d'Etat in Association des Marocains en France et G.I.S.T.I. (Dall.1978, J.52). See also F. Zerebours-Pigeonniere, Droit International Privé, Dalloz, Paris, 1970 (9th edn), 278.
- 69 Le Monde 27 March 1976.
- 70 Le Monde 19 August 1977.
- 71 Le Monde 17 October 1973.
- 72 J.O.R.F., 24 déc., p.1172. But cf. the ruling of the Conseil d'Etat in Kyttelis-Hager (105 J.D.I.(1978)74).
- 73 Indeed, until recently the administration used to grant residence permits to illegal immigrants provided that they found work. See P. and P. Calame, Les Travailleurs Etrangers en France, Eds Ouvrieres, Paris, 1972, 15.
- 74 Le Monde 19 February 1975.
- 75 J.O.R.F., 3 mai.
- 76 Article 7 of the 1946 Décret.
- 77 See the ruling of the Conseil d'Etat in Molinelli-Wells (82 J.L.I. (1955) 392).
- 78 Article 7 of the 1946 Décret.
- 79 See 57e Congrès des Notaires de France, Le Statut des Etrangers et le Marché Commun, Librairies Techniques, Paris, 1959, 96.
- 80 Article 2 of the 1946 Décret.
- 81 Article 8 of the 1946 Décret.
- 82 This is the commission set up to hear the representations of aliens against whom deportation orders have been made. See note 84 infra.
- 83 Article 18 of the 1945 Ordonnance as amended by Article 1 of Décret 68-748 of August 14, 1968 (J.O.R.F., 21 août, p.8044) and by Article 3 of the 1976 Décret.
- 84 Under Articles 24-26 an alien who has entered France legally and holds a valid residence permit has the opportunity to be heard by a special commission, except in an emergency.
- 85 See, for example, P. Waquet, 'L'Expulsion des Etrangers', Etudes (1978) 337-347.
- 86 Le Monde 18 May 1973.
- 87 Le Monde 22 June 1973.
- 88 Le Monde 2 August 1973.
- 89 Le Monde 28 July 1973.
- 90 Le Monde 18-19 December 1977.
- 91 Le Monde 31 December 1977.
- 92 See the statement of the Minister of the Interior quoted in Le Monde 11 September 1973.
- 93 Groupe d'Information et de Soutien des Travailleurs Immigrés, 'Les Expulsions', Droit Social (1976) 73-7, 75. See also D. Loschak, 'Observations sur un Infra-Droit', Droit Social (1976) 43-9, 45-6.
- 94 De Solms (Dall.1854.3.31).
- 95 Dall.1885.3.9.
- 96 Ibid.
- 97 Ribes (Dall.1891.3.92).
- 98 Gueron (R.C.D.I.P.(1939) 442).
- 99 M. Waline, op.cit., 487-8.
- 1 Missir (A.C.Kiss.op.cit., vol.4, 417).
- 2 See Situation Juridique et Social des Travailleurs Migrants en Europe, Conference Organisée par l'Association Internationale des Juristes Démocrates, AIJD., Brussels, 1977, 89.
- 3 On the distinction between the exactitude and the qualification of the facts see C. Debbasch, Contentieux Administratif, Dalloz, Paris, 1975, 738.

4 In Meckert (80 J.D.I. (1953) 136) the Conseil stated that the  
 Minister enjoys a power to appreciate the facts which may not be  
 questioned before it.

5 J.-M. Auby, and R. Drago, Traité de Contentieux Administratif,  
 L.G.D.J., Paris, 1962, vol. 3, 41.

6 31 A.J.D.A. (1975) 143.

7 D. Laboutelle and P. Cabanes, 'Contrôle du Juge de l'Excès de Pouvoir,  
 Erreur Manifeste d'Appréciation', 27 A.J.D.A. (1971) 33-7, 34.

8 G. Finkel, 'L'Expulsion des Etrangers et le Juge Administratif en  
 Droit Français', 34 A.J.D.A. (1978) 257-67, 262.

9 M. Nauwelaers and L. Fabius, 'Chronique Général de Jurisprudence  
 Administrative Française', 33 A.J.D.A. (1977) 130-38, 134 state that  
 the error must be "absolutely evident". See also A. Bockel,  
 'Contribution à l'Etude du Pouvoir Discretionnaire de  
 l'Administration', 34 A.J.D.A. (1978) 355-70, 365.

10 33 A.J.D.A. (1977) 154.

11 On this doctrine see J. Megret, 'De l'Obligation Pour l'Administration  
 de Procéder à un Examen Particulier des Circonstances de l'Affaire,  
 Avant de Prendre Une Decision Môme Discretionnaire', Etudes et  
 Documents du Conseil d'Etat (1953) 77-9.

12 33 A.J.D.A. (1977) 399.

13 C. von Bynkershoek, Quaestionum Juris Publici Libri Duo, Clarendon,  
 Oxford, 1930, 260.

14 See, for example, J. Westlake, International Law, Cambridge Univ.  
 Press, 1904, vol. 1, 211.

15 M. Sibert, *op. cit.*, 607.

16 J. L. Brierly, The Law of Nations, Clarendon, Oxford, 1963, 278.

17 U.N. General Assembly Resolution 217(III).

18 Cmd. 3220.

19 Cmd. 4108.

20 Glanv. EL. Cas. 120.

21 12 House of Commons Journals (1697-1699) 367.

22 12 & 13 W. III, c2.

23 8 House of Commons Journals, 42. The exclusion of aliens from  
 voting rights was confirmed in the Middlesex Case (1804) 2 Peck.  
 I, 118.

24 Section 1.

25 A. J. Peaslee, *op. cit.*, vol. 3, 76.

26 *Ibid.*, 253.

27 *Ibid.*, 463.

28 *Ibid.*, 500.

29 *Ibid.*, 554.

30 *Ibid.*, 652.

31 Acts of the Oireachtas 1963, No. 19.

## Chapter Two European Citizenship and the E.E.C. Treaty

The Treaty provides no express basis for overcoming the obstacles to the creation of European citizenship. This does not necessarily mean, however, that no basis at all can be found in the Treaty for the necessary action.

Article 48 (1) provides for freedom of movement for "workers" to be secured within the Community. According to Article 227 (4), the Treaty is applicable to the European territories for whose external relations the Member States are responsible. Therefore, workers are to be free to move within the area of the Member States and such territories. The problem is that the term "workers" is not defined in the Treaty. Consequently, it is not clear which persons are to enjoy freedom of movement.

It is true that Article 52 and 59, which deal with freedom of establishment and freedom to provide services, refer only to "nationals" of Member States". However, this restrictiveness may do nothing more than reflect

the fact that rights for legal as well as natural persons are envisaged by these provisions. Thus the wording of these provisions does not necessarily imply that only "nationals of Member States" can qualify as "workers" for the purposes of Article 48. Moreover, even if such a restrictive interpretation of the latter provision were justified, this does not in itself mean that in the context of Community law Member States will be free to determine for themselves the scope of the expression "nationals of Member States". In effect, the question depends on the implementing measures enacted by the Council and Commission and the interpretation of the relevant provisions by the Court of Justice. Therefore, these institutions would seem to possess the legal basis for embodying in Community law a definition of those persons benefitting from freedom of movement. Such a definition could presumably serve as a definition of European Community nationality.

As for the rights and freedoms entailed by European citizenship, express provision is made in the Treaty for a limited form of free movement. Articles 48-51

envisage rights of entry and residence for persons wishing to take up an offer of employment "actually made" in a Member State. Similar rights are envisaged in Articles 52-58 for natural or legal persons wishing to set up or manage an undertaking or carry on a self-employed occupation. Finally, Articles 59-66 envisage rights of entry and temporary residence for those wishing to provide a service in a Member State without establishing themselves there permanently. Therefore, the Treaty makes express reference to rights of entry and residence only in the case of those wishing to engage in specified economic activities. This restrictiveness resulted from the fact that the Treaty authors sought merely to ensure that national immigration barriers would not prevent persons moving to those areas of the Community where their labour, professional or entrepreneurial skills or services were most in demand. It is for this reason that Article 48 (3) only speaks of rights of entry and residence for those wishing to take up an offer of employment "actually made". Clearly, such rights will only be available where there is demand for immigrant labour in the host Member State.

Also, these rights are, according to Articles 48 (3), 56 (1) and 66 of the Treaty, subject to "limitations justified on grounds of public policy, public security or public health". Of particular significance for the present work is the derogation based on public policy.

This concept, which is not readily defineable, is of broad and varied application in English law. Hartley refers to its application in contract law and private international law.<sup>1</sup> It may also be found in several other areas of the law. For instance, public policy may on some occasions require the admission of evidence in court proceedings which would otherwise have been inadmissible.<sup>2</sup> On other occasions it may require evidence otherwise admissible to be rejected.<sup>3</sup> It is also upon public policy that the doctrine of judicial immunity is said to be based.<sup>4</sup> Finally, the concept has been employed in cases where bequests and trusts for sale have come before the courts. For example, in Thrupp v. Collett<sup>5</sup> the court refused to uphold a bequest of £5,000 left to pay the fines of convicted poachers as being contrary to public policy, and in re Johnson's Will Trusts: National Provincial Bank v. Jeffrey<sup>6</sup> the court refused to uphold on the same ground a clause in a trust for sale requiring, in effect, that the beneficiary divorce her husband. However, while this concept may be of varied application, it is not employed in United Kingdom immigration law. Instead, the concept of "public good" is employed.

However, in the context of the Treaty public policy is not connected with either of the above two concepts. Rather, it is

the term chosen by the translators of the official English version of the Treaty to denote the civil law concept of ordre public.<sup>7</sup> Some commentators have criticised this choice, on the ground that public policy is too broad an expression suitably to denote the concept of ordre public. Leleux, for example, suggests that "public order" would be a more accurate translation.<sup>8</sup> The Editor of the Common Market Law Reports seems to share this preference.<sup>9</sup> Smit and Herzog, for their part, would prefer the expression "public good".<sup>10</sup> In the present writer's view, however, public policy is a suitable term, given the breadth and imprecision of the civil law concept it is meant to denote.

It is established in international law and municipal law that this concept allows for the exclusion or expulsion of politically active aliens. The Treaty authors were presumably aware of this aspect of ordre public. Thus it would seem that by including in the Treaty a derogation based on the same concept



the Treaty authors seemingly intended the Member States to retain the sovereign right to expel for political reasons and thus to deny migrants freedom of political activity.

Moreover, while Article 7 (1) of the Treaty does contain a broad prohibition of discrimination on grounds of nationality, the same paragraph makes clear that this prohibition is without prejudice to any special Treaty provisions. One such special provision is Article 48 (2), which provides for migrant workers to enjoy equality of treatment as regards "employment, remuneration and other conditions of work and employment". Thus migrants are only entitled to equality of treatment in the economic and social but not the political field. The Treaty does not, then, require Member States to grant electoral rights to migrants.

The question of access to public office is rather less straightforward. Since Article 48 (2) does envisage equality of treatment as regards employment, it would seem to prohibit discrimination as regards appointment to civil service posts. For this reason, Article 48 (4) was included. This paragraph expressly states that the provisions of Article 48 are not applicable to employment in the "public service". Although this expression is not defined in the Treaty, it is thought to cover "classical intergovernmental functions" of the sort performed by civil servants. <sup>11</sup> Therefore, Article 48 (4) seems to have been included in the Treaty specifically to ensure that migrants would not be entitled to claim the right under Article 48 (2) to hold public office as civil servants.

The above Treaty provisions, therefore, do not seem to have been intended to constitute the basis for the creation of European Community citizenship. Nevertheless, much would depend on the manner in which the European Court interpreted these provisions.

Moreover, the Treaty authors realised that the inclusion of the public policy derogation could cause difficulties. First, this concept is so broad and uncertain in its scope and content that, in the absence of guidelines, the Member States might have invoked it ostensibly for political reasons but really for economic reasons.<sup>12</sup> This problem is faced squarely in the Treaty provisions governing the free movement of goods. Article 36 permits the Member States to derogate from this freedom on several grounds, including that of public policy. However, this provision states that such derogations must not

constitute a means of arbitrary  
discrimination or a disguised  
restriction on trade between  
Member States.

The prohibition on "arbitrary" action here laid down presumably means that public policy measures must be well-founded on public policy. They are not apparently to be regarded as well-founded, if they are adopted for the purpose of restoring national trade barriers.

Some commentators believe that similar conditions for resort to the public policy derogation from the free movement of persons are to be understood in the requirement in Article 48(3)<sup>13</sup> that such a derogation must be "justified".<sup>14</sup> Doubtless, the Treaty authors would not have wished to see the public policy derogation<sup>15</sup> invoked for the purpose of restoring national immigration barriers. This could occur, for example, where a Member State wishing to protect the national labour market argued that immigration from another Member State was such as to threaten its political stability and thus invoked the public policy derogation to curtail this immigration. In practice, it might not be easy to determine whether or not such action was justified on public policy<sup>16</sup> grounds. Consequently, the Treaty authors may have felt that this was a problem too difficult to be solved merely by a formal prohibition in the Treaty itself against the adoption of public policy measures against migrants for reasons of economic protectionism. Nevertheless, this was a problem which would have to be tackled somehow.

Secondly, some commentators note that the concept which is

50  
( termed public policy in the Treaty is not identical in the national law of each Member State.

The writer has already mentioned the breadth of ordre public in France. However, the German version of this concept, termed "öffentlich Ordnung", is rather narrower and is said to cover only "die Normen, deren Anwendung im Interesse der staatliche Existenz unabweisbar ist." 17 Thus the problem arose that the movement of persons might be determined by national variations in this concept rather than by economic factors. 18 Thus even if the Treaty authors intended to provide in Part Two of the Treaty for freedom of movement to have only an economic role, they may still have felt that such variations would have to be reduced in order to ensure that this freedom could satisfactorily fulfil its economic role.

Therefore, the Treaty authors were faced with two problems.

( Not only might public policy be invoked as a disguised means of restoring national protectionist barriers to the movement of persons, but also national variations in this concept could have distorted the pattern of such movement. For these two reasons, while the Treaty authors may have wished to leave unaffected the sovereign right of the Member States to exclude or expel migrants for political reasons, they may also have realised that retention by the Member States of an unrestricted right to act against migrants on public policy grounds could impede the effective fulfilment by freedom of movement of its economic role.

( Consequently, provision was made in Article 56(2) of the Treaty for the "coordination" of national rules regarding public policy.

The meaning of the expression "co-ordinate" is not defined in the Treaty and is open to doubt. It may be compared with the terms "approximation" and "harmonisation", both of which are also to be found in the Treaty. For example, Article 100 requires the enactment of Directives for the "approximation" of national

laws "which directly affect the establishment or functioning of the common market", and Article 117 refers to the "harmonisation of social systems". All three expressions would seem to contemplate Community action to bring about the closer alignment of national law in the fields specified in the various Treaty provisions.<sup>19</sup>

Some commentators believe that the use of these different terms indicates that the Treaty authors envisaged action varying in degrees of intensity.<sup>20</sup> Such commentators argue, for example, that the process of "approximation" would require actual changes in the substance of the relevant national laws, whereas "co-ordination" would require no more than the elimination of conflicts between the national law.<sup>21</sup>

Other commentators, however, point out that usage of the various terms is not consistent as between the original four authentic versions of the Treaty or, indeed, even within the same version. Consequently, they take the view that the Treaty authors did not intend to attribute any special significance to the particular term employed in a given provision.<sup>22</sup> This view could explain why the term "co-ordinate" is found in Article 56(2) and the term "approximation" in Article 100, even though the former is regarded as being lex specialis in relation to the latter.<sup>23</sup>

Therefore, it does not seem that a clear indication of the content envisaged by the Treaty authors for the Directives to be enacted pursuant to Article 56(2) can be obtained through an examination of the wording of this provision. Consequently, the content of the Directives to be enacted under Article 56(2) would seem to have been left largely to be determined by the Community institutions themselves.<sup>24</sup> Presumably, then, these Directives could be such as to restrict the right of Member States to expel for political reasons and thus contribute towards introduction of freedom of political activity throughout the Community.

Moreover, several provisions elsewhere in the Treaty may provide a basis for legislative action to secure the full rights and freedoms entailed by European citizenship. In the first place, Article 7 (2) permits the Council to enact measures so as to expand the equality of treatment to be enjoyed by migrants beyond that stipulated in Article 48 (2). Consequently, some commentators have described this provision as constituting a basis for the creation of European citizenship.<sup>25</sup>

Secondly, Article 235 is notable. This provision

empowers the Community institutions to go beyond the more specific provisions of the Treaty and enact measures necessary for the attainment of the Community's objectives. It thus compensates somewhat for the rigidity of Article 4. However, this power may only be exercised "in the course of the operation of the common market". This condition might be thought to mean that action taken under Article 235 must relate to the functioning of the common market. Indeed, support for this view may be found in the French version of the Treaty, which uses the phrase "dans le fonctionnement du marché commun". However, the German and Dutch versions are rather different. The former uses the phrase "im Rahmen des Gemeinsamen Marktes", and the latter "in het kader van de gemeenschappelijke markt". These two versions suggest that action under Article 235 need only relate to the common market generally and not necessarily to its functioning. Marengo, indeed, argues that the condition only requires action to be taken "dans le contexte du traité"<sup>26</sup>. On the other hand, Article 203 of the Euratom Treaty - the equivalent provision to Article 235 in the E.E.C. Treaty - contains no condition relating to the common market or to "the context of the Treaty". The absence of a condition relating to the common market may be explained by the fact that the Euratom Treaty does not provide for the creation of a common market. However, the absence of any condition relating to the context of the Treaty in Article 203 of the Euratom Treaty suggests that such a condition should not be read into Article 235 of the E.E.C. Treaty. Instead, it is better to interpret the condition concerning the common market in the latter provision as requiring that action taken thereunder must relate in some way to the common market.

The E.E.C. Treaty, of course, does not deal merely with the establishment of the common market but also with its functioning and, more particularly, its development. This is implicit in Article 2, which envisages the common market developing so as to allow for

the attainment of the Community's objectives, and explicit in several Treaty provisions, such as Article 155, which speak of the "development" of the common market. Therefore, if Article 235 merely requires that action taken thereunder relate in some way to the common market, this provision would seem to allow for the enactment of measures involving the development of the common market. Therefore, insofar as the creation of European citizenship is necessary to attain the Community's objectives, Article 235 would seem to allow for the enactment of measures developing freedom of movement so as to give effect to this notion.

According to Article 2, the objectives of the Community include the promotion of "closer relations between the States belonging to it." Article 2 itself does not clearly explain whether political or merely economic integration is envisaged by these words. However, guidance as to their meaning may be sought in the Preamble to the Treaty. The general view of international lawyers is that treaty preambles may be employed to assist in interpretation of operative provisions of the treaty.<sup>27</sup> Article 31 of the Vienna Convention on the Law of Treaties<sup>28</sup> states that a treaty is to be interpreted in its context. For interpretative purposes the "context" of a treaty is defined as including its preamble. There would seem, then, to be little doubt that the Preamble to the E.E.C. Treaty may be employed to assist in the interpretation of Article 2.<sup>29</sup> According to the Preamble, the signatories are "determined to lay the foundations of an ever closer union among the peoples of Europe". The Preamble seems here to envisage developments in the direction of political integration. It may be thought that a similar



objective is meant by the reference to "closer relations" in Article 2.<sup>30</sup> However, while the Preamble speaks of popular union, Article 2 merely deals with relations between Member States. It may be, then, that the latter contemplates a looser version of political integration than the former.<sup>31</sup> Specifically, the objective stated in Article 2 seems to assume the continuation of independent States within the Community, while the objective stated in the Preamble apparently makes no such assumption. Some support for the view that the Community seeks popular union and not merely closer relations between the Member States may be found in Article 138(3). This provision allows for the holding of direct elections to the European Parliament. Such elections would seem to envisage a direct relationship between individuals and the Community institutions transcending the relationship of individuals with their State. Nevertheless, some doubt must remain as to the precise nature of the Community's political objective.

Even so, significant remarks were made by some of those involved in the negotiating and drafting of the Treaty. Ophuls, the leader of the West German delegation during the negotiations, explained that the free movement of persons had to be included in the Treaty because a system limited to the free movement of goods would have been inadequate to secure the "butts politiques"<sup>32</sup> of the Community. Of more particular significance is a remark of the Italian Foreign Minister. When the Treaty was signed, he spoke of the "united Europe" envisaged by the Treaty and predicted that freedom of movement would lead every individual in the Community to feel himself a "cittadino di questa nuova Europa".<sup>33</sup> There is, then, evidence to suggest that some at least

of the Treaty authors regarded the creation of European citizenship through the development of the free movement of persons as being encompassed by the Community's objectives. Certainly, if the development of this freedom were to involve the introduction of the rights and freedoms of citizenship throughout the Community, beneficiaries would be encouraged to identify with the Community, and political integration would be promoted.

Insofar as the creation of European citizenship is encompassed by the Community's objectives, Article 235, like Article 7 (2), would seem to permit the enactment of measures necessary to introduce the rights and freedoms entailed by this citizenship. If, however, the Member States

and their representatives in the Council feel that the political changes which would be involved are too profound to be encompassed by the Community's objectives, the Council may be unwilling to either of these provisions for this purpose.

Nevertheless, two Treaty provisions might still be employed. Article 220 allows for intergovernmental negotiations leading to reciprocal arrangements whereby nationals of one Member State resident in another will enjoy equality of treatment with nationals of the host Member State. Like Article 7 (2), then, Article 220 allows for action to be taken so as to extend the equality of treatment to be enjoyed by migrants further than is envisaged in Article 48 (2) of the Treaty. However, Article 220 seems to contemplate an agreement between Member States rather than the enactment of Community measures and does not apparently require that the matters addressed in such an agreement be encompassed by the Community's objectives.

Similarly, there is no express statement of such a requirement in Article 236. This provision allows for the Government of a Member State or the Commission to present the Council with a proposal for amendment of the Treaty. The Council is then to consult the European Parliament

and the Commission, if the proposal originated from the Government of a Member State. If the Council then decides in favour of calling a conference of representatives of the national Governments, the President of the Council is to convene a conference for the purpose of determining by common accord the amendments to be made to the Treaty. The amendments enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. This is clearly a very broad power, whereby existing provisions of the Treaty may be modified or new provisions added. It is for this reason that the predominant role in this procedure is to be played by the Member States themselves. Nevertheless, it is not a classical intergovernmental procedure because roles are also allotted to the Council, Commission and Parliament. As such, it offers a compromise procedure between the two extremes represented by Article 220 on the one hand and Articles 7 (2) and 235 on the other. Article 236 may, then, usefully be employed to give effect to the requirements of European citizenship where it is felt that such citizenship is too closely connected with the Community itself to be left entirely to the Member States but, at the same time raises issues of such a nature that a predominant role should be played by the Member States.

Therefore, despite uncertainty as to the precise nature of the Community's political objectives and the sensitive nature of the issues involved, the Treaty would seem to provide the legal basis for the creation of European citizenship. Comprehensive Community rules regarding the personal scope of freedom of movement would lead to the embodiment of a definition of Community nationality in Community law. Moreover, the development of this freedom so as to bring it into line with the freedom of movement enjoyed by nationals of Member States within their own State and to secure for beneficiaries freedom of political activity and political rights throughout the Community would result in the introduction of the rights and freedoms entailed by European citizenship. Some of this work may be performed by the Court of Justice, but the approval of the Member States or at least their representatives in the Council will be needed for the enactment of several measures.

- 1 T.C. Hartley, E.E.C. Immigration Law, North-Holland, New York, 1978, 152.
- 2 Tumath v. Tumath (1970) P. 78.
- 3 See W. Blake Odgers and Walter Blake Odgers, The Common Law of England, Sweet and Maxwell, London, 1920 (2nd edn), vol. 1, 1099.
- 4 Lincoln v. Daniels (1962) Q.B. 237.
- 5 (1858) 26 Beav. 125, 126.
- 6 1967 Ch. 387.
- 7 See The European Communities: A Glossary of Legal Terms Appearing in the French Text of the Treaties Establishing the European Atomic Energy Community, the European Coal and Steel Community and the European Economic Community and Related Documents, H.M.S.O., London, 1962, 14-15.
- 8 P. Leleux, 'Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and the Free Supply of Services', in European Law and the Individual, ed. F.G. Jacobs, North-Holland, Amsterdam, 1976, 79-93, 92, note 14.
- 9 See Case 36/75 Rutili 1976 1 C.M.L.R. 140, 153, note 4.
- 10 H. Smit and P. Herzog, The Law of the European Economic Community, A Commentary on the E.E.C. Treaty, Matthew Bender, New York, 1976, vol. 3, 617.
- 11 A. Campbell and D. Thompson, Common Market Law: Texts and Commentaries, Stevens, London, 1962, 232.
- 12 L. Cartou, Le Marche Commun et le Droit Public, Sirey, Paris, 1959, 37.
- 13 See, for example, H. Smit and P. Herzog, *op.cit.*, vol. 2, 616.
- 14 The omission of the term "justified" from Article 56 (1) in the English version of the Treaty is of little significance, since the French version employs "justifiees" and the German version "gerechtfertigt" in both Articles 48 (3) and 56 (1).
- 15 H. Smit and P. Herzog, *op.cit.*, vol. 2, 616.
- 16 E. Stein and F.L. Nicholson, American Enterprise in the Common Market: A Legal Profile, Univ. of Michigan Law School, Ann Arbor, 1960, 344.
- 17 E. Wohlfath et al., Die Europäische Wirtschaftsgemeinschaft: Kommentar zum Vertrag, Vahlen, Berlin, 1960, 169.
- 18 L.-E. Troclet, 'Les Travailleurs' in Droit des Communautés Europeenes: Les Nouvelles, ed. W.G. Ganshof van der Meersch, Larcier, Brussels, 1967, Nos 1823-54, 1842.
- 19 E. Stein, 'Assimilation of National Laws as a Function of European Integration', 58 A.J.I.L. (1964) 1-40 describes the process as "assimilation".
- 20 See, for example, R. Monaco, 'Comparaison et Rapprochement des Legislations dans le Marche Commun Europeen', 12 R.I.D.C. (1960) 61-74, 64.
- 21 *Ibid.*, 64.
- 22 A. Dashwood, 'Hastening Slowly: The Communities Path Towards Harmonisation' in Policy-making in the European Communities, eds H. Wallace et al., Wiley, London, 1977, 273-300, 274-5 and E. Stein, 'Assimilation of National Laws', *id op.*, 5.
- 23 E. Wohlfarth et al., *op.cit.*, 184.
- 24 A. Dashwood, 'Hastening Slowly:...', *id op.*, 275.

- 25 U. Everling, Das Niederlassungsrecht im Gemeinsamen Markt, Vahlen, Berlin, 1963, 3 and D. Vignes, 'Le Droit d'Établissement et les Services dans la C.E.E.', 7 A.F.D.I. (1961) 668-725, 670.
- 26 G. Marengo, 'Les Conditions d'Application de l'Article 235 du Traité C.E.E.', R.M.C. (1967) 147-157, 150.
- 27 See, for example, C. Rousseau, Droit International Public, Dalloz, Paris, 1965, 30 and G. Scelle, Precis de Droit des Gens, Sirey, Paris, 1932-4, vol. 2, 464. But cf. P. You, Le Preambule des Traités Internationaux, Librairie de l'Université de Fribourg, 1941, who argues that a preamble may also be a source of legal obligations.
- 28 Cmd. 4140.
- 29 See J. Megret et al., Le Droit de la Communauté Economique Européenne, Presses Universitaires Bruxelles, 1970, vol. 1, 4.
- 30 This is the view of D.J. Gilstra et al., Leading Cases and Materials on the Law of the European Communities, Kluwer, Deventer, 1977, 132. See also H. von der Groeben et al., Kommentar zum E.W.G. Vertrag, Nomos, Baden-Baden, 1974 (2nd edn), vol. 1, 75 and E. Wohlfarth et al., op.cit., 5.
- 31 H. Smit and P. Herzog, op.cit., vol. 1, 14 describe Article 2 as making a "much more muted reference to non-economic matters" than the Preamble.
- 32 C.F. Ophuls, 'La Relance Européenne', 4 Euro. Ybk (1958) 3-20, 13.
- 33 This speech is quoted in Presidenza del Consiglio di Ministri, Comunità Economica Europea, Rome, 97-110, 106.

Chapter Three European Citizenship and the Practice  
of the Community Institutions

The Council of Ministers implemented the Treaty provisions regarding the free movement of persons during the 1960s through the enactment of several measures culminating in Regulation 1612/68<sup>1</sup> and Directive 68/360<sup>2</sup> in the case of employed persons and Directive 64/220<sup>3</sup> - later brought up to date by Directive 73/148<sup>4</sup> - in the case of the self-employed. Despite this legislative activity, however, migration within the Community during this period in comparison with migration from third countries. In 1962 there was a total of almost two million foreign workers in the Member States. Of this total, forty-five per cent were migrants from other Member States. They were, in fact, mostly Italians who had migrated to find work in West Germany or France. By 1972 the total of foreign workers in the Member States had risen to almost four and a half millions, but only twenty-two per cent were from other Member States. The great majority of foreign workers in the Six now came from countries such as those in North Africa, Portugal, Turkey and Yugoslavia.<sup>5</sup>

This comparative fall in intra-Community migration might be attributable to the fact that the above measures only provided for migrants from within the Community to enjoy equality of treatment in the host Member State. As far as Community law was

concerned, immigrants from third countries might still suffer discrimination. This factor may have rendered such immigrants more attractive to prospective employers than nationals of Member States.<sup>6</sup> Certainly, there are frequent allegations that employers exploit immigrants from third countries by paying them less than their own nationals and subjecting them to inferior working conditions.<sup>7</sup>

On the other hand, it must be remembered that the 1960s were a period of rapid economic growth. Italy, which had been the main labour-exporting country of the Six, benefited considerably from the favourable economic conditions of this period. Its Gross National Product rose from nineteen thousand billion Lire in 1958 to sixty-nine thousand billion Lire in 1972.<sup>8</sup> This substantial increase in national wealth was accompanied by a large drop in unemployment in Italy. The number of unemployed fell, in fact,<sup>9</sup> from one and a third million in 1958 to six hundred thousand in 1972.<sup>9</sup> This meant that fewer Italians now felt the need to emigrate to make a living than in the past. Consequently, France and West Germany - the main labour-importing countries of the Six - now had to draw on sources outside the Community in order to satisfy their growing manpower requirements. Therefore, it may well have been the rapid economic growth experienced by the Member States during the 1960s rather than Community enactments which produced the comparative fall in intra-Community migration during this period.<sup>10</sup>

The fact that individuals within the Community were now under less economic pressure to migrate to make a living accorded well with the approach to free movement advocated by the Community institutions. In a Recommendation and Opinion of July 1962<sup>11</sup> the Commission argued that this freedom was not concerned with traditional notions of emigration and immigration. These notions assumed that individuals migrated because they were unable to secure satisfactory living standards in their own countries. The Community however, sought to



ensure uniformly high living standards throughout its territory. The problem of depressed areas of high unemployment should be remedied through investment in those areas rather than through emigration.<sup>12</sup> In effect, capital should be moved to the unemployed rather than vice versa. Thus sufficient jobs would be made available to the unemployed in their own countries. Consequently, in the context of the Community the traditional motive for migration would cease to exist, and freedom of movement would lead to the establishment of "notions de libre déplacement et de libre installation sur le territoire de la Communauté"<sup>13</sup>. What was involved was the freedom of an individual to choose the place in the Community where he would settle and make a living. This choice would not be determined by economic necessity but could be exercised in the interests of one's career or cultural preference and so on.<sup>14</sup> Therefore, freedom of movement in Community law represented a considerable expansion of personal freedom.<sup>15</sup> Indeed, it was described by the Commission in November 1961 as "le premier aspect d'une citoyenneté européenne".<sup>16</sup>

While economic conditions in 1960s rendered such an approach to free movement feasible, it was political developments which led the Community institutions to give greater prominence to this approach and greater articulation to the relationship between this freedom and European citizenship. The famous ruling of the European Court of Justice in Costa v. E.N.E.L.<sup>17</sup> had made it clear that Community law was to enjoy supremacy over conflicting national law. As a result, fears were expressed in the Member States, especially West Germany, that the fundamental rights contained in national constitutions might be overridden by Community measures.<sup>18</sup> These fears culminated in 1974 with a ruling by the Bundesverfassungsgericht<sup>19</sup> (the West German Federal Constitutional Court) in which a residuary right was claimed to review Community measures for compatibility with the fundamental rights provisions of the Grundgesetz (the West

German Constitution). This ruling confirmed that the concern of national courts to protect fundamental rights could endanger the supremacy and uniform application of Community law.

The response of the Court of Justice to such problems was to rule in the Internationale Handelsgesellschaft<sup>20</sup> and Mold<sup>21</sup> cases that fundamental rights were enshrined in the unwritten principles of Community law. In developing these principles the Court would draw upon national constitutions and international legal instruments concerning human rights, such as the European Convention on Human Rights. Since the Court would ensure respect for such principles on the part of the Community institutions, national courts would not need to intervene against Community measures in defence of fundamental rights. The Commission, for its part, was at pains to point out that certain Community measures had the effect of extending rather than threatening fundamental rights. Specifically, in June 1965 Commission President Hallstein argued before the European Parliament that the measures regarding the free movement of persons had such an effect.<sup>22</sup> This argument subsequently found legislative recognition in the Preamble to Regulation 1612/68, which described free movement as a "fundamental right of workers and their families". Clearly, the Community institutions were seeking to draw an analogy between free movement in Community law and the fundamental rights guaranteed in national constitutions.<sup>23</sup> This analogy was particularly apt in the case of West Germany. Articles 11(1) and 12(1) of the Grundgesetz<sup>24</sup> guarantee for all Germans freedom of movement throughout the federal territory and the right to choose their place of work within it. Community law conferred a right of the same nature, but it could be exercised throughout the Community and not just within one Member State. Consequently, Community law could justifiably be regarded as extending at least one fundamental right.

When Regulation 1612/68 was enacted, Commission Vice-President Sandri took the analogy a stage further. After invoking the Community's objective of "political union of the European peoples" he argued that free movement in Community law constituted<sup>25</sup> an incipient form of European citizenship". Unfortunately, he did not elaborate on this argument. His failure to do so probably reflects the lack of serious consideration previously given to this<sup>notion.</sup> On the other hand, it is notable that European citizenship was described as being "incipient". This was presumably because at this stage free movement involved no more than the right to choose one's place of work within the Community. In effect, European citizenship could only be said to exist in the socio-economic sense.

In the following decade, however, the Community institutions became committed to this notion in its broadest sense. The basic Treaty rules regarding the common market had now been put into effect, and it was natural for these institutions to turn their attention to the longer term objectives of the Community. Moreover, the accession of the three new Member States made the time seem ripe for new initiatives. Finally, the anticipated recession convinced the institutions that the Community risked being associated in the popular mind with economic problems just as it had been associated with the economic success of the previous decade. Thus if the Community were to be assured of the popular support necessary for its continued development, it would have to prove its worth in fields other than the economic.

Such considerations lead Commission President Mansholt in April 1972 to tell the European Parliament that the Commission would call for the creation of a full European citizenship at the forthcoming Summit Conference.<sup>26</sup> Such citizenship would involve complete freedom of movement throughout the Community and the right for migrants to participate in local elections in the host

Member States. Clearly, then, European citizenship was now regarded as a notion going far beyond the socio-economic field. Instead, it would seem to have come to be regarded as entailing the same rights and freedoms as those associated with citizenship of a liberal democratic State. In fact, it was subsequently defined as entailing the right of residence, electoral rights, the right of access to public office and freedom of political activity, particularly freedom of association and assembly, throughout the Community. It was apparently envisaged by the Commission and the European Parliament that these rights and freedoms would be enjoyed by individuals by virtue of their link with the Community itself and would be guaranteed by Community law. Therefore, while - in line with the above-mentioned rulings in Internationale Handelsgesellschaft and Nold - European citizenship was to be based on the same basic constitutional principles as citizenship in the Member States, it was to be a new form of citizenship at the Community level and independent of the law of the Member States. As such, it would encourage individuals to identify with the Community rather than a particular Member State and, thereby, contribute to the attainment of the popular union mentioned by Commission Vice-President Sandri.

The Commission's proposals did win support from the Belgian and Italian Prime Ministers at the October 1972 Summit Conference. However, the Communique issued at the termination of the Conference made no reference to European citizenship or to popular union. Instead, political integration was treated purely in terms of the "relationships between States". Therefore, while the Commission's

proposals had apparently been framed with popular union in mind, the Member states seemed to envisage a much less intense form of political integration.

Nevertheless, by December 1974 the Member States had apparently reached agreement that it would be desirable to consider the possibility of introducing the rights and freedoms regarded by the Commission as implicit in the notion of European citizenship. Accordingly, the Communique<sup>31</sup> issued after the December 1974 Summit Conference called for the establishment of two Working Groups. The first would study the possible creation of a passport union, which would involve the introduction of a uniform European passport and the abolition of passport control within the Community. The second Working Group was instructed by Point 11 of the Communique to study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community.

Initially, these "special rights" were regarded as entailing the right to vote and stand as a candidate in local elections and to hold public office at this level.<sup>32</sup> Subsequently, however, the work of this Group has been extended to include the right of residence as well as freedom of expression, association and so on. The reference to a right of residence, to which the European Commission and Parliament were also committed is notable. The inclusion of this right was presumably intended to emphasize that freedom of movement should involve more than the right to choose one's place of work and should no longer be dependent on the wish to carry on an economic activity. Instead, individuals should be completely free to choose their place of residence anywhere in the Community. The implementation of the right of residence combined with successful completion of the work assigned to the first Working Group would mean that individuals would enjoy the same freedom of movement throughout the Community as they already enjoy within their own Member State. Therefore, the action envisaged by the Member States was broad enough to encompass the rights and freedoms implicit in the notion of European citizenship.

Even so, it is notable that no mention was made of this notion in the Communique. In fact, the Member States apparently

preferred to see the introduction of reciprocal arrangements whereby each would agree to extend the benefits of its existing national citizenship, perhaps through simplified procedures for naturalisation, to cover nationals of other Member States. This approach is presumably intended as far as possible to preserve the close relationship between individuals and a particular Member State. The Member States' preference for this approach presumably resulted from their reluctance to accept that the high degree of political integration entailed by European citizenship was encompassed by the Community's objectives. They may, on the other hand, have regarded their approach as a means of developing closer relations amongst themselves in accordance with Article 2. Nevertheless, the use of the expression "special rights" is notable. This expression would suggest that the rights and freedoms involved were treated by the Member States as being distinct from those encompassed by the Treaty. In effect, the Member States wished to keep them separate from the supranational legal order and were not apparently willing to see them embodied in Community law.

Clearly, therefore, little consensus exists between the approach of the European Commission and Parliament on the one hand and that of the Member States on the other. The Council and the Court have been somewhat less explicit in revealing their respective approaches. Nevertheless, a similar divergence seems to have arisen between these two institutions.

The measures enacted by the Council in implementation of the Treaty provisions regarding the free movement of persons conferred on nationals of Member States rights of entry and residence in other Member States for the purpose of carrying out specified economic activities. These measures apparently meant that the personal scope of free movement remained ultimately dependent

on the manner in which each Member State defined its own nationality.

Consequently, when the United Kingdom acceded to the Community in 1973, a special definition of "United Kingdom nationality" had to be adopted in order to satisfy the requirements of the measures regarding the free movement of persons. United Kingdom Citizenship could not be employed for this purpose, because only those Citizens defined as "patrials" under section 2 (1) of the 1971 Immigration Act enjoyed the right of abode in the United Kingdom. Presumably, the other Member States would have feared an influx of "non-patrial" United Kingdom Citizens denied the right of abode in the United Kingdom but paradoxically enjoying rights of entry and residence in their territories under Community law. Hence, a special definition of "United Kingdom nationality" for the purposes of Community law was adopted. According to this definition, "patrial" United Kingdom Citizens and "patrial" Commonwealth Citizens without the Citizenship of the United Kingdom or of any other Commonwealth country as well as persons enjoying United Kingdom Citizenship by virtue of birth, adoption, registration or naturalisation in Gibraltar were to be regarded as "United Kingdom nationals" for the purposes of Community law.

The European Court, however, seems to have adopted a different approach to the personal scope of free movement. In Unger in 1964 the Court ruled that the expression "workers" in Article 48 (1) of the Treaty was to be given a Community meaning and was not to be subject to unilateral alteration by the Member States. The

Court maintained this approach in several subsequent rulings.

Moreover, in Rutili the Court described the beneficiaries of freedom of movement as "persons protected by Community law". As Lord Mackenzie Stuart, one of the judges of the Court, later wrote in the Journal of the Law Society of Scotland, this terminology

was "reminiscent" of the "concept of citizenship" in the United Kingdom. <sup>37</sup> This statement suggests that the Court may have in mind the notion of European Community citizenship and that the above rulings may represent the first steps towards the embodiment in Community law of a definition of European Community nationality. At present, however, the term "Community nationals" is treated as covering only those persons qualified as nationals of a Member State under its domestic law.

Nevertheless, matters may come to a head as a result of the new British Nationality Bill <sup>38</sup> currently before the United Kingdom Parliament. According to this Bill, United Kingdom Citizenship is to be replaced by three new forms of citizenship: British citizenship, Citizenship of the British Dependent Territories and British Overseas Citizenship. Only those United Kingdom Citizens acquiring British Citizenship will enjoy the right of abode in the United Kingdom along with "patrial" Commonwealth Citizens.

Presumably, the terminology of the definition of "United Kingdom nationality" for Community purposes will be amended so that the expression "patrial United Kingdom Citizen" will be replaced by "British Citizen". However, "patrials" registered as United Kingdom Citizens under the British Nationality (No. 2) Act 1964 will not become British Citizens and are likely to fall outside the scope of the definition of "United Kingdom nationality" for Community purposes in its new form. Since it is unlikely that the government intends to amend this definition so as to preserve rights under Community law for persons who are to be deprived of the right of abode in the United Kingdom, a unilateral alteration in the personal scope of freedom of movement would seem to be entailed.

In these circumstances, the European Court may recognise the need for embodying a definition of Community nationality in



Community law and unequivocally establishing that a unilateral alteration in the personal scope of this freedom by a Member State is not permissible. If the Court were to do so, it would be consistent with the approach of the Commission and Parliament towards the notion of European Citizenship as well as with the progress already being achieved as regards introduction of the rights and freedoms entailed by this citizenship.

- 1 J.O. 1968, L257/2.
- 2 J.O. 1968, L257/13.
- 3 J.O. 1964, 845.
- 4 O.J. 1973, L172/14.
- 5 See K. Mihabovic, 'La Comunita Economica Europea e le Migrazioni del Lavoro', 30 Economica Internazionale (1977) 55-69.
- 6 This view is suggested by R. Plender, 'An Incipient Form of European Citizenship' in European Law and the Individual, ed. F.G. Jacobs, North-Holland, Amsterdam, 1976, 39-53, 40.
- 7 See, for example, B. Granotier, Les Travailleurs Immigrés en France, Maspero, Paris, 1970.
- 8 International Financial Statistics, Annual Data 1951-1975, I.M.F., 1976, 214-5.
- 9 United Nations Statistical Yearbook, 1963, 61 and 1974, 90.
- 10 This view is taken by H.S. Feldstein, 'A Study of Transaction and Political Integration: Transnational Labour Flow Within the European Economic Community', 6 J.C.M.S. (1967-8) 24-55, 47.
- 11 J.O. 1962, 2118.
- 12 See Commission Recommendation and Opinion of 7 July 1965 (J.O. 1965, 2293).
- 13 Suora note 11.
- 14 See Commission Reply to Written Question 122/71 by Mrs Caretoni Romagnoli and Mr Bersani (J.O. 1971, C84/3).
- 15 See the Resolution of the Economic and Social Committee of October 1967 (J.O. 1967, 298/9).
- 16 P.E. Debs No. 48, 135, 22 November 1961.
- 17 Case 6/64 (1964) E.C.R. 1141.
- 18 See, for example, P. Pescatore, 'Les Droits de l'Homme et l'Integration Europeene', 4 C.D.E. (1968) 627-73.
- 19 1974 2 C.M.L.R. 540, 552.
- 20 Case 11/70 (1970) E.C.R. 1125, 1134.
- 21 Case 4/73 (1974) E.C.R. 491, 507.
- 22 P.E. Debs No. 79, 222, 17 June 1965.
- 23 W. Hallstein, Der Unvollendete Bundesstaat, Europaischen Erfahrungen und Erkenntnisse, Econ. Verlag, Dusseldorf, 1969, 47.
- 24 A.J. Peaslee, Constitutions of Nations, Nijhoff, The Hague, 1968, vol. 3, 361.
- 25 L. Sandri, 'Free Movement of Workers in the European Community', Bull.E.C. 11-1968, 5-9.
- 26 P.E. Debs No. 149, 107, 19 April 1972.
- 27 See, for example, the Resolution of the European Parliament of November 1977 (O.J. 1977, C299/25).
- 28 Bull. E.C. 11-1972, 46.
- 29 Ibid., 39.
- 30 Bull. E.C. 10-1972.
- 31 Bull. E.C. 12-1974, 8.
- 32 Commission Report on the Implementation of Point 11 of the Final Communiqué of the European Summit held in Paris on 9 and 10 December 1974: the Granting of Special Rights, COM(75) 321 final.
- 33 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term "Nationals".
- 34 Case 75/63 (1964) E.C.R. 177.
- 35 Case 61/65 Vaassen-Goebbels (1966) E.C.R. 261; Case 27/69 Caisse de Maladie des C.F.L. (1970) E.C.R. 405; Case 44/65 Singer (1965) E.C.R. 965.

36 Case 36/75 (1975) E.C.R. 1219.

37 A.J. MacKenzie Stuart, 'Recent Trends in the Decisions of the European Court: Towards the Creation of a Community Citizenship', J.L.S. (1976) 40-44,44.

38 Bill 20, 1981.

PART TWO  
THE RIGHTS AND FREEDOMS OF EUROPEAN CITIZENSHIP

## Chapter Four Freedom of Movement

### Introduction

The Treaty provisions governing the free movement of persons refer expressly to no more than certain rights of entry and residence for those wishing to carry out specified economic activities in a Member State other than their own. These provisions, therefore, seem to offer only a limited basis for securing for Community nationals the same freedom of movement throughout the Community as they enjoy in their own Member States. Nevertheless, the Community institutions have sought to extend the personal scope of the relevant Treaty provisions and to reduce the formalities faced by those crossing frontiers between Member States.

### Extension of the Personal Scope of The Treaty Provisions

#### Regarding Freedom of Movement

The first extension occurred when Directive 64/220<sup>1</sup> was enacted on the basis of Articles 52 and 59 of the Treaty. This measure duly granted rights of entry and residence to Community nationals wishing to establish themselves in a Member State other than their own or to provide a service there. However, such rights were also granted to recipients of services. The justification for granting rights to recipients is not immediately clear, since the Treaty does not expressly envisage rights for such persons. The Preamble to the Directive merely stated that freedom to provide services in Article 59 of the Treaty

details that persons providing and receiving services should have the right of residence for the time during which the services are provided.

This statement fails to explain why freedom to provide services should entail rights for recipients, but two explanations are possible.

Article 3(c) of the Treaty, in fact, refers not only to the free movement of persons but also to the free movement of services. Moreover, freedom to provide services is dealt with in Title III of Part Two of the Treaty. This Title is headed "The Free Movement of Persons, Services and Capital". Thus the Treaty may be thought to envisage the free movement of services themselves and not just the free movement of persons providing services. Accordingly, freedom to provide services in Article 59 could be interpreted as entailing the removal of all barriers to the provision of services across frontiers. Thus rights of entry and residence would have to be granted to all persons providing or receiving a service in a Member State other than their own. It may have been this reasoning which underlay the grant of rights to recipients of services in Directive 64/220.<sup>2</sup>

On the other hand, while Articles 60(3) and 65 of the Treaty clearly envisage free movement of providers of services, no similar reference is made in the Treaty to such freedom for recipients. Moreover, the relationship between freedom of establishment in Article 52 and freedom to provide services in Article 59 is notable. Article 60(3) states that the rights of entry and temporary residence for persons providing services are without prejudice to the Treaty provisions governing freedom of establishment. Article 66, in turn, states that precisely the same derogations based on "public policy, public security and public health" and "the exercise of official authority" are applicable to both freedoms. Since the two freedoms

are so closely linked in Title III, freedom to provide services can easily be seen as having been intended to supplement freedom of establishment. It does so by granting rights of entry and residence to those wishing to provide a service in a Member State other than their own without establishing themselves there permanently.

Therefore, both the detailed provisions and the structure of Title III suggest that freedom to provide services in Article 59 only aims at the removal of barriers to Community nationals providing a service in a Member State other than their own and not the free movement of services themselves or of recipients of those services.

However, as the Preamble to Directive 64/220 suggests, the removal of barriers to the movement of persons providing services may in certain circumstances entail the grant of rights to recipients.

For example, a person with an established clientele in his own Member State may be deterred from moving temporarily to provide a service in another Member State if his traditional clients are not also entitled to enter and reside temporarily in his new Member State so as to continue to receive his services. Again, a person may wish to provide services in a Member State other than his own specifically to persons who are also not nationals of that State. The success of such a venture might be jeopardised unless recipients of his services from other Member States were granted rights of entry and residence. In such circumstances, the grant of rights to recipients could be regarded as necessary to ensure the full freedom of a Community national to choose the place in the Community where he would provide a service. If this were the reasoning behind Directive 64/220, recipients would only enjoy rights of entry and residence in a Member State other than their own where the person providing the service was himself a migrant.

This interpretation of Directive 64/220 certainly seems consistent with the view favoured by the Commission during the

1960s. For example, in 1969 the Commission twice suggested that tourists did not benefit from free movement.<sup>3</sup> Tourists, of course, normally receive services in the country which they visit. Thus by taking the view that tourists did not benefit from free movements, the Commission implied that recipients of services in general were not covered by Directive 64/220. Therefore, the Commission's view does lend support to the above argument that this Directive was intended to grant rights to recipients only when the person providing the service was himself a migrant. Even so, by granting limited rights to recipients the Council extended the personal scope of free movement beyond the strict requirements of the Treaty provisions governing this freedom, since these provisions made no express reference at all to rights for such persons.

Further extension of the personal scope of free movement occurred when Directive 68/360 was enacted. This Directive represented the culmination of a series of measures intended to implement Article 48 of the Treaty. Thus it granted rights of entry and residence to Community nationals taking up an offer of employment in a Member State other than their own. However, when giving its approval to this Directive, the Council agreed that Community nationals would be admitted to a Member State other than their own for a minimum of three months in order to look for work.<sup>4</sup> No express basis for such an agreement may be found in the Treaty. Article 48(3)(a) speaks of a right to take up an offer of employment "actually made", but there is no mention of a right for look for work. Nevertheless, the latter right obviously facilitates exercise of the right to take up employment and could perhaps be said to be implied by Article 48(3)(a).<sup>5</sup> Moreover, Article 48(1) requires that "freedom of movement for workers" be secured. This broad expression might also be thought to imply rights for job-seekers.<sup>6</sup> Therefore, the Council's agreement may have been based on a broad interpretation of Article 48(1) or (3)(a).



Certainly, the Community institutions have provided adequate confirmation that they regard free movement as involving rights of entry and temporary residence for job-seekers. Article 5 of Regulation 1612/68 requires that national employment offices supply Community migrants with the same assistance in finding work as they do in the case of their own nationals. Moreover, Article 69(1) of Regulation 1408/71 states that persons entitled to unemployment benefit in their own Member State may continue to draw such benefit for up to three months whilst seeking work in another Member State. Both provisions would seem to have been enacted on the assumption that job-seekers do enjoy rights of entry and temporary residence. Finally, the existence of such rights was recognised by the Court of Justice in Jean Noel Royer.

During the 1960s, therefore, the personal scope of free movement was extended beyond the strict requirements of the Treaty provisions governing this freedom in two respects. Rights of entry and temporary residence were granted to those wishing to receive a service in a Member State other than their own from a person who is himself a migrant in that State. The intention behind the grant of these rights was to broaden the the choice of Community nationals as to the place in the Community where they would provide a service. In addition, rights were granted to Community nationals wishing to look for work in a Member State other than their own. The intention behind the grant of these rights was to broaden the choice of Community nationals as to the place in the Community where they would take up employment. Therefore, these extensions of the personal scope of free movement were intended to maximise the fundamental right of Community nationals to choose their place of work within the Community. In other words, the Community institutions were seeking to give effect to the limited notion of European citizenship as it had evolved in the 1960s. It was because this notion had not

yet evolved beyond the socio-economic field that these extensions of the personal scope of free movement left unaffected the link between exercise of this freedom and the wish to carry out economic activity as required in Title III of the Treaty.

In the following decade, however, a more complete notion of European citizenship became prominent, and the Community institutions began to seek a much broader extension of the personal scope of the Treaty provisions regarding free movement. Initially, the Commission tried to establish a broader interpretation of existing measures in this field. In May 1975 French immigration officials refused to admit three West German Amnesty International delegates who wished to enter France for a restaurant meal. Messrs Giraud and Schmidt, two M.E.Ps, asked the Commission whether the French officials had infringed Community law. The Commission replied:

a decision by a Member State to refuse entry to nationals of another Member State who wish to enter its territory as recipients of services violates the principle of the free movement of persons and services within the Community. More specifically, Article 3(1) of Directive 73/148 ... stipulates that recipients of services must be admitted on production of a valid identity card or passport.

The Commission here implied that Community law seeks the free movement of services rather than merely the free movement of persons providing services. Consequently, although Directive 73/148 dealt with recipients of services in the same way as had Directive 64/220, the Commission now felt able to interpret the Directive as conferring rights on all recipients of services. It was enough that the three West Germans wished to take a restaurant meal in France. It was not necessary that the person providing

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this service also be a migrant in France.

Since most travellers receive a service in the country which they visit, the Commission's interpretation of Directive 73/148 would involve rights of entry and residence for virtually all Community nationals travelling between Member States.

Nevertheless, an incident in 1975 demonstrated that some

Community nationals would remain unable to benefit from free movement. A group of demonstrators from Luxembourg and West Germany who wished to enter France in order to protest against the siting of a nuclear power-station at Sentslich were excluded. When questioned about this exclusion, the Commission took the view that such persons enjoyed no right to enter France under Directive 73/148.<sup>11</sup> The reasoning behind this view was not explained. The Commission may have felt that they did not qualify as recipients of services under the Directive because their primary intention was to demonstrate rather than to receive a service.<sup>12</sup> Alternatively, the Commission may have concentrated on the objective situation and concluded that they did not qualify because they would have been unlikely to receive any service even if they had been admitted.<sup>13</sup> Since it was by no means clear at the time which of these tests the Commission favoured, the personal scope of freedom of movement remained uncertain.

The following year, however, in Lynn Watson and Alessandro Belmann<sup>14</sup> the European Court of Justice was presented with the opportunity to resolve this uncertainty. This Case involved a British girl, apparently an au pair, who had stayed at the home of an Italian family without complying with the registration

formalities required of an alien under Italian immigration law. When the British girl and the Italian family were both prosecuted for this offence before the Milan pretura, the question of the compatibility of this prosecution with Community law was raised. Thereupon, the pretura decided to request a preliminary ruling from the European Court of Justice under Article 177 of the Treaty. Unfortunately, he failed to state conclusively whether or not Watson was an au pair. The Commission, Italy, the United Kingdom and Advocate-General Trabucchi all took this as an opportunity to discuss whether she would have benefitted from freedom of movement if she had been merely a tourist. The Commission, apparently contradicting its view of 1969, argued that tourists did enjoy free movement under Directive 73/148, since they constituted recipients of services. Italy<sup>15</sup> and the United Kingdom<sup>16</sup> both disagreed with the Commission and<sup>17</sup> maintained that this Directive had never been intended to cover tourists. The Court of Justice, for its part, merely stated that it was for the national courts to determine whether a particular individual was covered<sup>18</sup> by Community law.

It was left, therefore, to Advocate-General Trabucchi to consider in detail the question of the personal scope of freedom of movement. He pointed out that while the Treaty itself made no express reference to tourists, the measures enacted under Article 59 could be taken to cover them, inasmuch as they did receive services. However, such a broad interpretation of Directive 73/148 would, he said, benefit all Community nationals travelling between Member States. This would conflict with the wording of Article 59 and with the very structure of the Treaty. Accordingly, the Advocate-General maintained:

the most that can be done is to recognise  
 freedom of movement for recipients of services  
 ...only in so far as it is indissolubly linked  
 with the right to movement of those who have  
 to provide these services.

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In the Advocate-General's view, then, recipients of services only enjoyed rights of entry and temporary residence where the person providing the service was himself a migrant and would be unable fully to exercise his freedom to provide services in a Member State other than his own unless such rights were granted to recipients. This view is similar to that suggested earlier by the present writer and constitutes a rejection of the broad interpretation of Directive 73/148 advocated by the Commission.

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However, the Advocate-General did make some rather more positive remarks. First, he pointed out that job-seekers enjoyed rights of entry and temporary residence in a Member State other than their own. Therefore, he suggested, the result which the Commission sought to achieve through a broad interpretation of Directive 73/148 could in practice be achieved by recognition of the rights of job-seekers. Certainly, any Community national travelling between Member States could claim to be seeking work. Such a claim could not be readily disproved. Consequently, any Community national prepared to make this claim would enjoy the right to enter and reside in another Member State for a minimum of three months. However, it might be thought unsatisfactory for the personal scope of freedom of movement to depend on the individual's willingness to make a statement to immigration officials that is not necessarily true.

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Secondly, Advocate-General Trabucchi suggested that resort might be had to Article 235 of the Treaty. The Commission

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had, in fact, already contemplated resort to Article 235 for the purpose of extending the personal scope of freedom of movement.<sup>24</sup> The view expressed by Advocate-General Trabucchi in Watson and Belmann presumably made the need for legislative action of this kind seem more pressing. Furthermore, in 1979 in Petrus Kuyken<sup>25</sup> Advocate-General Capotorti stated that the relevant provisions of Directive 73/148

are designed to remove obstacles to the free movement between Member States of those who provide services and not of those who use these services.<sup>26</sup>

This statement lent support to Advocate-General Trabucchi's interpretation of the Directive rather than that of the Commission and confirmed the need for legislative action.

Moreover, in a Resolution of November 1977 the European Parliament drew up a list of the rights and freedoms entailed by European citizenship.<sup>27</sup> Amongst these was included the right for any Community national to enter and reside permanently in a Member State other than his own. The Commission was, accordingly, urged to draw up appropriate proposals to grant this right to Community nationals.

Consequently, on 31 July 1979 the Commission presented the Council with a proposal for an important Directive.<sup>28</sup> The Preamble to this draft states that one of the Community's objectives is to ensure that all Community nationals may move freely throughout the Community. Evidence for this proposition is drawn from the reference in the Treaty Preamble to "an ever closer union among the peoples of Europe" and from the fact that Article 3(c) of the Treaty calls for the introduction of freedom of movement for persons generally. It is then noted that the provisions of Title III of Part Two of the Treaty only allow for action to remove barriers to the movement of those wishing

to pursue certain economic activities in a Member State other than their own. Therefore, resort must be had to Article 235 in order to attain one of the objectives of the Community.

As for the operative part of the draft, Article 1(1) provides for the abolition of restrictions on the movement of Community nationals not covered by existing Community measures. Under Article 3(1) such persons and their families are to enjoy the right to enter a Member State other than their own. Moreover, provided that they are financially self-supporting, Article 4 grants such persons the right of permanent residence there. The latter right is, according to Article 5, to be evidenced by a document entitled "Residence Permit for a National of a Member State of the European Community"<sup>29</sup>. This document is to be issued by the authorities of the host Member State and renewed automatically. This proposal, therefore, seeks to extend the personal scope of free movement so as to grant rights of entry and residence to all financially self-supporting Community nationals.

On the very day prior to the submission of this proposal to the Council the Commission gave a notable Reply to a Written Parliamentary Question by Mr Hoffman. He had questioned the Commission about an incident where the French authorities had refused to admit a group of demonstrators from Belgium, Luxembourg and West Germany. This group had sought to enter France in order to protest against the siting of a nuclear power-station at Cattenom. The Commission replied that such persons did not benefit from freedom of movement, because they "were clearly not entering France to carry out an economic activity or to obtain services"<sup>30</sup>. By implication, therefore, the Commission maintained its position that all recipients of services enjoyed rights of entry and residence under Directive 73/148. In view of this, the new proposal might seem to have

the rather limited purpose of confirming the existing legal situation as the Commission saw it and conferring rights on the small number of persons, such as demonstrators, who do not qualify as recipients of services.

The real purpose of the proposal, however, is to remove the link between freedom of movement and the wish to carry out economic activity. For this reason, the proposal could not be based on any provisions in Title III of Part Two of the Treaty. Instead, it is based on Article 235, and the Preamble to the proposal invokes the Community's political objective of popular union. As the Commission stated in the Thirteenth General Report, the proposal will, if approved by the Council, grant rights to Community nationals "no longer as persons engaged in economic activity but in their capacity as Community citizens". This view was confirmed by the European Parliament in April 1980 in its Resolution embodying its Opinion on the Commission's proposal. This Resolution described the proposal as "the first step towards the creation of European citizenship". Certainly, by granting rights of entry to all financially self-supporting Community nationals this proposal would, if accepted, represent an important step towards the introduction of full freedom of movement for Community nationals - a major element in the creation of European citizenship.

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A further step of some significance has been taken by the European Court. The measures already enacted by the Council in implementation of the Treaty provisions regarding the free movement of persons, like the Commission's proposal of July 1979, only envisage rights of entry and residence for Community nationals in a Member State other than their own. No such limitation on the content of this freedom, however, is entailed by the notion of European citizenship. Rather, rights throughout the Community, even in one's own Member State are implied. In fact, Article 48 (3) of the Treaty itself does not clearly preclude the grant of such rights, and in P. v. Saunders<sup>35</sup> in 1979 the European Court recognised that they might exist in certain circumstances. While accepting that the relevant Community enactments did not cover situations wholly internal to a Member State, the Court maintained that Article 48 would be applicable where there were factors connecting them with any of the situations envisaged by this provision. Presumably, the Court meant that a Community national wishing to migrate from a Member State other than his own to his own in order to look for, or take up, employment in the latter would enjoy rights of entry and residence there for this purpose. This ruling, therefore, seems to represent a step towards establishing that Community nationals enjoy freedom of movement throughout the Community, even in their own Member State. Nevertheless, Community nationals will only enjoy the same freedom of movement throughout the Community as they enjoy in their own Member State, if the formalities faced by such persons when travelling between Member States are abolished.

Abolition of Frontier Formalities

As early as October 1960 M. Drouot l'Hermine, an M.E.P., presented to the Parliament a draft Resolution calling for the introduction of a European identity card. This draft was passed on to the Parliament's Legal Affairs Committee. The Report of this Committee, published in February 1962, explained what was entailed by Drouot l'Hermine's proposal. The new identity cards were to be issued by the national authorities of the Member States but would have a uniform appearance and bear the heading "European Community". It was envisaged that nationals of a Member State would be able merely on presentation of this card to enter and reside in another Member State. This arrangement, thought the Committee, would render the Community a reality to ordinary people.<sup>34</sup> Certainly, the individual would be provided with a tangible sign of his relationship with the Community. Moreover, a considerable reduction would be secured in the formalities faced by Community nationals travelling between Member States. The European Parliament as a whole endorsed the view of its Legal Affairs Committee and passed a Resolution on 22 February 1962 recommending the introduction of a uniform European identity card.<sup>35</sup> At this stage, however, the Council and Commission concentrated on implementing the Treaty provisions regarding the free movement of persons.

i) measures implementing the Treaty provisions regarding free movement.

These measures were not entirely without significance for the problem of entry formalities. In particular, Directive 68/360, which granted rights of entry and residence to those taking up employment in another Member State, provided for such persons to be supplied to be supplied with documentary evidence of their right of residence in the host Member State. This evidence was to take the form of a "Residence Permit of a National of a

Member State of the European Community". This document, which was to be issued by the national authorities of the host Member State, would be valid for five years and automatically renewable.<sup>36</sup> By virtue of Directive 73/148 similar arrangements were/in the case of self-employed migrants.<sup>37</sup>

Inasmuch as the documents now available to employed and self-employed migrants would have a uniform appearance throughout the Community and provide evidence of a right enjoyed by the holder, they possessed certain of the characteristics of a uniform European passport. Certainly, the introduction of these documents was welcomed with considerable enthusiasm in some quarters. The Social Affairs Committee of the European Parliament described their introduction as "une premiere esquisse de la nationalite europeene"<sup>38</sup>. Moreover, the Commission felt that political integration would be promoted, because the individual's sense of belonging to the Community would be strengthened.<sup>39</sup> On the other hand, these documents were only valid on the territory of the issuing Member State and were only available to certain categories of Community nationals. Therefore, the "Residence Permit of a National of a Member State of the European Community" was far from constituting a uniform European passport on the basis of which a Community national could travel without formality throughout the Community.

Some reduction in entry formalities is, however, entailed by the above measures. Article 3(1) of Directive 68/360 stipulates that Member States must admit Community nationals wishing to take up employment on their territory "simply on production of a valid identity card or passport". No entry visa or equivalent document may, according to Article 3(2), be required, except in the case of members of a migrant's family who are not Community nationals. In their case, the Member States are to "accord every facility for obtaining the necessary visas". Under Article 3 of Directive 73/148 the position is the same

for self-employed migrants. Finally, Article 3 of the July 1979 proposal would require that those Community nationals not benefitting under either of the above two Directives should also be admitted merely on production of a valid identity card or passport.

The above provisions indicate that while a Community national may enjoy the right to enter a Member State other than his own, he must still present a passport or identity card to immigration officials. Such a requirement is necessary because nationals of a third country do not on the whole benefit from freedom of movement in Community law. In view of this limitation on the personal scope of this freedom, Member States may reasonably require evidence that persons seeking admission on the basis of Community law are indeed Community nationals.

However, problems do arise as regards documents, such as landing cards in the United Kingdom, which Community nationals are often required to complete when travelling between Member States. The Commission has taken the view that such documents are not formally incompatible with Community law, since the national authorities are entitled to satisfy themselves that an entrant is covered by the measures regarding free movement. However, the consequences of a migrant who is covered by Community law failing to complete such a document are not clear.

In the first place, the circumstances in which Member States may exclude or expel Community migrants have been partly defined by Directive 64/221. Article 3(3) of this Directive provides, in particular, that

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Expiry of the national identity card  
or passport used by the person concerned  
to enter the host country and to obtain  
a residence permit shall not justify  
expulsion.

This provision assumes that a Community migrant must possess  
a national identity card or passport when entering a Member  
State other than his own. Moreover, he is also required to  
possess such a document in order to obtain a residence permit  
there. Provided, however, that he complies with these  
requirements, a migrant may not be expelled merely because  
of subsequent expiry of a national travel document. The  
underlying principle seems to be that the rights of a  
Community national are founded on Community law. Thus so long

as he complies with the administrative formalities stipulated in Community law, his rights cannot be withdrawn

merely for failure to comply with national legal requirements for entry and residence. The exclusion of a Community national for failure to complete a landing card or similar document would seem irreconcilable with this principle.

Secondly, three relevant rulings have been delivered by the European Court of Justice. In Royer<sup>42</sup> the Court accepted that the Belgian authorities could require a Frenchman to report his presence on a local population register but ruled that they could not deport him for failing to do so.<sup>43</sup> Similarly, in Watson and Belmann the Court ruled that the Italian authorities could require a British girl to report to the police within three days of her arrival. Again, however, failure on the part of a migrant to satisfy this requirement could not result in deportation.<sup>44</sup> In Sagulo<sup>45</sup> the Court faced a more complex situation. Two Italian migrants who possessed no valid passport or identity card and no residence permit and a Frenchman without a residence permit had all been prosecuted for infringement of West German aliens law. The Court noted that the residence permit which the three lacked was only issued at the discretion of the German authorities, whereas Community law required that they be granted as of right a "Residence Permit for a National of a Member State of the European Community."<sup>46</sup> Thus the requirement that Community nationals possess a residence permit issued only at the discretion of the national authorities was incompatible with Community law. Consequently, the three could not be punished for failing to respect this requirement.<sup>47</sup> In contrast, the two Italians could be punished for not having an identity card or passport, because these documents were required under Community law. However, the punishments permitted did not include deportation.<sup>48</sup> These three rulings were based on a principle

similar to that underlying Article 3 (3) of Directive 64/221. Provided that national immigration formalities are not incompatible with Community law in the sense that they take the place of arrangements laid down in the relevant Community enactments, Community migrants must respect such formalities. However, if they fail to respect them, their rights of entry and residence as Community migrants may not be withdrawn.

As far as landing cards are concerned, they do not take the place of the arrangements laid down in the relevant Community enactments and thus, as the Commission accepts, are not incompatible with Community law. Therefore, it is not unlawful for Member States to require Community migrants to complete such documents, but it is doubtful whether such a person could be excluded for failing to respect this requirement.

In this connection, notable statements have been made by the Council of Ministers and the Commission. In 1978 Mr Dondelinger, an M.E.P., asked the Council about an incident involving French immigration officials. The officials had apparently required a number of West German journalists to disclose the names and addresses of their newspapers before admitting them to France. The Council felt unable to comment on a specific case such as this, but did point out that Article 3 of Directive 73/148 grants such persons the right of entry simply on production of a valid national travel document.<sup>49</sup> By saying this, the Council implied that the right of entry of Community nationals was dependent on compliance with formalities laid down in Community law and not on compliance with additional national legal requirements. A similar view was taken by the Commission in the following year. Mr. Nyborg, another M.E.P., had asked whether French officials were entitled to question train passengers about their nationality, their point of departure, their destination, their occupation and their employer. The Commission also referred to the relevant Community legislation and stated that the right of a Community national "must not be made dependent on the answer to questions such as those" mentioned by Mr. Nyborg. The Commission then went on to give an assurance that it would take action against the Member States concerned if it was notified of specific breaches of Community law in this field.<sup>50</sup> These statements by the Council of Ministers and the Commission both suggest that the right of entry of a Community national cannot be made conditional upon his completion and presentation of a landing card or similar document.



This was confirmed by the ruling of the European Court of Justice in Pieck<sup>51</sup> in July 1980. This was a case of a Netherlands national employed as a printer near Cardiff. He originally arrived in the United Kingdom 1973, but had left the country temporarily on several occasions. He returned after his last absence on 29 July 1978. On entry, the immigration officer concerned stamped his passport with the date and place of entry together with the words "given leave to enter the United Kingdom for six months" in accordance with Rule 51 of the Statement of Immigration Rules for Control on Entry: E.E.C.

and Other Non-Commonwealth Nationals.

His six months leave of entry expired on 21 January 1979. On 3 May 1979 he was charged with an offence under section 24 (1) (b) (i) of the Immigration Act. This provision makes it an offence punishable on summary conviction with a fine of not more than £200 or with imprisonment for not more than six months for any non-patrial having only limited leave to enter or remain in the United Kingdom knowingly to overstay his leave. At the same time, a notice was served on Pieck under section 6 (2) of the Immigration Act to the effect that if he was convicted of the above offence the court concerned would have the power to recommend him for deportation under section 3 (6) of the Act.

On 12 July 1979 Pieck appeared before the Pontypridd Magistrates Court and, whilst not contesting the evidence adduced by the prosecution, pleaded not guilty to the charge. He invoked Article 48 (3) of the E.E.C. Treaty and Directive 68/360 to show that the initial grant of six months leave to enter the United Kingdom and the requirement that he apply to have this leave extended were both incompatible with Community law. Faced with this problem, the Magistrates Court decided to refer the matter to the European Court of Justice for a preliminary ruling under Article 177 (2) of the Treaty. In particular, three questions were asked: 1) what was the meaning of the requirement in Article 3 (2) of Directive 68/360 that Community nationals be admitted solely on production of a valid national identity card or passport, 2) is the grant of an initial six months leave compatible with Article 48(3) of the Treaty and Directive 68/360 and (3) if it is, can a Community

national be imprisoned or recommended for deportation for overstaying such leave?

In reply, the European Court confirmed its established jurisprudence that Community nationals enjoyed rights of entry and residence under Community law, which cannot be made to depend on national legal formalities. Thus these rights could not be made subject to the grant of clearance by the authorities of a Member State. Within the limits of Directive 64/221, restrictions could be imposed on grounds of public policy, public health or public security. However, these restrictions could not include administrative measures requiring in a general way that Community nationals submit to entry formalities other than the production of a valid national identity card required by Directive 68/360. Therefore, Article 3 (2) of this Directive should be interpreted as prohibiting the imposition on a Community national of any entry formality coupled with a passport or identity card check. In effect, then, the entry of a Community national in the United Kingdom cannot be made conditional on his obtaining leave to enter.

As for the second question, the Court noted that under Article 4 of Directive 68/360 a Community national was entitled as of right to a "Residence Permit for a National of a Member State of the European Community" as evidence of his right of residence. This document could not be replaced by a discretionary arrangement, such as the grant of leave to enter. Thus a Community national's residence in the United Kingdom cannot be made to depend on the renewal of his leave.

As for the third question, the Court ruled that a Community

national could not be punished for failing to comply with an arrangement that was incompatible with Community law. Thus Pieck could not be punished for overstaying his leave. On the other hand, a Community national could be punished for failing to obtain a "Residence Permit for a National of a Member State of the European Community", since this document was prescribed by Community law. However, deportation in such circumstances would be incompatible with Community law, since such action would negate the very right conferred and guaranteed by Article 48(3) of the Treaty and Directive 60/360. As for other penalties, such as fines and imprisonment, the national authorities were entitled to impose penalties comparable to those attaching to minor crimes committed by their own nationals. However, such penalties must not be so disproportionate to the gravity of the offence that they become obstacles to the free movement of persons. Therefore, Pieck's failure to renew his leave and to obtain a residence permit prescribed by Community law could not be punished by a recommendation for deportation or imprisonment.

This ruling would suggest that the only formality with which a Community national must comply when entering a Member State other than his own is passport control. Provided that he presents a valid passport or national identity card, he cannot be excluded from the United Kingdom merely for failing to obtain leave to enter or complete a landing card. Indeed, since these latter formalities are not prescribed by Community law, it would seem that failure to comply with them cannot lead to a fine or imprisonment. As for presentation of a valid passport or national identity card, it would seem that a Community national who fails to comply with this formality may be fined but not imprisoned or excluded.

At one stage, the Commission had apparently envisaged abolition even of these checks through an amendment to Directive 64/221 so as to abolish the use of such checks completely.<sup>53</sup> This plan, however, was soon overtaken by events.

ii) the proposed passport union

It will be recalled that in April 1972 Commission President Mansholt invoked the notion of European citizenship and called for action to ensure that Community nationals would enjoy full freedom of movement throughout the Community. Two years later, on 12 November 1974, the West German representative at the Council of Ministers for Foreign Affairs took up this suggestion and advocated the introduction of a passport union in the Community.<sup>54</sup> The following month at the Paris Summit Conference the Member States announced:

A working party will be set up to study the possibility of establishing a passport union and, in anticipation of this, the introduction of a uniform passport.

If possible, this draft should be submitted to the Governments of the Member States before 31 December 1976. It will, in particular, provide for stage-by-stage harmonization of legislation affecting aliens and for the abolition of passport control within the Community".<sup>55</sup>

The Member States envisaged, then, both the introduction of a

(uniform passport and the abolition of passport control within the Community. As a result, Community nationals would no longer face systematic checks and would enjoy free and unhindered travel between the Member States.

The procedure by which this union was to be established is particularly noteworthy. Usually draft Community legislation is prepared by the Commission and then, after the European Parliament or the Economic and Social Committee has been consulted, is submitted to the Council for its approval. If this approval is given, the draft is enacted by the Council in the form of a Regulation or Directive. A different procedure, however, was to be adopted in the case of the passport union. The preparatory work would be undertaken by a special Working Group, which would submit a draft to the Member States. No formal role was allocated to the Council or Commission. The reason for excluding the Community institutions in this way was probably that establishment of the passport union involved sensitive issues. In particular, it is the distinctiveness of his national passport which normally provides evidence of an individual's nationality. The Member States may have been concerned to ensure that such distinctiveness was not lost as a consequence of the introduction of a uniform European passport. For this reason they may have preferred to undertake the arrangements for its introduction as far as possible amongst themselves.

Nevertheless, the Commission was requested by the Committee of Permanent Representatives (Coreper) to draw up a report on the implementation of Point 10 of the above Communiqué. This Report was duly submitted to the Council on 2 July 1975.<sup>56</sup> The Commission suggested that the proposed uniform passport should continue to be issued by the individual Member States but should have a standard appearance throughout the Community. Thus it should demonstrate

the holder's relationship not only with his own Member State but also with the Community.<sup>57</sup> The introduction of the new passport would be accompanied by the abolition of passport control within the Community and the opening of negotiations with non-Member States so as to obtain agreement from them to treat all holders of the passport equally.<sup>58</sup> The effect of all this, thought the Commission, would be to confirm the Community as an entity vis-a-vis the rest of the world and to create a feeling on the part of individuals that they belonged to the same Community.<sup>59</sup> Finally, the Commission did not foresee any serious obstacles to the introduction of a uniform European passport, provided there was agreement amongst the Member States that the document should demonstrate the holder's relationship with the Community as well as with his own country.<sup>60</sup>

The Commission then went on to consider the procedure whereby the passport union should be introduced. In the Commission's view, no treaty provision permitted the Community institutions to enact the necessary legislation. It is notable that even the possibility of resort to Article 235 was dismissed on the grounds that a passport union was not essential to the attainment of the Community's objective. Instead, the Commission concluded that the necessary action could only be taken by means of an ad hoc international agreement or an amendment to the Treaty, possibly under Article 236. By advocating action of this kind rather than resort to Article 235 the Commission would seem to have accepted that the introduction of the passport union was a matter largely for the Member States themselves. On the other hand, the Commission argued that the introduction of such a union represented a natural extension of the principle of free movement.<sup>61</sup> Consequently, the Community institutions should be

involved in the negotiations as far as possible. Specifically, it was suggested that the Commission should provide the chairman of the Working Group proposed at the December 1974 Summit Conference.<sup>62</sup>

In fact, however, at their meeting of 16 and 17 July 1975 in Brussels the Member States instructed the Council of Foreign Ministers to prepare a report on the matter by the end of the year.<sup>63</sup> Thus the Member States seem to have been determined that the necessary preparatory work should be undertaken within the Council framework rather than under the chairmanship of the Commission. The Foreign Ministers duly presented their report to the Member States, and the latter referred to the proposed passport in the "Summary of Conclusions" published after their meeting in Rome on 1 and 2 December 1975. It was stated that agreement had been reached on issuing the new passport from 1978. Outstanding problems were to be resolved by the Council of Foreign Ministers.<sup>64</sup> It would appear, therefore, that the Member States had agreed in principle on the introduction of a uniform European passport by 1978. Nevertheless, some problems remained.

Some indication of the nature of these problems was given by Mr. Thorn, the President-in-Office of the Council of Foreign Ministers, in March 1976. While he told the European Parliament that the 1978 deadline should still be met, he admitted that problems had arisen over certain technical details. These problems concerned the choice of languages to be used in the new passport and the question whether the words "European Community" should be placed above or below the name of the issuing Member State.<sup>65</sup> Although Mr. Thorn did not mention this, it subsequently emerged that disagreement existed over the colour of the passport. These were presumably the sort of problems which the Commission had predicted could be overcome, provided there was agreement that the passport should demonstrate the holder's relationship with the Community as



well as with his own Member State. Moreover, since Mr. Thorn still expected the 1978 deadline to be met, he also did not seem to expect serious delay to be caused by these problems.

Certainly, the Council of Foreign Ministers continued its preparatory work with a degree of apparent optimism and at a meeting on 18 and 19 October 1976 instructed Coreper to settle the final problems remaining so that agreement could be reached at the Council's meeting on 15 and 16 November 1976.<sup>66</sup> However, the Council failed to reach agreement at the November meeting or, indeed, at its next meeting on 13 and 14 December 1976.<sup>67</sup> Consequently, the 1978 deadline was not met despite protests from the Commission<sup>68</sup> and a Parliamentary Resolution insisting that this deadline should be met.<sup>69</sup> However, agreement has now been reached regarding the format and layout of the proposed passport, which will contain thirty-two pages and be burgundy in colour. It has also been agreed which languages be used in the document. On the other hand, no decision has apparently been taken as to the legal instrument on the basis of which it will be introduced.<sup>70</sup>

Therefore, the negotiations for the creation of a passport union have been delayed by haggling over details of the appearance of the proposed European passport. In March 1980 the European Parliament passed a Resolution calling for the Council to take a definite decision on its introduction by the end of that year at the latest,<sup>71</sup> and the President of the Council agreed to press the matter with his colleagues.<sup>72</sup> However, it is likely that further delays will be encountered in reaching agreement on the legal instrument to be employed for the introduction of the new passport.

iii) informal Commission action

Partly perhaps as a reaction to this lack of progress, the Commission has begun to emphasize that abolition of frontier

formalities is more important than the introduction of a uniform passport.<sup>73</sup> For the moment, however, the Commission has confined itself to making practical suggestions to reduce the inconvenience of the existing situation. This approach seems to have enjoyed a degree of success. For example, the United Kingdom has adopted a system of major British ports, whereby Community nationals enter the United Kingdom through a passport control channel reserved specially for them. According to the Government, this system has been introduced because in the case of Community nationals systematic checking can be replaced by special checks designed only to detect criminals and terrorists.<sup>74</sup> Not surprisingly, the Commission has suggested that other Member States adopt this system as a temporary expedient pending the creation of a passport union.<sup>75</sup>

Moreover, in 1976, when questioned about United Kingdom landing cards, the Commission hinted that the authorities might be able to obtain the necessary information orally and stated that it would "take all initiatives within its competence to remove unnecessary impediments to the free movement of our citizens".<sup>76</sup> It may well have been as a result of informal action of this kind on the part of the Commission that the British Government announced in November 1979 its intention to abolish the requirement that Community nationals complete landing cards.<sup>77</sup> Presumably,

however, passengers travelling between the Irish Republic and Northern Ireland will still be required, for security reasons, to complete such cards in accordance with the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1976.<sup>78</sup> Moreover, it may be assumed that chief officers of police with airports in their areas will still be permitted, also for security reasons, to introduce arrangements whereby passengers from Ireland are requested "voluntarily" to complete landing cards.<sup>79</sup>

### Conclusion

The creation of the proposed passport union raises issues of considerable political sensitivity. In particular, introduction of a uniform European passport would encourage individuals to identify with the Community as a whole rather than with individual Member States. The lack of commitment on the part of the Member States to this degree of political integration and to the notion of European citizenship itself is reflected by the failure of the Working Group and the Council to reach agreement on the introduction of a European

passport. As a result, negotiations for the creation of a passport union have so far been fruitless.

Nevertheless, the Commission has presented to the Council a proposal for a Directive to grant all self-supporting Community nationals the right of entry and permanent residence in a Member State other than their own. This proposal involves few problems for the Member States. In practice, they already admit most Community nationals irrespective of whether or not they wish to carry on an economic activity specified in the relevant Community enactments. For example, Community nationals are usually admitted to the United Kingdom without detailed questioning as to the purpose of their visit. It is true that some Community nationals who were not previously entitled to a "Residence Permit for a National of a Member State of the European Community" will now be entitled to such a document. However, their number will not be great, since few people will be able to support themselves in a Member State other than their own without carrying on one of the economic activities specified in existing Community enactments. Therefore, the Council is unlikely to reject this proposal. Moreover, rulings of the European Court and informal Commission action have done much to reduce the formalities faced by Community nationals travelling between Member States.

Therefore, despite Member States' reluctance to accept the degree of political integration entailed by the creation of European citizenship, the Community institutions are making considerable progress in securing for Community nationals freedom of movement throughout the Community of the sort already enjoyed by such persons in their own Member States.



- 1 J.O. 1964, 345.
- 2 See G. Le Tallec, 'La Police des Etrangers dans les Etats Membres  
de la C.E.E. et le Traité de Rome', 7 R.M.C. (1964) 371-380, 372-3.
- 3 See Commission Replies to Written Questions 48/69 (J.O. 1969, C79/38) and 277/69 (J.O. 1969, C159/1), both by Mr Vredeling.
- 4 Although this agreement has never been officially published, its existence is well-known. See, for example, J. Mégret *et al.*, Le Droit de la Communauté Economique Européenne, Presses Universitaires de Bruxelles, 1970, vol. 3, 21, note 29.
- 5 See M. Mazziotti in La Libre Circulation des Travailleurs dans les Pays de la C.E.E., ed. M. Mazziotti, Giuffrè, Milan, 1974, 3-89, 11 and J. Verhoeven, *ibid.*, 179-334, 204.
- 6 See E. Stein and F. Nicholson, American Enterprise in the European Common Market, A Legal Profile, Univ. of Michigan Law School, Ann Arbor, 1960, 345, note 191a.
- 7 J.O. 1971, D149/2.
- 8 Case 48/75 (1976) E.C.R. 497, 512.
- 9 European Union, Report by Leo Tindemans, Ministry of Foreign Affairs, Brussels, 1976, 41.
- 10 Commission Reply to Written Question 859/75 (O.J. 1976, C99/39).
- 11 Commission Reply to Written Question 214/75 (O.J. 1975, C242/4).
- 12 Such a test for determining the personal scope of Directive 73/148 was favoured by T.C. Hartley, 'The Internal Personal Scope of the E.E.C. Immigration Provisions', 3 E.L.Rev. (1978) 191-207, 204.
- 13 A similar approach was favoured by M. Bogdan, 'Free Movement of Tourists within the E.E.C.', 11 J.W.T.L. (1977) 468-75, 474. He argues that all Community nationals should be regarded as covered by Directive 73/148 except those who are penniless. Those without money would, of course, be unable to pay for services within the meaning of Article 60 of the Treaty.
- 14 Case 118/75 (1976) E.C.R. 1185.
- 15 *Ibid.*, 1193.
- 16 *Ibid.*, 1193.
- 17 *Ibid.*, 1195.
- 18 *Ibid.*, 1197.
- 19 *Ibid.*, 1204.
- 20 C. Tomuschat, 'Le Principe de Proportionnalité: quis Indicabit? L'Affaire Watson', 13 C.E.E. (1977) 97-102, 102 conclude that only those persons benefit as recipients "à l'arrivée de qui le prestataire porte un intérêt spécifique en ce sens qu'il peut les désigner nommément."
- 21 Case 118/75 (1976) E.C.R. 1185, 1205.
- 22 D. Stephen, 'Immigration, The Challenge of the Common Market,' 3 Race Today, (1971) 254. T.C. Hartley, *id op.*, 194 suggests: "If the immigrant states that his purpose is to seek work, this should be accepted unless there is positive evidence to the contrary".
- 23 Case 118/75 (1976) E.C.R. 1185, 1204.
- 24 See the Commission's Report on the Implementation of Point 11 of the Final Communiqué of the European Summit Held in Paris on 9 and 10 December 1974: the Granting of Special Rights, COM(75) 321 final, C.
- 25 Case 66/77 (1977) E.C.R. 2311.
- 26 *Ibid.*, 2325.
- 27 O.J. 1977, C299/25.
- 28 O.J. 1979, C207/14.
- 29 Such documents were already available to employed migrants under Article 4 of Directive 68/360 and to self-employed migrants under Article 4 of Directive 73/148.
- 30 See Commission Reply to Written Question 233/79 by Mr Hoffman (O.J. 1979, C214/31).

- 31 Thirteenth General Report 1979,84.  
 32 O.J.1980,C117/48.  
 33 P.E.Debs No.32,181,15 October 1960.  
 34 Drouot l'hermine Report,P.E.Doc.136/62. See also the remarks of the President of the Legal Affairs Committee during the Parliamentary debate on this Report (P.E.Debs No.54,98,22 February 1962).  
 35 J.O.1962,361.  
 36 Article 4 of Directive 68/360.  
 37 Article 4.  
 38 Petre Report,P.E.Doc.128/67,41.  
 39 Commission Reply to Written Question 190/68 by Mr Muller (J.O.1962,C8/1).  
 40 See, for example, Commission Replies to Written Questions 348/72 (J.O.19772,C138/61) and 250/76 (O.J.1976,C251/2) both by Mr Seefeld.  
 41 J.O.1964,850.  
 42 Case 48/75 (1976) E.C.R.497.  
 43 Ibid.,513.  
 44 Case 118/75 (1975) E.C.R.1185,1199.  
 45 Case 8/77 (1977) E.C.R.1495.  
 46 Article 4 of Directive 68/360.  
 47 (1977) E.C.R.1503-4.  
 48 Ibid.,1506.  
 49 Council Reply to Written Question 370/78 (O.J.1978,C245/19).  
 50 Commission Reply to Written Question 234/79 (O.J.1979, C232/6).  
 51 Not yet reported.  
 52 H.C. 81,1972-3.  
 53 Commission Reply to Written Question 405/74 by Mr Brewis (O.J.1975,C4/6).  
 54 Frankfurter Allgemeine Zeitung of 13 November 1974.  
 55 Bull.E.C.12-1974,7-12,8.  
 56 Report on the Implementation of Point 10 of the Final Communiqué Issued at the European Summit Held in Paris on 9 and 10 December 1974 Concerning a Passport Union,COM(75) 322 final.  
 57 Ibid.,5.  
 58 Ibid.,19-20.  
 59 Ibid.,12.  
 60 Ibid.,14.  
 61 Ibid.,23.  
 62 Ibid.,24.  
 63 Bull.E.C.7/8-1975,89.  
 64 Bull.E.C.11-1975,8.  
 65 See Mr Thorn's Reply to an Oral Question by Mr Seefeld (E.P. Debs No.201,18,10 March 1976).  
 66 See Council Reply to Written Question 459/76 by Mr Couste (O.J.1976,C300/12).  
 67 See Council Reply to Written Question 76/76 by Mr Couste (O.J.1976,C70/16).  
 68 See, for example, the Commission's comments in the Tenth General Report 1976,85 and the Eleventh General Report 1977, 84.  
 69 O.J.1976,C178/13.  
 70 See the Commission's Reply to Written Question 241/79 by Mr Seefeld (O.J.1979,C253/7).  
 71 O.J.1980,C85/45.  
 72 E.P.Debs No.1-253,74-5,12 March 1980.  
 73 See the remarks on this point by Commissioner Gundelach (E.P.Debs No.204,100,16 June 1976).

- 74 See the statement by Lord Trefgarne (402 H.L. Deb. 5s.c. 778, 6 November 1979).
- 75 See Commission Reply to Written Question 273/76 by Mr Dondelinger (O.J. 1976, C203/29).
- 76 See Commission Reply to Oral Question by Mrs Boothroyd (E.P. Debs No. 204, 155, 16 June 1976).
- 77 Note 72 supra.
- 78 S.I. 1976, No. 466.
- 79 See the statement of Mr Carlisle on behalf of the Home Office in January 1974 (367 H.C. Deb. 5s.c. 139-40, 17 January 1974).
- 80 Control of Immigration Statistics 1976, 8.

Introduction.

Under Articles 48(3), 56(1) and 66 of the Treaty the Member States retained the power to restrict the entry and residence of migrants on public policy grounds. The public policy derogation was based on the civil law concept of ordre public, which permits action against migrants for political reasons. However, Article 56(2) of the Treaty requires the enactment of Directives for the "co-ordination" of national public policy rules. So far one Directive, Directive 64/221,<sup>1</sup> has been enacted pursuant to this provision. The first part of the present Chapter will consider the significance of this Directive for the adoption of public policy measures against Community migrants for political reasons. In the second part of the Chapter the writer will turn to the jurisprudence of the Court of Justice. Since public policy is a term of the Treaty, it is the duty of this Court to interpret it. The Court has since 1974 handed down several preliminary ruling on the adoption of public policy measures against Community migrants. Two of these rulings have been concerned specifically with the adoption of such measures for political reasons, and it is these to which special attention will be paid.

Directive 64/221.

Although Directive 64/221 was enacted pursuant to Article 56(2) of the Treaty, its personal scope includes both employed and self-employed Community migrants.<sup>2</sup> The Directive not only deals with the substantive area of application of public policy measures but also provides certain procedural safeguards for migrants affected by such measures. These procedural safeguards require, in particular, that a migrant be given reasons for any such measure adopted against him.<sup>3</sup> He is also entitled to be heard by an independent body before any such measure is carried out.<sup>4</sup> Finally, he is to have access to the same legal remedies as do nationals of



the host Member State when challenging administrative action. Of greater relevance to the present work, however, is the way in which the Directive deals with the question of the substantive area of application of public policy.

The Preamble to the Commission's proposal for the Directive stated that, although the concept of public policy, and indeed that of public security, could not easily be defined,

néanmoins dès maintenant les limites  
de ces concepts peuvent être  
6  
circonsrites.

This clause was dropped from the Preamble to the final version of the Directive. Nevertheless, it does provide useful guidance as to the approach of the Commission. The Commission apparently felt that the concept of public policy could not be given a definition in the Directive. This would be very difficult because, as the writer has explained, this concept is of broad and uncertain scope and content in municipal law and is not identical in each Member State. There is also the problem that a rigid definition of this concept would have seriously affected national sovereignty in this field. On the other hand, limits could be laid down within which the concept was to operate. Indeed, the Commission felt that the co-ordination of national rules in this area entailed "l'elimination de toute divergence essentielle" in national variations of this concept. Consequently, certain limits to the application of public policy are contained in Articles 2 and 3 of Directive 64/221.

Article 2(2) provides that public policy measures cannot be employed against Community migrants "to serve economic ends". This means that a Member State cannot invoke the public policy derogation for economic reasons. In particular, a Member State may not invoke it so as to protect the national labour force against competition in the job-market from Community migrants. This stipulation is natural in a Community designed to abolish

protectionism and to ensure the maximum possible utilisation of all economic resources, including manpower.

Article 2(3) of the Commission's proposal, however, would have gone much further. It stated:

Les raisons d'ordre public ou de sécurité  
public doivent présenter un caractère  
particulier de gravité.

This paragraph would have meant that the principle of proportionality would have general application in this context. According to this principle, which is particularly well-known in German administrative law,<sup>8</sup> administrative action must be "proportionate" having regard to all the circumstances. Article 2(3) would, in effect, have meant that the exclusion or expulsion of a Community migrant would not have been "proportionate" and, consequently, would not have been permitted, unless it was based on particularly serious facts. A similar clause had, it may be noted, already been included in Article 3(3) of the European Convention on Establishment<sup>9</sup> and Article 5 of the Convention Implementing Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union,<sup>10</sup> both of which seek to limit the circumstances in which a Contracting State may expel nationals of other Member States on its territory. The Council, however, decided to omit Article 2(3) altogether from the final version of Directive 64/221 and merely came to an informal agreement that the public policy derogation would not be employed in cases of minor importance.<sup>11</sup>

On the other hand, the Council was prepared to approve three more specific limits to the scope of application of public policy, which are contained in Article 3 of the Directive. Two negatively-worded

conditions and one positively worded condition for resort to public policy are laid down in Article 3. Under paragraph two of this Article previous criminal convictions cannot "in themselves" justify a public policy measure, nor under paragraph three can expiry of the national identity card or passport upon the basis of which entry was gained or a residence permit obtained in the host Member State. The latter stipulation serves to emphasize that the rights of entry and residence of Community migrants are based on Community law itself. Thus expiry of a national travel document cannot lead to the withdrawal of such rights from a Community migrant.

Article 3(2) is of somewhat broader significance. It provides,

in effect, that a criminal conviction cannot without more serve as a basis for the adoption of a public policy measure. The question arises as to what additional factors are required. Presumably, repeated offences or an offence of a serious nature would be required. In other words, public policy may only be invoked in such circumstances that it would be proportionate to the criminal record of the migrant concerned. Thus, while the Council declined to embody the principle of proportionality in a general way in the Directive, this principle does seem applicable in relation to the adoption of public policy measures on the basis of a criminal conviction. Moreover, if Article 3(2) is taken with Article 3(3), which could be interpreted as treating resort to public policy as disproportionate in the event of expiry of a travel document, the implication could be drawn that the adoption of any public policy measure against a Community migrant must respect the principle of proportionality.<sup>12</sup>

The positively-worded condition upon resort to public policy is contained in Article 3(1), which provides that public policy measures must be

based exclusively on the personal conduct of  
the individual concerned.

It is generally thought that this paragraph was included in the Directive so as to prohibit mass expulsions.<sup>13</sup> Such expulsions could seriously jeopardise the objective of ensuring maximum utilisation of manpower throughout the Community. However, since this provision is worded in positive terms, it may reasonably be read in such terms. Thus it would seem to require that public policy measures may only be taken against Community migrants individually.<sup>14</sup> More specifically, it would seem to be necessary for such a measure to be based on facts particular to the migrant concerned.<sup>15</sup> Therefore, this provision apparently goes beyond the

prohibition of mass expulsions and subjects the adoption of any public policy measure to an important limit. 123

This examination of Directive 64/221 leads to the following conclusion. Both the Council and Commission seemed to accept that the Directive should prohibit the adoption of public policy measures for economic reasons and should reduce national variations in the concept of public policy. However, the views of the two institutions apparently diverged as regards the degree to which the Directive should go in reducing such variations. The Commission sought to lay down general limits within which the concept of public policy was to operate. The Council, however, seemed unwilling to encroach so far on national sovereignty and preferred to deal only with specific problems. Consequently, the Council rejected the Commission's proposal to subject public policy measures expressly to a requirement that the principle of proportionality be respected. Nevertheless, the Directive does impose two important general limits on resort to public policy. Article 3(2) and (3) may be interpreted as implicitly requiring that the proportionality principle be respected, and Article 3(1) may be interpreted as requiring that any public policy measure be based on facts particular to the migrant concerned.

#### The Jurisprudence of the Court of Justice.

It was realised at the time of the drafting of Directive 64/221 that much would depend on the manner in which the Court of Justice interpreted the concept of public policy. <sup>16</sup> In fact, the Court did not have the opportunity to give a ruling on the adoption of public policy measures against Community migrants for ten years. However, since 1974 the Court has handed down several important rulings.

The first such ruling was that in Van Duyn v. The Home Office. 17

This Case involved a Dutch national who arrived at Gatwick Airport in May 1973 with the intention of taking up a job as a secretary

with the Church of Scientology at its East Grinstead Headquarters. However, since 1968 the British Government had taken the view that the "cult" of Scientology was "socially harmful" and had adopted a policy of excluding alien Scientologists from the United Kingdom.<sup>18</sup> In accordance with this policy Van Duyn was refused entry to the United Kingdom. Van Duyn decided to challenge her exclusion before the Court of Chancery,<sup>19</sup> which thereupon referred the Case to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.

The Court of Justice delivered its ruling on 4 December 1974 and began by stating that

the concept of public policy in the context of Community law and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.<sup>20</sup>

The Court thus began by emphasizing that the concept of public policy now had to be viewed in the context of the Community rather than the national legal systems. In the context of Community law this concept represented the basis for exceptions to a fundamental principle. Thus it had to be strictly interpreted, and its scope could not be determined unilaterally by the Member States without any supervision by Community institutions. Thus the Court took into account the important roles attributed to this freedom by the Treaty authors and by the Community institutions themselves and laid down a basic theoretical proposition that might have been expected to have had significant implications.

However, the Court was more reserved when it came to the interpretation of public policy in practice. Immediately following the passage quoted above the Court stated:

Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent authorities an area of discretion within the limits imposed by the Treaty.

Thus the application of public policy measures would depend on the particular circumstances and on the time and place. In order to take account of these factors, the national authorities were to retain a degree of discretion as regards the application of public policy measures. Nevertheless, the Court's earlier proposition to the effect that the concept of public policy was to be strictly interpreted was not deprived of all practical significance. For the Court insisted that the national authorities must exercise their discretion within limits laid down by Community law. The Court then went on to consider what these limits were.

First, the Court dealt with Article 3(1) of Directive 64/221 and ruled that:

present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.

The Court's argument seems to have been as follows. The

expression "personal conduct" in Article 3(1) of the Directive covered voluntary acts of the migrant concerned. More specifically, where a Community migrant was affected by a public policy measure because of his association with a group, Article 3(1) required that he participate in its activities and identify with its aims. This would seem to impose an important limit upon the discretion of the Member States. However, most of its effect seems to have been lost, since the Court was apparently prepared to assume that the two-fold condition of participation and identification was fulfilled by present association with the group.<sup>23</sup>

Secondly, the Court employed the principle of proportionality. It stated:

a Member State, for reasons of public policy, can where it deems necessary, refuse a national of another Member State the benefit of the principle of the free movement of workers.<sup>24</sup>

Thus public policy measures must be "necessary". However, no criteria were laid down for determining whether a public policy measure is "necessary". All that was apparently required was that the national authorities must deem it so. Nevertheless, it should be noted that earlier in the ruling the Court had observed that the United Kingdom authorities had "clearly defined their standpoint" as regards Scientology, considered it to be "socially harmful" and had taken administrative measures to curb the activities of the Church.<sup>25</sup> Therefore, it may have been that evidence was required as to whether the authorities really did "deem necessary" the public policy measure. Even so this requirement still leaves a Member State ultimately free to determine for itself the necessity of a public policy measure. For provided that the Member State concerned has already shown



that it regards certain conduct as contrary to public policy, it may exclude or expel a Community migrant engaging in this conduct.

Thirdly, the Court discussed the relevance of the principle of equality of treatment. The writer explained in Chapter Two that this principle was given a prominent role in the Treaty. However, in this ruling it was approached solely in terms of the rights of entry and residence which it entails for Community migrants. The Court pointed out that since the Treaty itself allows for these rights to be limited on public policy grounds, then the principle of equality of treatment must also be subject to derogation on these grounds. The Court supported this argument by invoking the

principle of international law, which the E.E.C.Treaty cannot be assumed to disregard in the relations between the Member States, that a State is precluded from refusing its own nationals the right of entry or residence.

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The Court presumably meant to say that the exclusion of a migrant would inevitably be discriminatory, inasmuch as a Member State was precluded by international law from excluding one of its own nationals. Therefore, there had to be certain circumstances in which the principle of equality of treatment permitted the exclusion of a Community migrant. As already mentioned, the Court noted that the United Kingdom authorities had made clear their disapproval of Scientology and had sought to curb its growth. Provided such factors were present, the principle of equality of treatment permitted the exclusion of Community migrants. Consequently, the Court's ruling allowed an alien Scientologist to be excluded even though the nationals of the Member State concerned were permitted to practice the "cult".

27

In the Van Duyn Case, therefore, the Court of Justice laid down the basic proposition that the concept of public policy, as a

derogation from freedom of movement for persons, was to be strictly 128  
interpreted. In practice, this meant that the national authorities were  
to enjoy a degree of discretion as regards the application of public  
policy measures but that this discretion had to be exercised within  
limits contained in Community law. The Court found that Article 3(1) of  
Directive 64/221 and the proportionality principle embodied two such  
limits. However, the former provision and the latter principle were  
interpreted in such a way as to leave the national authorities with  
considerable discretion. Moreover, the Court failed to utilise the  
principle of equality of treatment to impose any real limit on the  
exercise of this discretion. Therefore, the Court's proposition that in  
principle the concept of public policy was to be strictly interpreted  
was not reflected in any significant limitations in practice on the  
discretion of the national authorities as regards the application of  
measures based on this concept. As Hailbronner suggests, this ruling  
imposed no real restriction on the power of the Member States to  
exclude or expel politically active migrants.  
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Two factors may explain the Court's restraint. First, this was the  
Court's first opportunity to rule upon the question of the adoption of  
public policy measures against a Community migrant. In view of this, the  
Court may have preferred to establish the basic proposition that the  
concept had to be strictly interpreted in the context of Community law  
and to leave the practical consequences of this proposition to be  
developed in subsequent cases. Secondly, this was the first time that  
a United Kingdom court had exercised its discretion under Article 177(2)  
in favour of seeking a preliminary ruling from the European Court. If  
the Court had handed down a ruling which cast doubt on the compatibility  
of Van Duyn's exclusion with Community law, the Chancery Court might have  
been in a difficult position. It would have had to intervene against  
administrative action in a sensitive/<sup>area</sup>traditionally regarded by the courts

as being suitable for extreme restraint. If the Chancery Court had found itself in such a position, other United Kingdom courts might have been less ready in the future to request preliminary rulings from the Court of Justice.

Whether or not these two factors did influence the Court of Justice in Van Duyn, the Court certainly seemed less inhibited in the Bonsignore<sup>29</sup> ruling some months later. This Case involved an Italian migrant in West Germany. He had been fined for possession of an unlicensed firearm and had been convicted of negligently causing the death of his brother with this weapon. However, because of the special circumstances of his case the convicting court decided to impose no penalty for the latter offence. The West German administration on the other hand, decided to deport him in order to deter other migrants from committing such offences. Bonsignore challenged the deportation order before the Cologne Verwaltungsgericht, which decided to refer the Case to the Court of Justice for a preliminary ruling.

The Court of Justice was requested, in particular, to rule on the question whether Article 3(1) of Directive 64/221 permitted the deportation of a Community migrant for the purpose of deterring other migrants. The Court went further than it had in the Van Duyn ruling and stated:

As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of "personal conduct" expresses the requirement that a deportation order may only be made for breaches of the peace and public security which might be committed by the individual affected.

The expression "breaches of the peace" in this passage should not be given its usual meaning in English law. It is, in fact, a translation of the German "Gefährdungen der öffentlich<sup>31</sup> Ordnung", which was used in the original German version of this ruling. The translators apparently believed that the expression "threats to public policy" would have been a rather awkward rendering. Instead, the expression "breaches of the peace" was chosen. The significance of this ruling for the present Chapter is that the Court here employed Article 3(1) of Directive 64/221 so as to give practical effect to the basic proposition that the concept of public policy is to be strictly construed. As a result, a Member State will now only be permitted to adopt a public policy measure against a Community migrant who represents a threat to public policy because of some action on his part. Thus it will apparently no longer be enough that the migrant concerned is a member of a group which the national authorities regard as a threat to public policy.<sup>32</sup>

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In October 1975 the Court went even further in the Rutili Case. This Case involved an Italian migrant in France, against whom public policy measures had been taken as a result of his political and trade union activities.

The Commission put some notable observations to the Court in this Case. The Community was described as seeking to "integrate the migrant worker more and more closely into the host country." Such integration presumably entailed extension of the scope of application of the principle of equality of treatment enshrined in the Treaty. Moreover, the Commission alluded to the increasing importance being attached to attainment of the Community's political objectives. As the writer has argued, attainment of these objectives would be facilitated by the creation of European citizenship and, more particularly, by action to secure freedom of political activity for Community migrants in the host Member State. Certainly, the above two considerations

lead the Commission to argue that the application to Community migrants of "the concept of political neutrality" was a matter to be "handled with care". This argument implies that in the Commission's view at least limits should be imposed on the right of Member States to exclude or expel Community migrants for political reasons.<sup>34</sup>

Accordingly, the Commission maintained that

an activity which consists of the legitimate exercise of a freedom enjoyed by the public and recognised as such by national law can scarcely be considered to affect adversely the public policy of a State because the person responsible for it is a foreigner.<sup>35</sup>

The basis for this statement seems to be that in the Commission's view the principle of equality of treatment prohibited the adoption of a public policy measure against a Community migrant merely because he exercised a freedom enjoyed by nationals of the host Member State. If this argument were accepted, it would mean that a migrant could not be excluded or expelled for exercising or seeking to exercise the same freedom of political activity as was enjoyed by nationals of the host Member State.

The Court also invoked the principle of equality of treatment. First, this principle was interpreted as prohibiting the imposition of residence restrictions on a Community migrant within the host Member State except in circumstances where such restrictions might also be imposed on nationals of that State.<sup>36</sup> Secondly, the Court ruled that public policy measures could not be employed where they adversely affected the exercise of trade union rights by a Community migrant.<sup>37</sup> Since equality of treatment in this field is expressly guaranteed by Article 8(1) of Regulation 1612/68, it was natural for the Court to take this position. However, the Court did not give effect to the principle of equality of treatment in the broad manner advocated by the Commission.

Instead, the Court concentrated on the principle of proportionality and ruled that the entry or residence of a Community migrant cannot be restricted,

unless his presence or conduct constitutes a genuine and sufficiently serious threat<sup>38</sup> to public policy.

In the Van Duyn ruling the Court had been prepared to assume that this principle had been respected on the basis of prior action taken by the national authorities themselves. Now, however, the Court has laid down an objective test for determining whether the adoption of a public policy measure is compatible with this principle. This test relates to the nature of the threat posed to public policy. It must be "genuine and sufficiently serious"<sup>39</sup>.

However, the Court then went on to suggest even where such a threat is present the exclusion or expulsion of a Community migrant may still be prohibited by Community law. In fact, the Court referred to Articles 9, 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms<sup>40</sup> and Article 2 of the Fourth Protocol<sup>41</sup> to this Convention. These provisions guarantee the enjoyment of certain human rights and fundamental freedoms to all those within the jurisdiction of the High Contracting Parties. The rights and freedoms so guaranteed are subject to several derogations, including that of "public order" or ordre public. However, under the terms of the above Articles these derogations are only permissible where they are "necessary in a democratic society"<sup>42</sup>. The Court had already indicated in the famous Nold ruling that this Convention could serve as an inspiration for the development of general principles of Community law.<sup>43</sup> As is

well-known, the Court took the view that these principles would enable it to ensure that fundamental rights were respected by the Community institutions. In the present Case the Court drew upon this Convention as the basis for finding that public policy measures could only be adopted against Community migrants where such action was "necessary in a democratic society".<sup>44</sup>

Consequently, democratic values are to be taken into account when public policy measures are adopted against Community migrants. Louis, in fact, believes that as a result of this ruling Member States must respect all the provisions of the E.C.H.R., including those guaranteeing political freedoms, when acting against Community migrants.<sup>45</sup> Whether it is the provisions of the Convention or the values underlying them which are to be taken into account, this ruling clearly has major implications for the exclusion or expulsion of Community migrants for political reasons. For example, when the national authorities contemplate adopting a public policy measure against such a migrant because of his membership of a particular organisation, his participation in a demonstration, or the views he holds they must balance the need for a public policy measure against freedom of association, assembly and opinion. This balancing requirement would seem likely to reduce significantly the instances in which a Community migrant may be excluded or expelled for political reasons. Certainly, it seems to leave little room for the practice of acting against them merely because of their failure to maintain "political neutrality".<sup>46</sup> The imposition of this limit on State action resulted from the willingness of the Court to draw upon the E.C.H.R. so as to articulate the principle of proportionality.

The Court's reliance on this principle rather than that of equality of treatment continued in its subsequent jurisprudence. It is true that in Watson and Belmann the Court seemed ready to utilise the latter principle so as to limit the penalties that may be incurred by Community migrants in breach of national immigration

formalities. However, in Sagulo the Court seemed to reject application of this principle even in<sup>48</sup> this particular area in favour of the proportionality principle. Moreover, it was the latter principle which was employed in Bouchereau in 1977.<sup>49</sup>

The Bouchereau Case concerned a Frenchman in the United Kingdom, whose two convictions for drug offences lead the Marlborough Street Magistrates Court to give notice of his intention to recommend him for deportation under section 6(1) of the 1971 Immigration Act. In response, the defendant raised the question of the compatibility of such a recommendation with Community law. In these circumstances, the Magistrate decided to seek a preliminary ruling from the Court of Justice.

The European Court ruled that a public policy measure must be based on

the existence...of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental<sup>50</sup> interests of society.

Accordingly, a public policy measure may now only be adopted against a Community migrant where a "fundamental interest of society" is under threat. Thus the Court has now developed the principle of proportionality so as to provide some definition of the interest which a public policy measure must be adopted to protect. Although the above Case is only of direct relevance for the question of action taken against Community migrants convicted of criminal offences, its implications extend to all public policy measures, including those adopted for political reasons.

Since 1974, therefore, the Court of Justice has utilised Article 3(1) of Directive 64/221 and has developed the principle of proportionality so as to limit significantly the scope of application of public policy. As a result, Member States may now exclude or expel a Community migrant only where he himself constitutes a genuine and sufficiently serious threat to a fundamental interest of society and where such



action is necessary in a democratic society. It is true that these<sup>51</sup> test may need further clarification. Nevertheless, their very existence means that Community law has already gone considerably beyond international law and the municipal law of most States in imposing limits on the right of a State to exclude or expel for political reasons.

However, the Court's reliance on the principle of proportionality rather than that of equality of treatment has sometimes been criticised.<sup>52</sup> Certainly, the Court might have taken the position that the latter principle prohibits the adoption of a public policy measure where a migrant exercises a political freedom enjoyed by nationals of the host Member State. This would mean that a Community migrant would be free to engage in political activity to the same degree as nationals without risk of exclusion or expulsion. Thus the level of protection enjoyed by a Community migrant would depend ultimately on the attitude of national law towards political activity on the part of its own nationals. Since the Member States are liberal democracies, they are likely in general to adopt a lenient attitude towards such activity on the part of nationals. The application of the principle of equality of treatment would mean that Community migrants engaging in political activity could expect to be treated with the same leniency.

Nevertheless, in this situation the level of protection enjoyed by Community migrants would depend on national law. Thus, for example, if the national authorities were to ban a particular organisation and restrict participation by its own nationals, the principle of equality of treatment would leave the Member State concerned free to exclude or expel Community migrants involved with the organisation. An analogous problem occurred in R.v.Saunders in 1979, where the Court of Justice ruled that Community law did not prohibit Member States from imposing residence restrictions on their own nationals in application

of their criminal law. However, as Advocate-General Warner remarked, this did not mean that a Member State could impose such restrictions on Community migrants provided only that its own nationals were treated in the same way. Rather, in dealing with Community migrants Member States had to take into account not only the principle of equality of treatment but also the importance of freedom of movement.<sup>54</sup> Apparently, this freedom might preclude a Member State from imposing on a migrant a residence restriction of the sort which it imposed on its own nationals. In effect, all public policy measures must be adopted in accordance with the jurisprudence of the Court of Justice regarding the proportionality principle.

The Court's reliance on this principle rather than that of equality of treatment in the context of its jurisprudence regarding the exclusion or expulsion of migrants has a similar effect. Even where a Member State prohibits its own nationals from engaging in a particular form of political activity, that State will only be entitled to exclude or expel a Community migrant engaging in such activity if the tests laid down by the Court for determining the legality of public policy measures against Community migrants. In principle at least, the situation could arise where a Member State was precluded from excluding or expelling a migrant for engaging in a form of political activity prohibited in the case of its own nationals.

### Conclusion.

While the Commission seemed eager in 1964 to restrict the scope of application of public policy as far as possible, the Council seemed equally anxious to preserve national sovereignty in this field. Thus the latter rejected the Commission's proposal for including a clear reference to the principle of proportionality in Directive 64/221. Nevertheless, the Court of Justice has since 1974 utilised this principle so as significantly to limit the circumstances in which Member States may employ their right to exclude or expel migrants for the purpose of restricting their political activity. As a result,

considerable progress has been achieved in securing freedom of political activity for Community migrants.

These developments do not, however, necessarily affect the application of provisions such as section 3(2) of the Aliens Restriction (Amendment) Act 1919, which allow for the imposition of criminal sanctions on politically active aliens. In 1975 the Commission did announce that it was investigating the compatibility of this provision with

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Community law but has taken no further action. The view of the United Kingdom Government is that there is no conflict between this provision and Community law, but

that directly effective Community law would prevail even if there was such a conflict. Presumably, then, section

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3(2) of the Act would not be employed so as to limit the trade union rights of Community migrants guaranteed under Article 8(1) of Regulation 1612/68. However, until it is clearly established that such provisions are inapplicable to Community migrants, their freedom of political activity

will remain in some jeopardy. For this reason in its 1977 Resolution<sup>57</sup>

the Parliament called for further legislative action to secure this freedom for Community migrants, and the

Working Group on Special Rights is considering the question of their freedom of expression and association. So far,

however, no concrete proposals for legislative action have emerged. In fact, the Council's attitude to the Commission's

proposal for Directive 64/221 suggests that the former body may be more concerned with the preservation of national sovereignty than with the creation of European citizenship. Thus the Council's readiness to approve the sort of measures desired by the European Parliament may be doubted. At present, the most practical solution will be for the Commission to seek by informal means to obtain assurances from the national authorities that legislation restricting the political activities of aliens will not be applied in the case of Community migrants. This may well have been done when the Commission contacted the United Kingdom about the Aliens Restriction (Amendment) Act 1919.

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- 1 C.J.1964,850.
- 2 Article 1(1). Its scope was extended by Directive 72/194 (J.O.1972, L121/32) to cover migrants remaining in the host Member State after having been employed there under Regulation 1251/70 (J.O.1970,L142/24) and by Directive 75/35 (O.J.1975,L14/14) to cover self-employed migrants staying on under Directive 75/34 (O.J.1975,L14/10). Finally, the Commission's proposal of July 1979 (O.J.1979,C207/14) envisages the extension of Directive 64/221 to Community migrants not covered by the above measures.
- 3 Article 6.
- 4 Article 8.
- 5 Article 9.
- 6 J.O.1962,2861.
- 7 G.Druesne, 'La Reserve d'Ordre Public de l'Article 48 du Traité de Rome', 12 R.T.D.E.(1976)229-258, 235-6.
- 8 E.Forsthoff, Lehrbuch des Verwaltungsrechts, C.H.Beck, Munich, 1968 (2nd edn), 68.
- 9 E.T.S.19.
- 10 8 Euro.Ybk (1980)169.
- 11 C.Maestriperi, op.cit., 174.
- 12 W.R.Bahning, The Migration of Workers in the United Kingdom and the European Community, Oxford Univ.Press, 1972, 140 believes it to be implicit in the Directive that public policy measures may only be adopted on "serious non-economic grounds".
- 13 See, for example, C.Maestriperi, 'Freedom of Establishment and Freedom to Provide Services', 10 C.M.L.Rev.(1973)150-173, 166.
- 14 P.Selmer, 'Die Offentliche Sicherheit und Ordnung als Schranke der Arbeitnehmer-Freizugigkeit gemass Art.48 Abs.3 E.W.G.Vertrag', 20 DoV (1967)328-34, 333.
- 15 T.C.Hartley, op.cit., 160.
- 16 See the Martino Report, P.E.Doc.102/62, 7.
- 17 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R.1337.
- 18 This policy was announced by the Minister of Health in July 1968, 769 H.C.Deb.5s.c.189-191, 25 July 1968.
- 19 Van Duyn v. The Home Office (1974) 1 W.L.R.1107.
- 20 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R.1337, 1350.
- 21 Ibid., 1350.
- 22 Ibid., 1349.
- 23 W.A.O'Dell, 'Labour Law - Common Market - Public Policy', 5 Georgia Journal of International and Comparative Law (1975)589-95, 595 maintains: "The Court in Van Duyn completely failed in establishing judicial standards with which to measure personal conduct in its application to public policy."
- 24 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R.1337, 1351.
- 25 T.C.Hartley, op.cit., 159 criticises the requirement that the national authorities must already have defined their position on the ground that public policy may necessitate swift action to be taken."
- 26 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R.1337, 1351.
- 27 P.Leleux, 'Recent Decisions of the Court of Justice in the Fields of Free Movement of Persons and Free Supply of Services', in European Law and the Individual, op.cit., 79-93, 91 warns that this "breach in the fundamental principle of non-discrimination cannot fail to cause some concern, because it seems to open a gap through which arbitrary decisions of the national competent authorities could easily sweep in."
- 28 K.Hailbronner, 'Die Freizugigkeit im Spannungsfeld zwischen Staatsrason und europaischen Gemeinschaftsrecht', 31 DoV (1977) 857-66, 863.
- 29 Case 67/74 Carmelo Angelo Bonsignore v. Oberstaadtdirektor der Stadt Cologne (1974) E.C.R.297.
- 30 Ibid., 307.
- 31 1975 1 C.M.L.R.472, 491.
- 32 J.M.Evans, Immigration Law, Sweet and Maxwell, London, 1976, 91. But of the remarks of Advocate-General Warner in Case 30/77 R.v. Pierre Bouchereseu (1977) E.C.R.1999, 2024.

- 33 Case 36/75 Rutili (1975) E.C.R.1219.  
 34 Ibid., 1226.  
 35 Ibid., 1225.  
 36 Ibid., 1235.  
 37 Ibid., 1232.  
 38 Ibid., 1232.  
 39 Ibid., 1231.  
 40 E.T.S. 5.  
 41 E.T.S. 46.  
 42 This expression is also used in the Universal Declaration of Human Rights (U.N. General Assembly resolution 217 (III)). See A. Verdoodt, Naissance et Signification de la Déclaration Universelle des Droits de l'Homme, Les Nauwelaerts, Louvain, 1964, 204 et seq. For discussion of this expression in the context of the E.C.H.R. see P.T. Vegleris, 'Valeur et Signification de la Clause "Dans une Société Démocratique" dans la Convention Européenne des Droits de l'Homme', 1 H.R.J. (1968) 219-241.  
 43 Case 4/73 Nold v. E.C. Commission (1974) E.C.R. 491, 507.  
 44 Case 36/75 Rutili (1975) E.C.R.1219, 1232.  
 45 J-V. Louis, 'Mise en Œuvre des Obligations Internationales de la Communauté dans les Ordres Juridiques de la Communauté et de ses Membres', 13 R.B.D.I. (1977) 122-43, 131.  
 46 G. Cohen-Jonathan, 'La Cour de Justice des Communautés Européennes et les Droits de l'Homme', 21 R.M.C. (1978) 74-100, 81.  
 47 Case 118/75 Lynn Watson and Alessandrio Belmann (1975) E.C.R. 1185, 1197.  
 48 Case 8/77 Concetta Sagulo, Gennaro Brenca and Abdelmajed Bakhouch (1977) E.C.R. 1495, 1506.  
 49 Case 30/77 R.v. Pierre Bouchereau (1977) E.C.R. 1999.  
 50 Ibid., 2014.  
 51 R. Kovar, 'La Jurisprudence Relative au Droit d'Etablissement', 105 J.D.I. (1978) 953-66, 956.  
 52 See, for example, D. Wyatt, 'Residence Permits for Nationals of Member States. Note on Sagulo', 2 E.L.Rev. (1977) 445-8.  
 53 Case 1175/78 R.v. Vera Ann Saunders (1979) E.C.R. 1129.  
 54 Ibid., 1143.  
 55 See Commission Reply to Written Question 697/72 by Lord O'Hagan (C.J. 1973, C47/32).  
 56 See the statement of Lord Drumalbyn on behalf of the Home Office (341 H.L. Debs 5s.c. 1208-9, 18 April 1973).  
 57 O.J. 1977, C299/25.

Introduction.

Article 48(2) of the Treaty, it will be recalled, requires that Community migrants enjoy equality of treatment in respect of their conditions of work and employment. This provision would seem to envisage Community migrants being enabled to participate on the same terms as nationals of the host Member State in the process by which the interests of employees are represented and safeguarded. In all the Member States trades unions exist for this purpose. Thus paragraph two would seem to require the granting of equality of treatment to migrants as regards participation in these unions. More particularly, trades unions often appoint representatives on bodies, membership of which constitutes the holding of public office.<sup>1</sup> Consequently, full equality of treatment as regards participation in trades unions would seem to require that Community migrants be allowed to hold certain public offices. Moreover, in the continental Member States various bodies have been established on which the work force as a whole is represented rather than merely the trade unions.<sup>2</sup> Although membership of these bodies cannot be treated as an aspect of participation in trades unions, it may be seen as a condition of work and employment. This is especially true in the case of representative bodies established at the level of the undertaking, since such bodies are closely concerned with matters of work and employment. Thus Community migrants would seem entitled to equality of treatment as regards eligibility for at least some of these representative bodies established independently of the trades unions. Again, however, membership of these bodies may constitute the holding of public office. Therefore, full realisation of the rights envisaged by Article 48(2) of the Treaty would seem to entail granting Community migrants the right to hold certain public offices as trade union delegates or as members of representative bodies elected by the workforce as a whole, particularly where these bodies are

established within the undertaking.

However, Article 48(4), in derogation from paragraph two, allows the Member States to exclude Community migrants from employment in the "public service". The effect of this derogation was to enable the Member States to prohibit Community migrants from taking up employment in such a capacity that they would hold public office. Thus while Article 48(2) might entail granting a Community migrant the right to hold certain public offices in the host Member State, Article 48(4) provides a basis for prohibiting him from doing so. Therefore, when implementing Article 48, the Community institutions have had to take into account the conflicting demands of paragraphs two and four of this provision. Three implementing measures have been enacted, the last one being amended in 1976.

Regulation 15/61

From the beginning, in Regulation 15/61,<sup>3</sup> it was recognised that Article 48(2) of the Treaty concerns the position of Community migrants in relation to both trades unions and other representative bodies.<sup>4</sup> As for their position in relation to the former, Community migrants were under Article 8(2) of the Regulation to enjoy the right to join on the same terms as nationals of the host Member State. The Regulation went no further in this matter, and the drafters were careful not to interfere with the internal organisation of trades unions. The question of other representative bodies was more controversial. The Commission originally proposed granting Community migrants the right to vote and stand as candidates in elections to those established within the undertaking.<sup>5</sup> The issue of eligibility was, however, a sensitive one, upon which the Council was unable to agree.<sup>6</sup> Consequently, in the final version of Article 8(2) only voting rights were stipulated. By virtue of his trade union membership a Community migrant might have been entitled to sit on certain bodies as a trade union



representative, but this matter was left to be determined by the internal rules of the unions and the national laws of the Member States.

A brief examination of the relevant French law will illustrate the limited significance of Regulation 15. Even before its enactment no nationality requirement was imposed upon members of trade unions. The Regulation had little more impact in relation to other representative bodies within the undertaking.<sup>7</sup> The two most important of these are the personnel delegates (délégués du personnel) and the enterprise committees (comités d'entreprise). The function of the former is to bring any grievances the workers may have before the management. The present arrangements result from Loi 46-730 of 16 April 1946.<sup>8</sup> The latter are concerned with the working conditions of employees but also have consultative status in relation to financial decision-making by the management. Their legal basis is Ordonnance 45-289 of 22 February 1945.<sup>9</sup> Prior to the enactment of Regulation 15 the position of migrants was as follows. They could neither vote nor stand as candidates for the committees, subject to an exception enabling them to vote if they held a privileged residence permit or had worked in France for five years.<sup>10</sup> No nationality requirement was imposed on the right to vote for personnel delegates, but migrants were not eligible, unless they held a privileged residence permit.<sup>11</sup> Regulation 15 did not affect the rules for the election of delegates, and the only gain for Community migrants was that they were now able to vote for members of the enterprise committees without having spent five years in France.<sup>12</sup> Thus the first Regulation achieved nothing in terms of trade union rights, and its impact in relation to other representative bodies was minor. As a result of failure to agree within the Council, Article 8(2) of Regulation 15 had been able to add little to the rights of migrants that were already recognised

Regulation 38/64

When Regulation 15 was being drafted, the Council had instructed the Commission to study the question of extending to Community migrants the right of eligibility for representative bodies within the undertaking.<sup>12</sup> It is likely that in the course of the resulting investigation the Commission was impressed by increasing trade union support for such a reform.<sup>13</sup> However, during the protracted negotiations for a second Regulation the West German delegates objected that certain representative bodies exercise certain legislative and political functions. Membership of such bodies would, of course, constitute the holding of public office.<sup>14</sup> Therefore, it seems that the Germans at least were opposed to Community migrants holding public office as members of representative bodies, though it may be that they only wished to exclude migrants from bodies with <sup>significant</sup> legislative or political functions.

The Commission responded by proposing that in view of the functions which were exercised by representative bodies only those Community migrants who had lived in the host Member State for three years<sup>15</sup> should be entitled to eligibility for representative bodies. By implication, then, it would seem that the Commission did not intend the Regulation to allow for the complete exclusion of Community migrants from membership of bodies involving the holding of public office, but merely to subject their right to do so to a three years residence condition.

The Council reinforced this restriction with a requirement that the migrant must also have worked in the same undertaking for at least three years. As a result, Article 9(2) of Regulation 38/64,<sup>16</sup> as it finally emerged, provided for Community migrants to enjoy equality of treatment as regards participation in representative bodies within the undertaking subject to a two-fold condition. The effect of Article 9(2) in France was that a

Community migrant who could satisfy the two conditions above was eligible to become a personnel delegate or a member of an enterprise committee on the same terms as nationals of the host country. One commentator has complained that a large number of migrants spend less than three years in the host country for reasons of personal convenience or because of the terms of their contract and, consequently, would be unable to benefit from Article 9(2).<sup>17</sup>

In addition to reinforcing the Article 9(2) restriction, the Council also amended the Preamble to the Regulation. The Preamble in the Commission's proposal had attributed the reason for the residence condition to the nature of some of the functions exercised by some representative bodies. This clause may have meant that the condition was included because membership of some representative bodies involved the holding of public office. Thus the clause in the Commission's proposed Preamble could have been employed as a basis for arguing that Article 9 entitled Community migrants to hold public office as members of representative bodies within the undertaking, provided that they satisfied the restriction in paragraph two of this provision. The Council, however, replaced this clause, and the final version of the Preamble to the Regulation gave a different reason for the two-fold condition stipulated in Article 9(2). It stated that this condition was necessary to ensure that a candidate would possess the requisite qualities of permanence in and experience of, employment in the host Member State. Thus the Council may have wished to remove any possible implication that Regulation 38/64 narrowed the scope of the derogation contained in Article 48(4) of the Treaty so as to allow Community migrants to hold certain public offices, provided only that they satisfied the three years condition.

Regulation 1612/68

A number of important developments took place four years later when Regulation 1612/68<sup>18</sup> was enacted. In relation to representative bodies within the undertaking the three years restriction was abolished by Article 8(1). This reform was implemented in French law by Loi 72-517.<sup>19</sup>

Article 2 and 3 respectively removed any requirement of French nationality for members of an enterprise committee or for personnel delegates. A source of possible discrimination, however, still existed.

Article 3 of Regulation 1612/68 permits the retention of discriminatory conditions that relate to "linguistic knowledge required by reason of the nature of the post to be filled". In France a personnel delegate or member of an enterprise committee was required to be able to "read and write".<sup>20</sup> The Mulhouse Tribunal d'Instance had

already decided on 9 July 1968 that it was literacy in the French language that was needed.<sup>21</sup> Thus a number of Italian workers were found ineligible to become personnel delegates because of their inability to satisfy this condition. Although this judgment was criticised by some commentators,<sup>22</sup> it subsequently gained legislative approval when Loi 72-517 was passed. Article 2 and 3 respectively stipulated that a worker standing for election as a member of an enterprise committee or personnel delegate must be able to read and write in French.<sup>23</sup> The rigorousness of this requirement was later moderated somewhat by Loi 75-630 of 11 July 1975,<sup>24</sup> which insists on no more than the ability to "express oneself" in French. It seems then that French law has provided a reasonable solution to the problem.

However, the scope of Article 8(1), as far as migrant participation in representative bodies is concerned, is still subject to two limitations. Firstly, the suggestion of the European Parliament<sup>25</sup> and the Economic and Social Committee<sup>26</sup> to the effect that Community migrants be granted eligibility to such bodies established at board level was rejected. In France an enterprise committee may designate two of its members to sit on the boards of public companies (sociétés anonymes).<sup>27</sup> Because this proposed amendment to Article 8(1) was not accepted, the right of migrants to participate at this level on the same terms of nationals is not guaranteed by Community law.<sup>28</sup> Secondly, the clause in Article 8(1) dealing primarily with trade union rights allows migrants to be prohibited from participation in the administration of bodies governed by public law or holding appointments governed by public law. This exclusion will be examined in more detail below. However, it may be remarked at this stage that as a result of this clause migrant participation in certain representative bodies within the undertaking may be restricted.

In relation to trade union rights, the progress achieved by Regulation 1612/68 was similarly imperfect. Article 8(1) states that a Community migrant

shall enjoy equality of treatment as regards membership of trades unions and the exercise of rights attaching thereto, including the right to vote.

This provision certainly seems to represent a considerable advance on the two earlier Regulations, which merely dealt with the question of trade union membership. Since the right to vote is explicitly protected, the rights "attaching" to membership must go beyond this. In Rutili, for example, the Commission argued that Community migrants were entitled to "make full use of collective bargaining rights, including, in particular, the right to take action in case of dispute and the right to strike".<sup>29</sup> One might also expect that they would be entitled to take up positions within a trade union and to represent their union on bodies to which the trades unions send representatives. However, such a conclusion would have to take into account three limiting factors.

Firstly, the lack of clarity in Article 8(1) was regarded as a possible source of difficulties for migrants in France. Since 1968 French trade unions have been able to choose trade union delegates (delegues syndicales), whose function is to promote union activities in the undertaking. Article 10 of Loi 68-1179 of 27 December 1968,<sup>30</sup> even though it was passed after the enactment of Regulation 1612/68, only permitted aliens to become delegates on the basis of a treaty providing for this and on condition of reciprocity. In May 1971 the French Cour de Casation heard a case<sup>31</sup> in which a number of Algerian migrants claimed that in their respect the two requirements were satisfied by virtue of a Franco-Algerian Agreement of 19 March 1961.<sup>32</sup> Article 7 of this

Agreement provided for Algerians to enjoy "les mêmes droits que les nationaux français, à l'exception des droits politiques". Consequently, they argued that they were entitled to become trade union delegates. This plea was, however, unsuccessful because of the rigorousness with which the Cour applied the reciprocity condition in Article 10. In fact, the Cour demanded proof that French migrants in Algerian would be entitled to become trade union delegates there.<sup>33</sup> Therefore, Community migrants who wished to be delegates might have encountered two obstacles. The wording of Article 8(1) of Regulation 1612/68 is not explicit and might not have satisfied an unsympathetic French court. Moreover, French judges might have demanded proof that French nationals were entitled to take up such posts in all the other Member States of the Community. Thus Article 8(1) did not, it seems, adequately guarantee the right of Community migrants to become trade union delegates in France. It is true that in the parliamentary debates preceding the enactment of the 1961 Loi the Minister of Social Affairs stated that Community migrants would not in practice be excluded.<sup>34</sup> However, such a statement did not provide a very firm basis on which a Community migrant could claim the right to take up such a post. In fact, it was only seven years after the enactment of Regulation 1612/68 that a satisfactory solution was found.<sup>35</sup> Loi 75-630 abolished any nationality requirement for trade union delegates. It will be noted that the problem was solved by national not Community law.

Secondly, when Regulation 1612/68 was enacted, the Council agreed, at French insistence, that Member States would be permitted to exclude Community migrants from management or administrative posts in a trade union.<sup>36</sup> The French attitude resulted from the fact that their national law, unlike that of

all the other Member States, prohibited aliens from taking up such posts.<sup>37</sup> The situation changed, however, when Loi 75-630 was passed. The new Loi permits aliens to take up such posts. For all except those from Community Member States there is a condition imposed of five years prior employment in France.<sup>38</sup> The Commission now acted swiftly and in September 1975 sent a Communication to the Council, which stated:

steps should be taken, in order to ensure legal certainty for those persons affected, to consolidate at Community level what Member States have already acknowledged and to amend Article 8 of Regulation 1612/68 by putting an end to the ambiguous situation resulting from its present wording.<sup>39</sup>

Thus, following a Commission proposal to the Council, Regulation 312/76<sup>40</sup> was enacted. This measure amends Article 8(1) so as to grant expressly to Community migrants the right of equality of treatment as regards eligibility to posts in the management or administration of trades unions. Council obedience to the lowest common denominator principle meant that the right could not be guaranteed by Community law, until the sole Member State that excluded migrants from such posts had reformed its own national law. Therefore, it was effectively because Loi 75-630 was passed that Community migrants were enabled to become trade union delegates and take up posts in the management or administration of a trade union on the same terms as nationals of the host Member State. The Regulations enacted by the Council played only a minor part in this achievement.



After granting trades union rights to Community migrants Article 8(1) of Regulation 1612/68 goes on with a clause to the effect that a migrant

may be excluded from taking part in the administration of bodies governed by public law and from holding an office governed by public law .

This clause was not included in the original proposal of the Commission<sup>41</sup> but was added by the Council apparently on French insistence.<sup>42</sup> "Public law" is originally a civil law term denoting the law in a given country which applies to the State, its organs and its activities.<sup>43</sup> Thus a body or office "governed by public law" will be one which involves the holding of public office. Since Article 48(4) of the Treaty was intended to allow for the exclusion of Community migrants from such offices, the Article 8(1) derogation clearly has some legal basis in the Treaty itself. However, by employing the "public law" criterion in Article 8(1) of the Regulation the Council seems to have shown a determination to leave each Member State to determine the scope of the derogation. For the question whether a body or office is "governed by public law" can only be answered by reference to the national legal system. The consequence of the Council's approach may be

illustrated by reference to the relevant French law.

Two representative bodies established within the undertaking may be noted. First, miners elect mining delegates (delegates mineurs), who are responsible for health and safety in the mines and are empowered to make inspection visits for this purpose.<sup>44</sup> These delegates act independently of their employer and are paid from public funds. Accordingly, they are regarded in France as being governed by public law.

Secondly, in industrial undertakings where fifty or more (or undertakings of other kinds where 200 or more) persons are employed health and safety councils (comites d'hygiene et securite) are established to represent workers. The functions of these councils include holding enquiries into serious accidents in the undertaking and ensuring compliance with the relevant legislation.<sup>45</sup> Like mining delegates, these councils are governed by public law.

Workers are also represented on several public law bodies in France established beyond the level of the undertaking, such as the Conseils des Prud' hommes or labour courts.<sup>46</sup> Often the worker-representatives on these bodies are appointed by their trade unions. For example, union representatives sit on the Economic and Social Council (Conseil économique et social).<sup>47</sup> The French Constitution of 1958 confers on this Council an important consultative role in the legislative process.<sup>48</sup> Clearly, then, bodies such as the Economic and Social Council exercise legislative and political functions and are governed by public law.

Community migrants would presumably be eligible to become mining delegates or members of health and safety councils, since they are representative bodies established within the undertaking, and to act as trade union delegates on the Economic and Social Council, were it not for the derogation contained in Article 8(1) of Regulation 1612/68. All four of the above bodies, however, are governed by public law and thus fall within the scope

of the derogation. Consequently, Community migrants may be excluded from all three. Indeed, Article 3 of Loi 71-1131 of 31 December 1971<sup>49</sup> expressly requires mining delegates to be French. Prior to 1971 and prior to the enactment of Regulation 1612/68 Community migrants were permitted to become mining delegates under a Circulaire of 1967. It is conceivable that the French felt able to enact Article 3 of the above Loi because of the derogation included in Article 8(1) of Regulation 1612/68.

In the case of the Economic and Social Council such an exclusion may be readily justified. For it is arguable whether the equality of treatment envisaged by Article 48(2) of the Treaty was intended to cover membership of such a body.<sup>50</sup> On the other hand, the derogation in Article 8(1) of the Regulation may be criticised for allowing the prohibition of Community migrants from becoming mining delegates or sitting on health and safety councils, both of which are closely concerned with the working conditions of employees. In laying down a derogation that has this effect, the Council has seemingly demonstrated a commitment to ensuring that the scope of the derogation contained in Article 48(4) of the Treaty remains broad and may be determined by the individual Member States. However, in doing this the Council failed to balance the competing demands of paragraphs two and four of Article 48 and to take account of the argument in favour of Community migrants holding certain public offices in the host Member States.

### Subsequent Developments

Some commentators who at the time of its enactment were critical of the derogation contained in Article 8(1) of Regulation 1612/68 drew a certain consolation from Article 8(2) of the same instrument.<sup>51</sup> Article 8(2) provided for a review of the situation and called upon the Commission to submit a new proposal within two years. Progress, however, was slow. By 1973 the Commission had to come to the conclusion that reform in this area would not be easy, since the large number and variety of bodies covered by the derogation raised "exceptionally complex problems not confined to legal matters alone"<sup>52</sup> This statement is presumably an acknowledgement of the fact that the derogation covers bodies ranging from those closely concerned with the working conditions of employees to those of considerable political significance. However, in February 1974 an important Case, Giovanni Maria

Sotgiu v. Deutsche Bundespost, came before the Court of Justice. This Case raised the question whether the West German post office could discriminate against Community migrants in the matter of separation allowances. The post office argued that Sotgiu, an Italian migrant, was employed in the "public service", so that the derogation contained in Article 48(4) of the Treaty permitted them to discriminate against him. Thus the scope of the Article 48(4) derogation came under discussion. Both the Commission and Advocate-General Mayras took the view that the term "public service" should be given a Community meaning independent of national law. <sup>54</sup> More particularly, the Commission argued that the derogation only covered those employees who

have to take account of the national interests with regard to secret matters or matters of public security. <sup>55</sup>

The Court of Justice showed some sympathy with the view of the Commission and the Advocate-General. The Court emphasised that freedom of movement for persons constituted a fundamental principle of the Community. Thus the Article 48(4) derogation should be strictly interpreted. <sup>56</sup>

Moreover, the Court went on to criticise the use of the "public law" criterion for determining the legal position of a Community migrant. The Court pointed out that designations such as this can be varied at the whim of the national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law. <sup>57</sup>

Therefore, the Court of Justice not only advocated a strict interpretation of the derogation contained in Article 48(4) of the Treaty but was also reluctant to see its scope determined by the national legal systems.

This Case is of two-fold significance for the matter under discussion in this part of the present Chapter. First, the Court has supported the Commission's view that Article 48(4) of the Treaty, the basis for the derogation contained in Article 8(1) of Regulation 1612/68, should be strictly interpreted. It may be, then, that the derogation contained in Article 8(1) of the Regulation is based on a broader interpretation of Article 48(4) of the Treaty than is consistent with the jurisprudence of the Court of Justice.

Secondly, not only did the Commission call in this Case for the derogation contained in Article 48(4) of the Treaty to be given a Community meaning, but also the Court expressly criticised the use of the public law criterion as a means of determining the legal position of Community migrants. Thus this ruling does not support the Council's policy of giving effect to the Article 48(4) derogation in the context of the trade union and related rights of Community migrants by use of the public law criterion. On both these grounds, therefore, the Sotgiu ruling would suggest that the derogation contained in Article 8(1) of Regulation 1612/68 should be reconsidered.

Certainly, the Commission may have been encouraged by this ruling and the implicit endorsement which its view received from the Court of Justice. For the Commission's Draft Action Programme in Favour of Migrant Workers and their Families of December 1974<sup>58</sup> called for the elimination of

obstacles that still exist in certain Member States with regard to the exercise of trade union rights, including the right to participation as a trade union representative in the management of public law bodies and for the exercise of public law office. <sup>59</sup>

Thus the Commission explicitly sought the granting to Community migrants of the right to hold public office in certain cases. As for the legal basis for such action, the Parliament<sup>60</sup> and the Economic and Social Committee<sup>61</sup> advocated resort to Article 49 of the Treaty. The Commission, in turn, felt that this matter went beyond Article 48<sup>62</sup> and did not clearly specify which Treaty provision it hoped to employ. However, in November 1975 Commissioner Brunner suggested that resort might be had to Article 235 of the Treaty<sup>63</sup> but did not explain why resort to this provision might be suitable.

( In contrast, the Council showed little interest in such action. The Council Resolution of 9 February 1976 on the Action Programme in Favour of Migrant Workers and their Families<sup>64</sup> was much more conservative than the Commission's Draft. The Council went no further than to instruct the Commission to act so as to

seek appropriate solutions with a view to eliminating progressively restrictions on the rights of workers who are nationals of other Member States....as may still exist under Community Regulations in force;

This Resolution does not refer expressly to the issue of participation in bodies where the holding of public office is involved. It does not seem, then, that the Council shared the Commission's desire for reform in this area.

The Council's attitude was emphasized in the same month, when

Regulation 312/76<sup>65</sup> was enacted. As already mentioned, this Regulation amended Article 8(1) of Regulation 1612/68 so as expressly to grant to Community migrants the right to take up posts in the administration or management of trades unions. Of more significance for the present discussion, however, is that the new Regulation also expressly "deleted" Article 8(2) of Regulation 1612/68. This would suggest that the Council does not favour reconsideration, at least for the time being, of the derogation contained in Article 8(1) of Regulation 1612/68.

In spite of this, the Commission stated that it intended to respect the review obligation which had been contained in Article 8(2) of Regulation 1612/68.<sup>66</sup> Indeed, the Commission later announced that it would submit a relevant proposal in the second half of 1978.<sup>67</sup> However, this plan seems to have been dropped.<sup>68</sup> Instead, the Commission now confines itself to carrying out a detailed examination of the matter,<sup>69</sup> and for the moment accepts that Article 8(1) of Regulation 1612/68 permits the exclusion of Community migrants from holding public office as defined by national law either as union representatives or as members of other representative bodies. Thus in March 1979 the Commission accepted that Loi 79-44 of 18 January 1979,<sup>70</sup> which prohibits migrants in France from becoming members of labour courts (Conseils des Prud'hommes), was not "formally in breach of" Regulation 1612/68.<sup>71</sup>

### Conclusion.

The Council has adopted a much narrower approach to the implementation of Article 48 than that favoured by the other Community institutions. Difficulty in obtaining consensus within the Council delayed the granting of eligibility to any representative bodies within the undertaking by seven years. There has also been a



tendency for the relevant Regulations to be enacted in accordance with the lowest common denominator principle. Thus in 1968 equality of treatment as regards participation in the administration and management of trade unions was not granted by Regulation 1612/68, because in France such posts were reserved for nationals. Moreover, lack of clarity in the wording of Article 8(1) of this Regulation raised doubt as to whether Community migrants were entitled to become trade union delegates in France. These two problems were eventually solved as a result of developments at the national rather than Community level. Even now, the scope of Article 8(1) remains restricted because the Council insisted on confining it to representative bodies within the undertaking. Of most relevance to the present work, however, is the Council's attitude to Article 48(4). While the other institutions have advocated restricting this derogation somewhat so as to allow migrants to hold certain public offices as union representatives or as members of other representative bodies within the undertaking, the Council has insisted on fully preserving this derogation. In fact, by employing the public law criterion in Article 8(1) of Regulation 1612/68 the Council has sought to ensure that the scope of this derogation will be determined by national law. Thus the Council has opposed the efforts of the other institutions to develop the principle of equality of treatment enshrined in the Treaty so as to grant migrants a limited right of access to public office and has preferred to leave the matter in the hands of the individual Member States. This preference presumably results from the fact that the Council regards the issues involved as being too complex and sensitive to be tackled through the Community's legislative process.

Nevertheless, in the Sotgiu ruling the Court of Justice demonstrated that it favoured a strict interpretation of Article 48(4) of the Treaty. Since the derogation in Article 8(1) of Regulation

1612/68 is based on this provision of the Treaty, it is likely that the Court would also favour a strict interpretation of the Article 8(1) derogation. More particularly, the Court disapproved of the use of the public law criterion as a means of determining the legal position of migrants. Therefore, it is possible that in an appropriate Case the Court may interpret the derogation in Article 8(1) of Regulation 1612/68 in such a way as to enable Community migrants to hold certain public offices as union representatives or as members of other representative bodies within the undertaking. Thus progress may result from judicial rather than legislative action by the Community institutions.

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- 1 On trade union representation on Government bodies in the United Kingdom see M. Stewart, Employment Conditions in Europe, Gower Press, London, 1976 (2nd edn), 172.
- 2 See 'Rights of Worker Representatives in Europe', E.I.R.R. (1978) 19-27, 23-4, where a table is given which indicates the bodies established at the level of the undertaking in all Member States (excluding the Irish Republic and Luxembourg) and Sweden.
- 3 J.O. 1961, 1073.
- 4 See Bertrand Report, P.E. Doc. 5/57, 25.
- 5 J.O. 1960, 1389.
- 6 The Germans and the Dutch, in contrast to the Italians, took a restrictive view. See L. M. Mebs No. 32, 117-121, 13 October 1960.
- 7 For details of the representative bodies that have been established in France at the level of the undertaking see D. Martin, 'Les Systemes de Negotiation et de Representation dans l'Entreprise', Droit Social (1976) 92-101.
- 8 J.O.R.F., 17 avril 1946, p. 3224.
- 9 J.O.R.F., 23 fevr. 1945, p. 954.
- 10 Articles 7 and 8 of Ordonnance 45-289 (supra note 9) and Article 10 of Décret 46-1340 of 5 June 1946 (J.O.R.F., 7 juin 1946, p. 5018).
- 11 Articles 6 and 7 of Loi 46-730 (supra note 8) and Article 9 of Décret 46-1340 (supra note 10).
- 12 See the Preamble to Regulation 38/64 (J.O. 1964, 965).
- 13 This support was noted on two occasions by the Social Affairs Committee of the European Parliament. See the Rubinacci Report, P.E. Doc. 86/61, Annex, 7 and the Storch Report, P.E. Doc. 118/64, 7.
- 14 See K.A. Dahlberg, 'The E.E.C. Commission and the Politics of the Free Movement of Labour', 6 J.C.M.S. (1967+8) 310-33, 318 et seq.
- 15 J.O. 1963, 1291.
- 16 J.O. 1964, 965.
- 17 R. Desclotres, The Foreign Worker, Adaptation to Industrial Work and Urban Life, O.E.C.D., Paris, 1976, 120.
- 18 J.O. 1968, L257/2.
- 19 J.O.R.F., 28 juin 1972, p. 6622.
- 20 Article 8 of Ordonnance 45-289 (supra note 9) and Article 7 of Loi 46-730 (supra note 8).
- 21 Dall. 1969, J. 355.
- 22 See G. Lyon-Caen, 'La Libre Circulation des Travailleurs (reglement et directive des Communautés europeenes du 15 octobre 1968)', La Semaine Juridique, Jurisclasseur Périodique (1969) 2222 and R. Bonnet, 'L'Europe ou Travail Est-Elle Réalisée?' Droit Social (1969) 160-171, 164.
- 23 G. Verbunt, 'Le Statut des Travailleurs Immigrés en France', Problemes Economiques (1974) 7-14, 10 complains: "Qui determinera et sur quels criteres si tel ou tel sait lire et ecrire le français? La clause pourra se reveler restrictive." See also L. Mincas, Les Travailleurs Etrangers en France, Pas du Seuil, Paris, 1973, 146.
- 24 J.O.R.F., 13 juill., p. 7236.
- 25 J.O. 1967, 208/9.
- 26 J.O. 1967, 298/7.
- 27 Ordonnance 45-289 (supra note 9).
- 28 R. Bonnet, *id op.*, 160 is particularly critical of the fact that Community migrants are not guaranteed the right to participate at this level.
- 29 Case 36/75 Rutili (1975) E.C.R. 1219, 1225.
- 30 J.O.R.F., 31 déc., p. 12403.
- 31 99 J.D.I. (1972) 578.
- 32 J.O.R.F., 20 mars, p. 3019.
- 33 See J. Mincas, *op. cit.*, 148 for a criticism of this ruling. But cf. J-F. Lachaume, 'L'Acces des Travailleurs Algeriens aux Fonctions de Représentants Elus du Personnel ou de Delegates Syndicaux dans les Entreprises', Droit Social (1972) 300-310, 310.
- 34 N. Notter and P. Brunini, 'Le Statut des Travailleurs Etrangers en Allemagne Federale et en France', 13 R.L.I.C.L. (1973) 209-248, 243.

- 35 Note 24 supra.
- 36 See Commission Communication to the Council Regarding a Proposal to Amend Regulation 1612/68 (COM(75) 455,1).
- 37 Code du Travail, Liv. III (J.O.R.F., 28 fevr. and 1 mars 1927), Article 4.
- 38 Note 24 supra, Article 4.
- 39 Note 36 supra.
- 40 O.J.1976, L39/2.
- 41 J.O.1967, 145/11.
- 42 Agence Europe 29 July 1968 and 30 July 1968.
- 43 H. Capitant, Vocabulaire Juridique, P.U.F., Paris, 1936, 215 defines it as "droit qui regle l'organisation de l'Etat et rapports dans lesquels il entre en jeu".
- 44 Décret 74-274 of 1 April 1974 (J.O.R.F., 5 avr., p. 3837).
- 45 Décret 47-1430 of 1 August 1947 (J.O.R.F., 2 août, p. 7553). For the functions of these councils see P. Suet, L'Application Pratique de la Legislation du Travail dans les Entreprises, L.G.D.J., Paris, 1970 (2nd edn), 170-2.
- 46 Loi 79-44 of 18 January 1979 (J.O.R.F., 19 janv., p. 163).
- 47 Ordonnance 58-1560 of 29 December 1958 (J.O.R.F., 30 déc., p. 12053), Article 7.
- 48 J.O.R.F., 5 oct., p. 9151, Articles 69 and 70.
- 49 J.O.R.F., 5 janv., p. 139.
- 50 See the Opinion of the Economic and Social Committee on the Commission's draft Action Programme in Favour of Migrant Workers and their Families (O.J.1976, C12/4).
- 51 See, for example, R. Bonnet, *id op.*, 24.
- 52 See Commission Reply to Written Question 29/73 by Messrs Girardin and Pisoni (O.J.1973, C67/66).
- 53 Case 152/73 (1974) E.C.R.153.
- 54 *Ibid.*, 158 and 169.
- 55 *Ibid.*, 159-60.
- 56 *Ibid.*, 162.
- 57 *Ibid.*, 162.
- 58 COM(74)2250.
- 59 *Ibid.*, 12.
- 60 See the Parliamentary Resolution of 13 November 1975 (O.J.1976, C280/43).
- 61 Resolution of 30 October 1975.
- 62 See the statement of Commissioner Brunner to the European Parliament (E.P. Debs No. 196, 252, 13 November 1975) and Commission Proposal for an Amendment to Regulation 1612/68 (COM(75) 455, 2).
- 63 E.P. Debs No. 196, 252, 13 November 1975.
- 64 O.J.1976, C34/2.
- 65 O.J.1976, L39/2.
- 66 Commission Reply to Written Question 257/76 by Mr Della Briotta (O.J.1976, C244/17).
- 67 Programme of the Commission for 1978, 34.
- 68 Twelfth General Report 1978, 127.
- 69 See Commission Reply to Written Question 371/78 by Mr Pisoni (O.J.1978, C245/20).
- 70 J.O.R.F., 19 janv., p. 163.
- 71 See Commission Reply to Written Question 984/78 by Mr Porcu (O.J.1978, C113/14).

Chapter Seven   Electoral Rights

Introduction.

The grant of electoral rights to Community migrants clearly raises complex issues of considerable constitutional and political significance for the Member States. Moreover, the determination of the Council to preserve the right of Member States to exclude migrants from holding public office as members of such politically insignificant bodies as health and safety councils in France suggests that the Council would be reluctant to approve proposals regarding electoral rights. It is presumably for such reasons that the grant of electoral rights at the national parliamentary level has not yet been seriously contemplated by the Community institutions. However, efforts have been undertaken to grant Community migrants the right to participate fully in direct elections to the European Parliament and in local elections in the host Member State.

Participation in Direct Elections in the Host Member State.

Under Article 138 (3) of the Treaty the European Parliament itself is to draw up proposals for the holding of direct elections "in accordance with a uniform procedure in all Member States". Naturally, any uniform procedure governing direct elections may be expected to stipulate those persons who will be entitled to participate in these elections.

This was recognised in the proposals drawn up by the European Parliament in the form of a Draft Convention drawn up in 1960.<sup>1</sup> For the purposes of the present Chapter, these proposals were notable in two respects. First, Article 11 (2) of the Draft provided that Community migrants should be entitled to vote in their Member State of origin. Article 11 (3), in turn, stated that where such migrants were also permitted to vote in the host Member State, they could not vote twice. These two paragraphs seem to indicate a preference for enabling migrants to vote in their Member State of origin. Nevertheless, while they are not expressly granted the right to vote in the host Member State, the prohibition of double-voting contained in Article 11 (3) suggests that such a possibility was at least contemplated. Certainly, the Political Affairs Committee of the European Parliament recognised that the grant of such a right would be "d'un grand avantage psychologique"

for the cause of European integration.

Secondly, Article 12 granted Community migrants the right to stand as candidates in the host Member State on the same terms as nationals of that State. This provision was described as "l'expression d'une volonté politique indubitablement européenne" by the Political Affairs Committee.<sup>3</sup> Certainly, this arrangement would favour European integration. Moreover, its practical consequences for political life in the Member States would not, one might think, have been serious enough to render this innovation unacceptable to them. Only migrants who were very well established and fully integrated in the host Member State could hope to command enough popular support to win a seat in the European Parliament.<sup>4</sup> Finally, while constitutional amendments would be necessary in some Member States before migrants could participate in domestic elections, the grant of rights to participate in direct elections could be granted by ordinary legislation. Therefore, the Parliament's proposals might have been expected to win Council approval with little difficulty.

In fact, however, the Council proved unable to agree on the Draft Convention.<sup>5</sup> Consequently, in March 1969 the Parliament resolved to draw the Council's attention to the possibility of legal action being taken under Article 175<sup>6</sup> for the latter's failure to act so as to "lay down" the Parliament's proposals to the Member States in accordance with Article 138(3). In response, the Member States at the Hague Summit in December 1969 announced<sup>7</sup> that the Council was still studying the Parliament's proposals. Nevertheless, it was not until December 1974 that further progress was made. At their Summit Conference on 9-10 of this month the Member States called for direct elections to be held as soon as possible.<sup>8</sup>

By now, a new set of proposals was already being prepared by the Parliament, and a new Draft Convention was drawn up in January 1975. The Parliamentary Political Affairs Committee described the grant of electoral rights to Community migrants as

a fundamental issue of some importance both for legitimation of the Parliament and for the rights of those E.E.C. citizens residing and working in other Member States.

On the assumption that this statement reflected the attitude of the European Parliament towards the grant of such rights one might have expected an approach in the 1975 Draft similar to that in its precedent. However, the question of the participation in these elections by Community migrants was felt to be one of some sensitivity for the Council. Therefore, in the hope of securing a greater degree of success for the 1975 Draft than had been enjoyed by the earlier version and to maximise the possibility of Council acceptance of the new Draft, the Parliament decided to include no reference to this question.

Under Article 7(1) of the Draft matters of electoral procedure were to be left to the national law of the Member States. This approach was also favoured by the Member States themselves. At their Summit Conference in December 1975 they decided that the question of migrant participation in direct elections was a matter to be determined by national law. However, Article 7(2) of the Draft did provide for the new directly elected Parliament to draw up rules to govern the procedure for future elections. Thus the Parliament seems to have accepted that questions such as that



of migrant participation were best left until after the first direct elections had been held.

The desire of the Parliament to avoid this question at this stage was emphasized on 15 September 1976, when Mr Bersani, an Italian M.E.P., planned to propose amending the Draft Convention so as to make "practical provision" for Community migrants to vote in direct elections in the host Member State.<sup>13</sup> However, in response to the views expressed by "such a large majority of the House", Mr Bersani agreed to withdraw his proposal so as to avoid the possibility of prejudicing Council acceptance of the Draft Convention.<sup>14</sup>

Therefore, when the Council gave its approval to the Draft Convention on 20 December 1976 in the form of the Act on Direct Elections,<sup>15</sup> Community migrants were granted no right to vote or stand in direct elections in the host Member State. However, Article 8 of the Act, which was added by the Council, provided for the prohibition of double voting. This prohibition must have been included because some Member States had expressed an intention to allow their nationals abroad to vote at home, while others intended to extend the franchise to Community migrants resident on their territory. Subsequently, the Council went further. It was decided (in an unpublished agreement) that any Member State would be allowed, on request, to organise electoral procedures for its nationals resident in another Member State.<sup>16</sup> The Council, then, presumably felt that if Community migrants were to participate at all in these elections, it should be in the Member State of origin.<sup>17</sup> Certainly, no reference was made to the question of their participation in the host Member State. Indeed, the Council warned the Parliament that any intervention by the latter in this area could delay the holding of the elections.<sup>18</sup>

As a result of the Council's policy, each Member State was for

the moment left free to decide whether or not to grant Community migrants the right to participate in direct elections in the host country, provided only that dual voting could not be permitted. In these circumstances, the Member States proved on the whole reluctant to grant such rights to migrants. Subject only to the following three exceptions, Community migrants were denied the right to participate in direct elections in the host country. First, Irish citizens resident in the United Kingdom were already entitled to participate fully in domestic Parliamentary and local government elections.<sup>19</sup> This entitlement was simply extended by the European Assembly Elections Act 1978 so as to cover direct elections.<sup>20</sup> A similar privilege was not granted to migrants from other Member States partly because of the practical difficulties involved in doing so.<sup>21</sup> It was also felt that if migrants had sufficient connection with the United Kingdom to justify the grant of such rights, they would have become naturalised and so qualified for the franchise in the normal way.<sup>22</sup> However, the then Home Secretary, Roy Jenkins, did state that once the first direct elections had been held, the arrangements might be "refined" so as to enable migrants to participate in future elections.<sup>23</sup> This remark suggests that, like the European Parliament itself, those in the Member States who felt some sympathy for the idea of migrant participation regarded this as an issue to be subordinated to the need to ensure that direct elections should be held at all. Secondly, the Irish European Elections Act 1977 permitted Community migrants resident in the Republic to vote there.<sup>24</sup> Thirdly, Community migrants were permitted to exercise voting rights in direct elections in the Netherlands.<sup>25</sup> Apart from these three exceptions, no provision was made for Community migrants to participate in direct elections in the host Member State.

The Council, therefore, has been happy to leave the question of migrant participation in direct elections to the Member States themselves. Consequently, the only achievements in this area have

resulted from the positions unilaterally adopted by three Member States. These achievements have been far more limited than those envisaged by the European Parliament in its proposal of 1960.

It has, however, been argued that failure to allow a Community migrant to participate in these elections may render a Member State in breach of Article 7(1) of the Treaty.<sup>26</sup> If in an appropriate case the Court of Justice were to accept this argument, the Council's preference for leaving the matter in the hands of the individual Member States might be frustrated. However, in 1974 in Walrave and Koch<sup>27</sup> - the Case of the cyclists' pacemaker - the Court ruled that Article 7(1) of the Treaty only prohibited discrimination in the economic field.<sup>28</sup> Therefore, it is doubtful whether the Court would find that this provision was relevant to the question of electoral rights.

Nevertheless, the question will presumably be re-examined by the new directly elected Parliament, when it comes to draw up proposals for a uniform electoral procedure in accordance with Article 7(2) of the Act on Direct Elections. The new Parliament may well be rather more forceful than its predecessor, which lacked a direct popular mandate. Its proposals may, therefore, be expected to approach the question of migrant participation in direct elections in such a way as to pose a challenge to the Council's preference for reserving the question for the individual Member States themselves.

Participation in Local Elections in the Host Member State.

During the 1970s the question of migrant participation in local elections in the host Member State also became prominent. As explained in Chapter Three, Commission President Mansholt originally proposed granting local electoral rights in April 1972.<sup>29</sup> This proposal won express support from the Belgian<sup>30</sup> and Italian<sup>31</sup> Prime Ministers at the Summit Conference in October 1972. It may well have been this support which encouraged the Commission to refer to the matter in its

Guidelines For a Social Action Programme of 19 April 1973. This document sought concrete action from the Community institutions by 31 December at the latest to promote migrant participation in the economic, social and political life of the host Member State.<sup>32</sup>

Participation in political life was presumably intended to encompass the exercise of certain electoral rights. It is notable that the Commission envisaged such rights being granted through action by the Community institutions.<sup>33</sup> The Commission continued to pursue this approach, and its Draft Social Action Programme of 24 October 1973 announced that an "initial programme with regard to migrant workers"<sup>34</sup> would be drawn up to deal with such matters.

This programme was submitted to the Council in December 1974 as the Draft Action Programme in Favour of Migrant Workers and Their Families.<sup>35</sup> It stated:

As regards nationals of Member States resident in another Member State denial of civic and political rights seems to be inconsistent with the spirit of the principle of the free movement of persons and with the political objectives of the Community with regard to European union.<sup>36</sup>

Thus the Commission regarded the grant of political rights to Community migrants as a development of the principle of free movement and as being encompassed by the Community's political objectives. Accordingly, the Commission called for action at the Community level to grant them the right to participate in local elections in the host Member State by 1980 at the latest.<sup>37</sup> This approach was supported by the European Parliament and the Economic and Social Committee in their respective Opinions on the Commission's Draft. The Parliament urged the Council to interpret the Draft

broadly, especially where political rights were concerned.<sup>38</sup> The Economic and Social Committee, for its part, called on the Council and Commission "immediately to start to work out how it can be made easier for migrant workers to exercise voting rights in the Member States where they are employed."<sup>39</sup> These institutions, therefore, all envisaged action by the Community institutions to grant local electoral rights to Community migrants. This approach was perfectly consistent with the requirements of the notion of European citizenship.

However, the Member States preferred to tackle such matters in terms of the extension of the rights of national citizenship to nationals of other Member State on a reciprocal basis. For this reason, the Communiqué issued after the December 1974 Summit Conference called for the establishment of a Working Group to study the problems raised by the grant of the rights involved, which were, of course, termed "special rights".<sup>40</sup> If the Member States did prefer such rights to be granted on a reciprocal basis, they would naturally feel that the necessary preparatory work should be carried out by a body other than the Community institutions proper.

It was presumably to encourage the Commission to accept this approach that the Committee of Permanent Representatives instructed it to draw up a report on "special rights".<sup>41</sup> This Report, published in July 1975, concentrated on local electoral rights. These rights were said to include the right to vote and stand as a candidate in local elections as well as the right to hold public office at the local level. The last-mentioned right was necessary, because the posts held by persons elected at the local level were frequently regarded as public offices. Moreover, it would be illogical to allow migrants to become elected representatives

responsible for policy-making at the local level, while prohibiting them from becoming local government officials responsible for implementing policy at this level.<sup>42</sup>

The Commission then went on to consider what legal basis for granting such rights could be found in the Treaty. The Commission felt that since the granting of such rights was not vital to the aims of the Treaty in its present form, resort to Article 235 was precluded. Instead, an ad hoc legal instrument could be adopted, possibly in the form of an amendment to the Treaty under Article 236.<sup>43</sup>

Thus the Commission agreed that a major role should be allotted to the Member States themselves, and it was presumably for this reason that a restrictive interpretation of the scope of Article 235 was adopted. Nevertheless, the Commission did take the view that the grant of local electoral rights could be regarded as the logical result of the principle of equality of treatment in Community law. Consequently, the Commission insisted that whatever legal procedure was adopted, the Community institutions should participate as far as possible.<sup>44</sup>

In fact, however, the Commission's role has been deliberately limited. The Council's Resolution of 9 February 1976 on the Action Programme in Favour of Migrant Workers and Their Families made no reference to the proposal contained in the Commission's Draft regarding local electoral rights. Instead, the study being carried out by the Working Group on Special Rights was expressly approved.<sup>45</sup>

Moreover, the chairman of this Group has been provided by the Council rather than the Commission, though the latter has been able to present its views to the Group. Thus at this stage the Commission lost the initiative and was left for the moment to concentrate on the possibility of establishing local consultative councils of the sort already existing in some Member States to represent migrants.<sup>46</sup>

Little information has been published concerning the discussions of the Working Group. It has not yet published a report or produced any concrete proposals. Consequently, the European Parliament in its Resolution of November 1977<sup>47</sup> called on the Commission to regain the initiative and submit a proposal to the Council under Article 235 or 236 for granting local electoral rights to Community migrants.

The Commission has certainly continued to study the matter and has identified the legal problems involved in the grant of such rights.<sup>48</sup> These problems concern the question whether dual voting should be permitted, whether the exercise of electoral rights should be subject to residence conditions, and whether migrants should be obliged to vote in Member States where voting by nationals is compulsory. In the Commission's view, any proposal it may submit will have to tackle these problems. Moreover, the Commission recognises the constitutional difficulties involved, since five Member States would have to amend their Constitutions to enable migrants to enjoy full local electoral rights. Therefore, once agreement is reached in principle on the grant of such rights, the Commission feels that there should be a delay of three years to allow the necessary constitutional amendments to be made. If these problems can be satisfactorily resolved, the Commission feels that action may be possible under Article 235. In coming to this conclusion, the Commission has relied on the evolutionary approach to the Treaty adopted by the Court of Justice.<sup>49</sup> This approach is, of course, well illustrated by the way in which the Court has been extending the competence of the Community in the external relations field.<sup>50</sup> By relying on the Court's evolutionary approach to the Treaty, the Commission now feels able to argue that the grant of local electoral rights is sufficiently closely connected with the principle of free movement and the Community's political objectives

set out in Article 2 to justify resort to Article 235. Thus the Commission has modified its position since 1975. In the present writer's view, this modification may be attributed not merely to the evolutionary nature of the Court's approach to the Treaty but also to the failure of the Working Group to make concrete progress regarding the grant of local electoral rights. The Commission may well have concluded that progress will only be made if the Community institutions themselves take the initiative.

#### Conclusion.

The Parliament and the Commission have sought to grant electoral rights to Community migrants through action at the Community level. The Council, however, has preferred to leave such matters in the hands of the Member States themselves. Thus the Parliament was deterred from proposing the grant of rights to participate in direct elections in the host Member States by fear of prejudicing Council agreement to hold these elections at all. Moreover, the Council rejected the Commission's call in the 1974 Action Programme for the grant local electoral rights and favoured the study being carried out by the Working Group on Special Rights.

Nevertheless, the new directly elected European Parliament may be expected to propose the granting of rights to participate in future direct elections in the host Member State when it comes to draw up proposals for a uniform procedure to govern these elections under Article 7(2) of the Act on Direct Elections. The directly elected Parliament may be expected to be rather more forceful than its purely nominated predecessor in presenting its proposals to the Council. Moreover, it need no longer be deterred from pressing its views by fear of prejudicing the holding of direct elections at all.

In addition, the Commission now seems ready to submit a proposal to the Council on local electoral rights. The timing of



any such proposal will presumably depend on how far agreement can be reached in the Working Group on the problems involved and on the Council's response to the Commission's proposal of July 1979 for extending the personal scope of free movement to cover all Community nationals. If the Council approves this latter proposal, it would be natural for the Commission to present a proposal regarding local electoral rights so as to go further in giving effect to the notion of European citizenship.

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- 1 Embodied in a resolution of 17 May 1960 (J.O. 1960, 834).
- 2 Schuijt Report, E.P. Doc.22/60, 31.
- 3 Ibid., 32.
- 4 See M.Stewart, 'Direct Elections to the European Parliament (with special reference to the United Kingdom)', 13 C.M.L.Rev. (1976) 283-99, 291-2.
- 5 See Council Reply to Written Question 163/63 (J.O.1963, 63) and the Patijn Report, E.P. Doc.368, 74, 4-5.
- 6 Resolution of 12 March 1969 (J.O.1969, C41/2).
- 7 Bull.E.C.1-1970, 15.
- 8 Bull. E.C.12-1974, 8.
- 9 O.J. 1975, C32/15.
- 10 Patijn Report, *id op.*, 44.
- 11 See F.Baverio-Baviera, 'Preparations for Direct Elections in Italy', 15 C.M.L.Rev. (1978) 199-200, 201.
- 12 This decision was revealed in the Andrianopoulos Report on the Political Rights of Aliens, Council of Europe Parliamentary Assembly Doc.3834, Sess.26 (1976-7), 17.
- 13 E.P. Debs No. 206, 98, 15 September 1976.
- 14 Ibid., 99.
- 15 O.J. 1976, C278/5.
- 16 See Commission Reply to Written Question 155/78 by Mr Borau (O.J. 1978, C188/53).
- 17 Legislation in Seven of the Member States did, in fact, provide for this. See Laws (and Draft Legislation) for Direct Elections, European Parliament, Luxembourg, 1978.
- 18 See the statement of Council President-in-Office Tomlinson (E.P.Debs No. 218, 127, 15 June 1977).
- 19 Representation of the People Act 1949, sections 1(1) and 2(1).
- 20 Sch.1, section 2(1) (a).
- 21 See the remarks of the then Home Secretary, Roy Jenkins (908 H.C.Deb.5s.c.1140, 30 March 1976).
- 22 This was the view of Mr Brynmor John, expressed on behalf of the Home Office in February 1978 (943 H.C.Deb.5 s. c.1521, 8 February 1978).
- 23 Note 21 *supra*.
- 24 Sections 3(1) and 14. This Act is set out in National Electoral Laws on Direct Elections, Texts of the Laws Adopted by the Parliaments of Denmark, France and Ireland, European Parliament, Luxembourg, 1978, 24. On this Act generally see M.Robinson, 'Preparations for Direct Elections in Ireland', 15 C.M.L.Rev. (1978) 187-198, 196.
- 25 For the text of the relevant Law see National Electoral Laws on Direct Elections, Texts of the Laws Adopted by the Parliaments of Belgium, Italy, Luxembourg and the Netherlands, European Parliament, Luxembourg, 1979. R.Bosscher, 'Preparations for Direct Elections in the Netherlands', 15 C.M.L.Rev. (1978) 465-72, 468 suggests that the Dutch Government was influenced in its decision to allow Community migrants to vote by the discussions taking place in the Community regarding the possibility of migrant participation in local elections in the host Member State.
- 26 See the suggestion of March Hunnings in L.A.M.Mulders, 'Conference Report, Direct Elections and the Future of Parliament, Sixteenth Leiden-London Meeting, London, June 25, 1977', 15 C.M.L.Rev. (1976) 69-74, 73. This suggestion was taken up by T.C.Hartley, 'Nationality and the Right to Vote in Elections for the European Parliament', 4 E.L.Rev. (1979) 50-2.
- 27 Case 36/74 (1974) E.C.R.1405.
- 28 Ibid., 1417.
- 29 P.E.Debs No.149, 107, 19 April 1978.
- 30 Bull. E.C.11-1972, 39.
- 31 Ibid., 46.

- 32 Bull. E.C. Supp.4/73,8.
- 33 This approach was approved by the European Parliament in its Resolution on the Sixth General Report (O.J. 1973, C57/32).
- 34 COM(73)1000 final,4.
- 35 COM(74)2250.
- 36 Ibid.,22.
- 37 Ibid.,22.
- 38 O.J. 1975, C229/34.
- 39 O.J. 1976, C12/4.
- 40 Bull. E.C.12-1974,8.
- 41 Report on the Implementation of Point 11 of the Final Communiqué Issued at the European Summit held in Paris on 9 and 10 December 1974.(COM(75)321 final).
- 42 Ibid.,6.
- 43 Ibid.,13.
- 44 Ibid.,14.
- 45 O.J.1976, C34/2.
- 46 See Commission Reply to Written Question 255/76 by Mr Borou (O.J. 1976, C203/24). These bodies are particularly common in Belgium. See L.Doyen, 'Les Conseils Consultatifs Communaux des Immigrés', Revue du Travail (1972) 107-121, 119-121. They also exist in West Germany and Luxembourg. See L.Lahalle, 'L'Insertion des Immigrés dans la Vie Politique', 26 L'Année Politique (1975) 189-200.
- 47 O.J. 1977, C299/27.
- 48 See Commission Reply to an Oral Question by Mr Bettiza (E.P.Debs No.245,268,27 September 1979).
- 49 See the remarks of Commission Vice-President Vredeling (E.P.Debs No.220,209,15 September 1977) and of Commissioner Davignon (E.P.Debs No.223,123,16 November 1977).
- 50 See K.R.Simmonds, 'The Evolution of the External Relations Law of the European Economic Community', 28 I.C.L.Q. (1979) 644-68.
- 51 Note 48 supra.

PART THREE  
ENFORCEMENT

## Chapter Eight Enforcement: The Role of the European Commission

### Introduction

The creation of European citizenship requires not only the development of substantive law embodying the rights and freedoms entailed but also the availability of procedures to ensure that the Member States fully respect this law in practice. If and when political rights are introduced, the relevant measures may be expected to define these rights and any permissible exceptions so precisely that any denial of these rights to a Community national by a Member State would amount to a clear denunciation of its obligations under Community law. The resulting situation would be more likely to admit of a political than a legal solution. Moreover, the developments that have occurred in freedom of movement have not, except in one respect, proved controversial and have encountered little resistance from the national authorities. However, the development of the law governing the circumstances in which Member States may restrict this freedom and thus exclude or expel beneficiaries marks an important step towards the introduction of freedom of political activity for Community nationals. Clearly, this is a controversial aspect of the developments in freedom of movement. Furthermore, the relevant Community law is at present so ill-defined that the precise extent of the restrictions on State action is uncertain. This uncertainty, combined with the inherent sensitivity of the issues raised for Member States, has meant that several problems have arisen regarding the application of this law, particularly in the United Kingdom.

### The Article 169 Procedure

The tasks of the European Commission are set out in Article 155 of the Treaty. In particular, it is provided that the Commission "shall ensure" the application of Community law. The wording of Article 155 would seem to be such as to impose a

broad obligation on the Commission to take action to this end.<sup>1</sup>  
Certainly, the Commission accepts that as a result of this  
provision it is under a duty to act as "guardian of the Treaty".<sup>2</sup>  
Usually the reason for the non-application of Community law  
will be that a Member State is in breach of its terms. In such  
case the Commission is equipped with a powerful weapon in  
Article 169 of the Treaty.<sup>3</sup> Article 169 states:

If the Commission considers that a  
Member State has failed to fulfil  
an obligation under this Treaty,  
it shall deliver a reasoned  
opinion on the matter after  
giving the State concerned the  
opportunity to submit observations.

If the State concerned does not comply  
with the reasoned opinion within the  
period laid down by the Commission,  
the latter may bring the matter  
before the Court of Justice.

A failure to fulfil an obligation may for the purposes of  
the above provision be deduced from positive action by a  
legislative, administrative or judicial organ<sup>4</sup> of a Member  
State as well as from an omission to act<sup>5</sup> on the part of  
these organs. Moreover, a relevant obligation may be

found not only in the provisions of the Treaty itself but also in Regulations, Directives and Decisions enacted by the Council and Commission and in judgments delivered by the Court of Justice. In addition, action under Article 169 is generally thought to be possible where a general principle of Community law is infringed.<sup>6</sup> Therefore, the scope of the Article 169 procedure is in theory very broad.

As for the substantive Community law governing the exclusion or expulsion of Community migrants, this consists of two elements: Articles 2(2) and 3 of Directive 64/221 and the jurisprudence of the Court of Justice regarding public policy. The Article 169 procedure is certainly available where a Member State infringes this Directive through the action or omission of a national legislative, administrative or judicial organ. Similarly, this procedure would seem available to enforce the relevant jurisprudence of the Court of Justice. There are two possible legal bases for this view. Since this jurisprudence represents an interpretation of "public policy" as employed in Articles 48(3) and 56(1) of the Treaty, a failure on the part of a national legislative, administrative or judicial organ to comply with it would constitute an infringement of these Treaty provisions. Alternatively, this jurisprudence may be regarded as embodying a number of general principles of Community law, in particular, the principle of proportionality. Action under Article 169 is thought to be possible in the event of there being an infringement of a general principle in its own right. Therefore, the Article 169 procedure is in theory a means whereby the Commission may seek to enforce fully the whole of the substantive Community law governing the exclusion or expulsion of Community migrants.

However, a number of practical restraints upon resort to this procedure exist. First, the procedure does, it should be noted,

represent a considerable advance on traditional international law, which usually leaves matters of treaty enforcement to be settled among the contracting States themselves. It is true that Article 170 does enable a Member State to bring such a dispute with another Member State before the Court of Justice. However, Article 169 enables an independent Community body, the Commission, to invoke the compulsory jurisdiction of the Court of Justice against a defaulting Member State. Thus resort to the Article 169 procedure may be a matter of some sensitivity to the Member State concerned. Accordingly, action under Article 169 should not be lightly undertaken.

Secondly, the execution of a series of acts by Community institutions is envisaged by this procedure. First of all, the Commission must form a conclusion as to whether there has been a breach of Community law. If the Commission "considers" that there has, the Member State concerned is then to be given an opportunity to submit observations. Next, a reasoned opinion is delivered. This opinion contains a statement of the alleged breach and of the measures which the Commission requires the Member State to take in order to remedy it. The Commission also specifies a date by which these measures are to be taken. If the matter is not settled by the date so specified in accordance with the reasoned opinion, the Commission may invoke the jurisdiction of the Court of Justice under Article 169(2). In the event of the Court finding against the Member State concerned, the latter is bound by Article 171 to take the necessary measures to comply with the judgement. It will be apparent, then, that the procedure is rather cumbersome and time-consuming. Consequently, it is doubtful whether the Commission would have adequate man-power to utilise the Article 169 procedure each time a Member State commits a breach of Community law.

Thirdly, the judgement delivered by the Court of Justice under Article 169(2) is declaratory only, and no sanctions are put at the Commission's disposal in order to ensure respect for the judgement. Thus in Commission v. Italy (1968) Advocate-General Roemer described



this procedure as a "weak instrument". In fact, if the Member State concerned fails to respect such a judgement, the Commission can do little more than seek a further declaratory ruling under Article 169, this time for breach of Article 171 of the Treaty. The latter provision obliges a Member State to take the "necessary measures" to comply with an Article 169(2) ruling. In 1968 the Court ruled in an Article 169 action that in imposing a tax on the export of art works Italy had infringed Community law.<sup>12</sup> When Italy failed to comply with this ruling, the Commission brought a further action, this time for breach of Article 171. Italy then abolished the tax before the Court was able to deliver a second ruling.<sup>13</sup> Thus resort to the Article 169 procedure will only be effective where the Member State concerned is prepared to comply with a purely declaratory ruling by the Court of Justice. Consequently, this procedure may not be an appropriate means of tackling a sensitive situation.

These three factors would suggest that while the scope of the Article 169 procedure may in principle be extremely broad, its scope in practice may be rather more limited. This distinction between the theoretical and the practical scope of Article 169 raises the question of the degree of discretion enjoyed by the Commission as regards resort to this procedure.

#### Commission Discretion As Regards Resort to the Article 169 Procedure.

##### i) the wording of Article 169.

When interpreting Article 169 commentators usually emphasize the distinction between paragraphs one and two. The former paragraph states that the Commission "shall deliver a reasoned opinion", while the latter states that it "may bring the matter before the Court of Justice" if the Member State concerned does not comply with the reasoned opinion within the period specified by the Commission. Thus it is often argued that whenever the Commission "considers" that a Member State is in breach of Community law, it is obliged to deliver a reasoned opinion after, of course, giving the Member State concerned an opportunity to

submit observations.<sup>14</sup> If the Member State fails to take the measures outlined in this opinion within the period specified, the Commission then enjoys discretion under paragraph two as regards bringing the matter before the Court of Justice.<sup>15</sup>

There can be little doubt that paragraph two does confer discretion on the Commission. However, the view that paragraph one obliges the Commission to deliver a reasoned opinion whenever it "considers" a Member State to be in breach of Community law may be criticised on two grounds. First, no such obligation can arise, unless the Commission "considers" that a breach has occurred. Hence, a subjective and undefined power of appreciation is left to the Commission.<sup>16</sup> Presumably, the Commission also enjoys similar powers to appreciate the observations submitted by a Member State prior to the delivery of a reasoned opinion<sup>17</sup> and to decide on the measures which the opinion will stipulate should be taken for the breach to be remedied.<sup>18</sup> Technically such powers may not constitute discretion, but the effective distinction is slight. Secondly, no time-limits are laid down in paragraph one. As a result, the Commission would seem free to select the date for the delivery of the reasoned opinion.<sup>19</sup> Through indefinite delay the Commission could largely frustrate the significance of any obligation that might be contained in paragraph one. In view of these factors, the wording of Article 169 alone would appear to offer only uncertain guidance as to the degree of discretion enjoyed in practice by the Commission as regards resort to the enforcement procedure contained in this provision.

ii) the jurisprudence of the Court of Justice.

The Court of Justice has never ruled that Article 169(1) obliges the Commission to deliver a reasoned opinion whenever the latter "considers" a Member State to have infringed Community law.<sup>20</sup> Rather, the procedural role of paragraph one has been emphasized. In 1969 the Court handed down a relevant ruling in E.C. Commission v. Italy,<sup>21</sup> a case which dealt with the legality of an Italian

turnover tax on wool imports. The Court referred to the importance of the Article 169 procedure and, in particular, the consequences of an adverse judgment under Article 169(2) for the Member State concerned. In fact, the Member State would be obliged under Article 171 to remedy the breach. For this reason, said the Court, the Article 169 procedure "is surrounded by guarantees which cannot be ignored". These "guarantees" would seem to be the opportunity for the Member State concerned to submit observations to the Commission before a reasoned opinion is delivered and to receive in this opinion a brief statement of the alleged breach. The purpose of these "guarantees" was taken to be the safeguarding of

the rights of the Member State to put forward its argument in defence based on complaints formulated [in the reasoned opinion] ...

Therefore, paragraph one, and in particular the requirement that a reasoned opinion is delivered, was apparently regarded as being designed to ensure that the Member State is able to defend itself in an action before the Court of Justice under paragraph two. It is notable that in coming to this conclusion the Court referred to the possible serious consequences for the Member State of an adverse ruling under Article 169(2). Thus the Court may well have been influenced by the novelty of the Article 169 procedure as compared with procedures available in traditional international law for settling disputes between State parties to a treaty.

The function of Article 169(1) seems, then, to be an elaborate means of ensuring respect for the audi alteram partem principle<sup>23</sup> of natural justice. Consequently, this paragraph seems to be interpreted not as obliging the Commission to deliver a reasoned opinion against any Member State "considered" to be in breach of Community law, merely because that State is considered to be in

breach of Community law. Rather, it is seen as laying down certain procedural conditions which must be met before the Commission may invoke the jurisdiction of the Court of Justice against a Member State "considered" to be in breach of Community law. The procedural role of Article 169(1) is also underlined by the fact that no action taken by the Commission, including delivery of a reasoned opinion, under this paragraph has "any binding force" upon the Member State concerned.<sup>24</sup>

Nevertheless, although no obligation to act against a Member State has been deduced from Article 169 itself, this does not mean that the Commission is left with complete discretion as regards resort to the enforcement procedure contained in this provision. In E.C. Commission v. Luxembourg and Belgium<sup>25</sup> in 1962, where the Commission brought an action against these two Member States for increasing the duty levied on the issue of import licences for gingerbread, the Court of Justice stated:

As the Commission is obliged by Article 155 to ensure that the provisions of the Treaty are applied, it cannot be deprived of the right to exercise an essential power which it holds under Article 169<sup>26</sup> to ensure that the Treaty is observed.

Article 155, then, was seen as obliging the Commission to ensure the application of Community law, and Article 169 as providing a means whereby the Commission may fulfil this obligation. One might conclude from this that the Commission's discretion as regards resort to the Article 169 procedure would be affected by the obligation recognised in Article 155.

Certainly, this possibility may have influenced the Court in a subsequent ruling. In E.C. Commission v. France<sup>27</sup> in 1971 the Commission brought an action against France under Article 141 of the Euratom Treaty. Article 141<sup>28</sup> of the Euratom Treaty is identical in its wording and function to Article 169 of the E.E.C. Treaty. Thus the above Case may for the purposes of the present Chapter be treated as if it had involved an action under

Article 169 of the latter Treaty. The defendants in this Case argued that it was now too late for the action to be brought. The Court rejected this argument saying that such an action does not have to be brought within a predetermined period, since, by virtue of its nature and its purpose, this procedure involves a power on the part of the Commission to consider the most appropriate means and time-limits for the purpose of putting an end to any <sup>29</sup> contraventions of the Treaty.

The Court here indicated that the "nature" and "purpose" of the Article 169 procedure mean that the Commission must enjoy a certain discretion as regards resort to the procedure contained in this provision. However, this discretion is not unlimited. It must be exercised so as to choose "the most appropriate means and time-limits" for ensuring the application of Community law. Unfortunately, the Court did not elaborate upon these points.

However, the submission of Advocate-General Roemer is more informative. He began by referring to a number of important features of the Article 169 procedure. Action under this provision, argued the Advocate-General, "naturally puts in issue to a certain extent the prestige of the Member State concerned." Moreover, it constitutes a last resort, which cannot be employed on every occasion when a breach of Community law is committed by a Member State. <sup>30</sup> Finally, there are no sanctions available to ensure that a judgment delivered by the Court under Article 169(2) is <sup>31</sup> respected. It was presumably such points that the Court itself had in mind when it referred to the "nature" of the Article 169 procedure. On the basis of these points, the Advocate-General took the view that the Commission must enjoy a degree of discretion as

regards resort to this procedure. However, far from assuming that this discretion is unlimited, he discussed the sort of circumstances in which it could be exercised: where the Commission was attempting to achieve an informal or "amicable" solution where only relatively slight breaches of Community law were involved, where a new legal enactment was anticipated or where use of the Article 169 procedure might inflame a politically sensitive situation. Provided such considerations were present, he concluded, the Commission might "properly" exercise discretion.<sup>32</sup> It was presumably considerations such as these which the Court had in mind when stating that the Commission enjoyed a power to choose "the most appropriate means and time-limits" for the purpose of ensuring the application of Community law. In this Case, then, Advocate-General Roemer laid down clear, but not necessarily exhaustive, guidelines within which the Commission is to exercise its discretion as regards resort to the Article 169 procedure. Moreover, the Court of Justice, albeit in a rather cryptic manner, seems to have approved the Advocate-General's view.

Two years later a further guideline was offered. In Geddo<sup>33</sup> the Court gave a preliminary ruling concerning the imposition of an Italian tax on rice. In his submission Advocate-General Trabucchi argued that where the Commission comes to the conclusion that a breach of Community law has occurred, it

must take the most appropriate steps [ to  
remedy it] including, where appropriate  
the procedure provided for in Article 169.<sup>34</sup>

Like the Court of Justice in E.C. Commission v. France (above), the Advocate-General employed the term "appropriate". Later he revealed the significance of this expression in this context. He stated that the Commission was to remedy the breach

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with all the means at its disposal including  
if need be the method provided for in Article  
169 .<sup>35</sup>

Resort to Article 169, then, is "appropriate" when it is needed i.e., necessary, to remedy a breach of Community law. It is only in such circumstances that the Commission is obliged to employ the Article 169 procedure. Where the application of Community law may be ensured without resort to this procedure, the Commission is not obliged to employ it. This view may be compared with that of Advocate-General Roemer in E.C. Commission v. France. The latter, it will be recalled, stated that the Commission did not have to employ the Article 169 procedure where a new legal enactment was awaited or where the Commission was attempting to achieve an informal solution. In either case the application of Community law might be ensured without resort to Article 169, and action under this provision could not be described as being necessary for this purpose. Thus the views of the two Advocates-General are essentially similar, though by concentrating on the criterion of necessity Advocate-General Trabucchi expressed his opinion in a rather more generalised way than did Advocate-General Roemer. Both Advocates-General appear, therefore, to have laid down certain guidelines within which the Commission is to exercise its discretion as regards resort to the Article 169 procedure.

These guidelines seem to have been put forward on the basis of a premise to the effect that there is a limit to Commission discretion as regards resort to the Article 169 procedure. Unfortunately, neither the Court of Justice nor the Advocates-General have explained explicitly the legal basis for this premise itself. It might be argued that it is based on the obligatory wording of Article 169(1). However, the Court has interpreted this paragraph as laying down procedural requirements to be met before

the Commission may invoke its jurisdiction under Article 169(2) rather than as obliging the Commission to act against any Member State "considered" to be in breach of Community law. Moreover, while the guidelines offered by the two Advocates-General seem to limit Commission discretion even as regards reference of a dispute to the Court of Justice under Article 169(2), the obligatory nature of Article 169(1) at most may only affect the earlier stages of the enforcement procedure. Consequently, it does not seem that the legal basis for the guidelines is to be found in Article 169(1).

On the other hand, Article 155 has been recognised as obliging the Commission to ensure the application of Community law. Logically this obligation could well require the Commission in certain circumstances to employ the Article 169 procedure and even to refer a dispute to the Court of Justice under paragraph two of this provision. The Commission did, in fact, seem to accept that this might be so in E.C. Commission v. Italy in 1968.<sup>36</sup> In the present writer's view, therefore, it is the obligation contained in Article 155 that has formed the basis for the position taken by the Advocates-General and, at least implicitly, by the Court of Justice that discretion as regards resort to the Article 169 procedure is not unlimited. More particularly, it is the Article 155 obligation which seems to have formed the legal basis for the guidelines laid down by the Advocates-General within which Commission discretion as regards resort to the procedure is to be exercised.

It is true that the restrictive conditions for locus standi in Article 175(3) of the Treaty offer individuals and private bodies little opportunity to challenge a failure on the part of the Commission to respect these guidelines.<sup>37</sup> Nevertheless, the existence of such guidelines could be invoked by those seeking to persuade the Commission to act under Article 169. Moreover, the possibility



is not excluded that another Community institution, such as the Parliament, could under paragraphs one and two of Article 175 seek to compel the Commission to employ the Article 169 procedure in accordance with these guidelines.

It is, therefore, against a background of limited discretion regarding resort to Article 169 that the Commission's efforts to ensure respect for Community law governing the exclusion or expulsion of migrants should be judged.

Commission Action to Ensure Respect for Community Law Governing the Exclusion or Expulsion of Migrants.

As has been said, the United Kingdom administration is empowered under the 1971 Immigration Act and accompanying Immigration Rules to exclude or expel an alien or non-patrial British Subject when such action is "deemed conducive to the public good". As far as Community migrants are concerned, the question arises as to whether the "conductive" power is broader than the public policy derogation on the basis of which Community law permits the exclusion or expulsion of such persons.

Since 1974 the Commission has been examining the compatibility of the Immigration Act and the Immigration Rules with Community law.<sup>38</sup> An initial problem which the Commission has presumably considered is this. While Community law only permits the exclusion or expulsion of Community migrants on public policy grounds,

United Kingdom legislation permits such action to be taken when "deemed to be conducive to the public good". Some commentators believe the latter power to be broader than the former and take the view that in this respect United Kingdom law is formally incompatible with Community law.<sup>39</sup> However, the public policy derogation is based on the broad and imprecise civil law concept of ordre public. Thus viewed in isolation, the public policy derogation is not necessarily any narrower than the "conductive" power in United Kingdom law.

It is only when viewed in the context of the developments in Community law discussed in Chapter Five that it may become so. Therefore, the real problem is whether the "conductive" power is compatible with Directive 64/221 and the relevant jurisprudence of the Court of Justice.

As for Directive 64/221, Article 189(3) of the Treaty provides with regard to a Directive that it

shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Thus the United Kingdom is required to implement Directive 64/221 but enjoyed discretion as to the manner of its implementation. More particularly, Article 10(1) of the Directive itself requires no more than that the Member States take the "measures necessary" to implement this Directive.

However, it is not clear whether the United Kingdom has, in fact, taken any such measures. In Van Duyn in 1974 the Commission noted that the United Kingdom had not "adopted the wording of Article 3 [of Directive 64/221] to achieve the desired result". Six years later neither the Immigration Act nor the Immigration Rules have

been amended in implementation of this provision. Indeed, no published measure has been enacted in the United Kingdom for this purpose. Nevertheless, the possibility remains that the Directive has been implemented by an amendment to the secret immigration instructions issued by the Home Secretary to guide immigration officers in applying the Immigration Rules.<sup>41</sup> If this is so, then two rulings of the Court of Justice may be pertinent.

In E.C. Commission v. France<sup>42</sup> in February 1973 the Court of Justice was faced with a Case involving Article 3(2) of the French Code du Travail Maritime.<sup>43</sup> This provision, which limited the proportion of migrants who could be employed on French merchant ships, had not been amended formally to comply with the requirements of Article 48(2) of the Treaty and Regulation 1612/68. Instead, verbal administrative instructions had been issued to the effect that Article 3(2) of the Code should not in practice be applied in the case of Community migrants. The Commission requested France formally to amend this provision and, since such amendment was not forthcoming, initiated an Article 169 action against France, which was referred to the Court of Justice in 1973. The Court felt that the failure to amend Article 3(2) of the Code would leave Community migrants uncertain as to their legal position. Such uncertainty constituted an obstacle to the free movement of persons. Consequently, the Court found France to be in breach of Community law.<sup>44</sup> This ruling may be of significance to the United Kingdom. Presumably, the Commission could argue that even if Directive 64/221 has been implemented by a secret amendment to the immigration instructions, Community migrants might in the absence of formal implementation feel uncertain as to their legal position in the United Kingdom. Thus the failure of the United Kingdom formally to implement the Directive could be regarded as a breach of Community law.

Moreover, in Jean Noel Royer,<sup>45</sup> a Case concerning the non-compliance of a French migrant with Belgian immigration regulations,

the Court of Justice stated:

The freedom left to the Member States by Article 189 as to the choice of forms and methods of implementation of directives does not affect their obligation to choose the most appropriate forms and methods to ensure the effectiveness of the directives .

Member States are, then, obliged by Article 189 to implement Directive 64/221 in the manner most appropriate to ensure its effectiveness.

In view of these two rulings, it would seem that resort to the Article 169 procedure is still open to the Commission, even if Directive 64/221 has been implemented in the United Kingdom by means of an amendment to the secret immigration instructions. The Commission could act under Article 169 on the grounds that the legal position of Community migrants in the United Kingdom has been rendered uncertain. Alternatively, the Commission could act on the grounds that the United Kingdom has failed in its obligation to implement Directive 64/221 in the manner most appropriate to ensure its effectiveness. On the other hand, if, as may be the case, no implementing measures at all have been taken, then the Commission could institute Article 169 proceedings for simple failure to take measures in implementation of the Directive as required by Article 189(3) of the Treaty and Article 10(1) of the Directive itself.

However, it may be that the Commission has taken the same position as it did in an analogous situation in 1970. Mr Berkhouwer, an M.E.P., asked the Commission in a Written Parliamentary Question about the

compatibility of Article 95(4) of the Dutch Vreemdelingenbesluit with Article 3(2) of Directive 64/221. The former provision states that when a public policy measure is adopted against a Community migrant because he has incurred a criminal conviction, the nature of the offence and the severity of the punishment are to be taken into account. Article 3(2) of the Directive, in turn, provides that a public policy measure cannot be taken against a Community migrant solely on the basis of a criminal conviction. The Commission felt that the formal compatibility or otherwise of the two provisions was difficult to assess. In these circumstances, the Commission stated that action against the Netherlands under Article 169 could only be contemplated if the "concrete application" of Article 95(4) of the Vreemdelingenbesluit proved incompatible with Directive 64/221.

However, when the formal incompatibility of national law with Community law in this field is clear, the Commission is prepared to institute proceedings under Article 169. For example, the Commission was informed that Article 35(4) of the Dutch Vreemdelingenwet<sup>49</sup> only allowed for an appeal against a deportation order where the alien concerned has lived in the Netherlands for at least a year. In the case of Community migrants this condition conflicts with Article 8 of Directive 64/221. At first, the Commission tried to achieve an informal solution to this problem.<sup>50</sup> Informal action was, however, unsuccessful. Consequently, in 1977 the Commission delivered a reasoned opinion on the matter under Article 169(1).<sup>51</sup>

In the case of the United Kingdom, the Commission may have taken the view that the formal incompatibility of the "conducive" power with the Directive is not established. Thus the Commission may prefer to examine whether the exercise or "concrete application" of this power is compatible with the Directive. It may be for this reason that the Commission has not so far acted under Article 169 in order to

secure legislative amendment of Directive 64/221 in the United Kingdom.

Problems also occur, however, as regards implementation of the jurisprudence of the Court of Justice regarding public policy. It has, in fact, been suggested that Directive 64/221 should be amended in order to take account of this jurisprudence.<sup>52</sup> The Commission, however, wishes to allow the development of this jurisprudence to continue. Consequently, the Commission has declined to propose such an amendment to the Directive.<sup>53</sup> The need to allow for the continued development of this jurisprudence would also seem to militate against action to ensure that it is embodied in national implementing legislation.

For these two reasons, the Commission has not so far acted under Article 169 to secure implementation of Community law governing the exclusion or expulsion of migrants in United Kingdom legislation. In these circumstances the manner in which the United Kingdom administration employs the "conducive" power against Community migrants becomes crucial. Advocate-General Warner presumably had this in mind in Bouchereau when he said of section 3(5) of the Immigration Act, wherein this power is contained, "manifestly that subsection has to be read subject to considerable modification in the case of a national of another Member State of the Community."<sup>54</sup>

Initially the United Kingdom administration showed no recognition of the fact that exercise of the "conducive" power might be limited by Community law. For example, in 1971 Mr Sharples for the Home Office answered a Written Parliamentary Question by Mr Clarke by saying that as far as could be foreseen, the power to exclude or expel aliens from the United Kingdom would be unaffected by accession to the Community.<sup>55</sup>

Two years later an Irishman named McGurran was reported in The Times as having been handed a notice by immigration officers which stated that the Home Secretary had given directions for him

not to be given entry to the United Kingdom on the ground that... [his exclusion...]<sup>56</sup> was conducive to the public good.

This exclusion order contains no acknowledgement on the part of the administration that such action may only be taken within the limits laid down by Community law. In fact, the order seems to confirm that the administration regarded the "conducive" power as being unaffected by Community law.

In May 1973 an exclusion order was served on Van Duyn, the Dutch Scientologist. This order stated that

the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom in the business of or in the employment of that organisation i.e., the Church of Scientology<sup>57</sup> .

This order was apparently served in accordance with general instructions from the Home Office to exclude anyone concerned with Scientology. Again, there seems to be little administrative recognition of the implications of Community law in this field. More particularly, no effort was made to justify the exclusion on the basis of Van Duyn's "personal conduct" as required by Article 3(1) of Directive 64/221.

However, when this Case came before the Court of Justice in the following year, the latter made it clear that the national authorities could only take action against Community migrants<sup>58</sup> within the limits contained in Community law. Moreover, in the same year the Commission announced that it would "make every effort to see to it that the treatment accorded Community migrants

by the British authorities is at least as favourable as that provided for in Community legislation." Such efforts would presumably entail action to ensure that migrants are only excluded or expelled in circumstances permitted by Community law.

A notable incident soon took place. On 18 December 1974 an Italian migrant working in London name Franco Caprino was detained pending deportation on "conducive" grounds. Caprino was allegedly a member of an extreme left-wing Italian group, Lutta Continua, and was a trade union activist. On the basis of such facts, the Home Secretary issued a deportation order against him under section 3(5) of the Immigration Act. However, on 25 January 1975 Caprino was released. No explanation for his sudden release was ever given, and the role of the Commission in this incident, if any, is not clear. However, there may be some significance in the answer given by the Commission to a Written Parliamentary Question by Mr Glinne et al. The Commission stated that it was aware of the action taken against Caprino and referred the questioners to its earlier assurance (quoted above) that "every effort" would be made to ensure that Community migrants were treated by the United Kingdom administration in accordance with Community law. The Director-General of the Commission's Legal Service has explained that these "efforts"



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range from informal contacts and meetings  
between the Commission and National  
administrators drawing their attention  
to any particular problems, to the formal  
procedure laid down in Article 169 of the  
Treaty <sup>63</sup> .

It may be, therefore, that in the Caprino case the Commission had such "informal contact" with the United Kingdom administration in order to point out the "particular problems" involved in his proposed deportation. Presumably this would involve a reference to the fact that such action may only be taken against a Community migrant in accordance with the provisions of Directive 64/221. If, in fact, the Commission did so, this would explain Caprino's sudden release as well as the meaning of the Commission's Reply to Mr. Glinne et al.

It is also worthwhile to compare the attitude of the Commission in the above case with that adopted in the case of the three West German Amnesty International delegates, who were excluded from France in 1975. It will be recalled from Chapter Four that the Commission's Reply to the Written Parliamentary Question of Messrs Giraud and Schmidt suggested that the action of the French administration may well have been contrary to Community law. Nevertheless, the Commission declined to intervene and certainly did not contemplate resort to the Article 169 procedure. The reason given by the Commission for its inaction was that French <sup>64</sup> legislation in this field complied with the requirements of Community law. The decision to exclude the three delegates was not the result of an administrative practice but was merely an individual act of the local authorities. Therefore, the three were advised to approach the "appropriate courts" <sup>65</sup>. It may be noted that the Court of Justice had already rejected the applicability of the local remedies rule in Community law. <sup>66</sup> Thus

the availability of redress before the national courts did not preclude the Commission from utilising the Article 169 procedure. However, the Commission exercised its discretion against doing so in this case. The Commission presumably took into account two factors. First, "only relatively slight effects" on Community law were directly involved. Secondly, since the three delegates could expect to obtain redress in local courts, the Commission might have felt action under Article 169 was unnecessary to ensure the application of Community law. Therefore, the Commission would seem to have exercised its discretion within the guidelines laid down by Advocates-General Roemer and Trabucchi.<sup>67</sup>

In the Caprino case, on the other hand, the Commission did not suggest that United Kingdom law was compatible with Community law or that Caprino should seek redress in the local courts. Rather, the Commission may well have seen this incident as an opportunity to take informal action to ensure that United Kingdom administrative action respected Community law. Therefore, it may be that where Community law governing the exclusion or expulsion of migrants has not been implemented in national legislation, the Commission will at least take informal action against individual administrative acts as part of its policy of ensuring the implementation of the relevant Community law in national administrative action.

In the following year controversy arose over the proposed visit of a Danish film-maker, Jens Thorsen. He apparently intended making a film about the life of Christ. His proposed treatment of this subject was such as to render his visit objectionable to many people in the United Kingdom. Consequently, demands were

directed towards the Government from many quarters to exclude Thorsen.<sup>68</sup> In October 1976, when questioned about the Government's attitude, Lord Harris on behalf of the Home Office told the House of Lords that if the Dane arrived at a port, then, "given the background to this case", the matter would be referred to the Home Secretary.<sup>69</sup> The "background" to the case could well have been the fact that Thorsen was a Community migrant. Thus it may be that the Home Office now accepted that the exclusion of such a migrant involved special problems. Certainly, in the same month Dr. Summerskill accepted on behalf of the Home Office that the grounds upon which a Community migrant may be excluded are "slightly more restricted" than those which allow for the exclusion of a migrant from a non-Community country.<sup>70</sup> On 9 February 1977 Thorsen finally arrived at Heathrow. An immigration officer questioned him about his visit. Thorsen explained that he wished to make a brief visit to promote a film other than the controversial one about the life of Christ. However, he did have with him a script for the film about Christ. In these circumstances, the immigration officer decided to exclude him on "conducive" grounds.<sup>71</sup>

The significance of this case is as follows. The questioning carried out by the immigration officer seems to have been designed to discover the precise purpose of Thorsen's visit. Although he claimed that he was not coming in connection with his film about Christ, his possession of the script for this film may have been taken as evidence that this was his purpose. Thus it may be that the administration was seeking to justify its action on the basis of the particular purpose of his visit, or in other words, on the basis of his "personal conduct." This could suggest that the United Kingdom administration was coming to realise the significance of Article 3(1) of Directive 64/221.

Confirmation of this realisation was provided later in the same year. In November 1977 a West German, Hubert Meyer, was presented

with a variation of leave order, which stated:

the Secretary of State considers it  
undesirable and against public policy  
for you as an ex-Member of the Waffen S.S.  
to come here for the purpose of promoting  
the publication or sale of a book about  
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the Waffen S.S.

The grounds given for this action relate in some detail to the case of Meyer. The order noted that he was an ex-member of the Waffen S.S. and, more particularly, that the purpose of his visit was to promote a book about this organisation. The reason for these details being given was presumably to justify the action against Meyer on the basis of his personal "conduct". Certainly, the then Home Secretary, Merlin Rees, seemed at pains to explain to the House of Commons that the action was taken because of the particular purpose of Meyer's visit.<sup>73</sup> Therefore, both the terms of the order and the remarks of the Home Secretary suggest recognition on the part of the United Kingdom administration that the "conducive" power may only be employed in accordance with Directive 64/221, in particular Article 3(1) thereof.

However, it is less clear whether the action taken against Meyer was compatible with the jurisprudence of the Court of Justice regarding public policy. It may be argued, in particular, whether Meyer really constituted a threat to a "fundamental interest" of British society or, if he did, whether the promotion of a book constituted "a genuine and sufficiently serious threat" to such an interest. Moreover, there is also the question of whether the action taken against Meyer was "necessary in a democratic society", given that the action was intended to deny him freedom of expression in the United Kingdom. Such questions, however, involve highly sensitive issues, and it is doubtful whether the United Kingdom would react favourably to the Commission's raising such issues even informally.

Therefore, the Commission does not seem well placed to ensure that the United Kingdom administration respects the jurisprudence of the Court of Justice regarding public policy.

### Conclusion.

In principle, the Article 169 procedure is broad enough to allow for action by the Commission to ensure respect for the substantive Community law discussed in Chapter Five. In practice, however, there are several constraints upon resort to this procedure. In order to take account of these constraints, the Commission is permitted a degree of discretion as regards action under this procedure.

In its approach to the enforcement in the United Kingdom of the substantive Community law governing the exclusion or expulsion of Community migrants the Commission has taken full advantage of the discretion available to it. The Commission's attitude has, in fact, been characterised by what Advocate-General Roemer in E.C. Commission v. France described as an attempt to achieve an "amicable" solution. To this end, the Commission has apparently concentrated on informal action designed to ensure that United Kingdom administrative action complies with the requirements of Community law. As a result, the administration now seems to exercise the "conducive" power in accordance with Directive 64/221. The only contribution that the Article 169 procedure can possibly be said to have made to this success is that its very availability may have added a certain weight to the Commission's informal action.<sup>74</sup>

Since the United Kingdom administration now respects Directive 64/221, the Commission is not obliged to utilise the Article 169 procedure in order to secure an amendment to the Immigration Act or Immigration Rules in implementation of this Directive.

As for the jurisprudence of the Court of Justice regarding public policy, the position is rather less straightforward. The Commission is not known to have sought legislative implementation of this jurisprudence in the Member States. But since this jurisprudence is

still developing, the situation is analogous to one where a new legal enactment is awaited. In such situations Advocate-General Roemer took the view that the Commission need not utilise the Article 169 procedure. Moreover, the Commission is not known to have acted so as to enforce this jurisprudence at the national administrative level. If it were to do so, the Commission might find itself on sensitive ground. Consequently, Commission inaction in this respect also is compatible with the view expressed by Advocate-General Roemer.

Therefore, the Commission may well have exercised its discretion as regards resort to Article 169 within the guidelines laid down by the two Advocates-General. Nevertheless, the contribution made by the Commission towards the enforcement of the substantive Community law discussed in Chapter Five has been limited. In particular, the Commission has apparently done little to ensure respect for the jurisprudence of the Court of Justice regarding public policy, even though it is within this jurisprudence that the most important developments concerning Community migrants' freedom of political activity have taken place.

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1 This is the view of H.Smit and P.Herzog, op.cit., vol.5, 171 and  
 E.Wohlfarth et al., op.cit., 482.

2 See, for example, Fourth General Report (1970), 404 and Commission Reply  
 to written question 808/74 by Mr Jahn (O.J.1975, C170/11).

3 The literature on this procedure is considerable. See, for example,  
 H.A.H. Audretsch, Supervision in European Community Law. Observance by  
 the Member States of their Treaty Obligations. A Treatise on International  
 and Supranational Supervision, North-Holland, Amsterdam, 1978 and  
 G.Hasquin, Les Manquements des Etats Membres des Communautés Européennes  
 Devant la Cour de Justice, U.G.A., Heule, 1974.

4 In Case 77/69 E.C. Commission v. Italy (1970) E.C.R. 237, 243 the Court  
 stated that obligations contained in Community law "devolve upon States  
 as such and the liability of a Member State under Article 169 arises  
 whatever the agency of the State whose action or inaction is the cause  
 of the failure to fulfil its obligations, even in the case of a  
 constitutionally independent institution." See also Case 8/70  
E.C. Commission v. Italy (1970) E.C.R. 961, 966.

5 Case 31/69 E.C. Commission v. Italy (1970) E.C.R. 25, 32.

6 See, for example, A.Parry and S.Hardy, op.cit., 94.

7 The Court of Justice delivered its first ruling under Article 170 in  
 Case 141/78 France v. United Kingdom (1980) 1 C.M.L.R. 6.

8 P.Cahier, 'Les Articles 169 et 170 du Traité Instituant la Communauté  
 Economique Européenne à Travers la Pratique de la Cour', 10 C.D.E. (1974)  
 3-38, 34 states that this novelty "s'explique par l'intégration partielle  
 des économies des Etats voulu par les traités communautaires".

9 Case 48/65 Lutticke v. E.C. Commission (1966) E.C.R. 19, 27.

10 In this context the Commission has expressly referred to its problems  
 resulting from shortage of manpower. See Commission Reply to Written  
 question 589/72 by Mr Vredeling (O.J.1973, C67/61).

11 Case 7/68 E.C. Commission v. Italy (1968) E.C.R. 423, 438.

12 Ibid.

13 Case 48/71 E.C. Commission v. Italy (1972) E.C.R. 527.

14 See, for example, H.Smit and P.Herzog, op.cit., vol.5, 321; P.S.R.F.  
 Mathijsen, A Guide to European Community Law, Sweet and Maxwell, London,  
 1972, 153-4; A.Parry and S.Hardy, op.cit., 95.

15 See the sources cited in note 14 *supra*.

16 H.A.H. Audretsch, op.cit., 20 finds it "curious that the obligation of the  
 Commission is made to depend on its own view".

17 See the remarks of Advocate-General Warner in Case 9/75 Martin Meyer-  
 Burckhardt v. E.C. Commission (1975) E.C.R. 1171, 1191.

18 See G.Ferriere, 'Le Contrôle de la Legalité des Actes Statiques par la  
 Cour de Justice des Communautés Européennes', R.G.D.I.P. (1967) 879-1008, 915.

19 See L.Le Bellescize, 'L'Article 169 du Traité de Rome et l'Efficacité du  
 Contrôle Communautaire sur les Manquements des Etats Membres', 13  
 R.F.D.E. (1977) 173-213, 193.

20 However, in Case 48/65 Lutticke v. E.E.C. Commission (1966) E.C.R. 19, 31  
 Advocate-General Gandia describe this as an "arguable possibility".

21 Case 7/69 (1970) E.C.R. 111.

22 Ibid., 117.

23 This principle has frequently been invoked by the Court of Justice.  
 See, for example, Case 36/62 Alvis v. E.E.C. Commission (1963) E.C.R. 49, 55  
 and Case 17/74 Transocean Marine Paint Association v. E.C. Commission  
 (1974) E.C.R. 1063, 1080.

24 Case 48/75 Lutticke v. E.E.C. Commission (1966) E.C.R. 19, 27. See also the  
 remarks of Advocate-General Lagrange in Case 7/61 E.E.C. Commission v.  
 Italy (1961) E.C.R. 317, 334.

25 Cases 2 and 3/62 (1962) E.C.R. 425.

26 Ibid., 430.

27 Case 7/71 (1971) E.C.R. 1003.

28 See J.Errera et al., Euratom. Analyse et Commentaire du Traité, Les Editions  
 du Librairie Encyclopedique, Brussels, 1958, 229 et seq.

- 29 Case 7/71 E.C. Commission v. France (1971) E.C.R. 1003, 1016.
- 30 *Ibid.*, 1020. In Case 20/59 Italy v. High Authority (1960) E.C.R. 325, 339 the E.C.S.C. Court described the enforcement procedure contained in Article 88 of the E.C.S.C. Treaty as an "ultima ratio".
- 31 Case 7/71 E.C. Commission v. France (1971) E.C.R. 1003, 1020.
- 32 *Ibid.*, 1020.
- 33 Case 2/72 Riseria Luigi Geddo v. Ente Nazionale Risi (1973) E.C.R. 865.
- 34 *Ibid.*, 885.
- 35 *Ibid.*, 887.
- 36 Case 7/68 E.C. Commission v. Italy (1968) E.C.R. 423, 428. See also the Commission's admission in Case 9/75 Martin-Meyer Burckhardt v. E.C. Commission (1975) E.C.R. 1171, 1176-7.
- 37 On this matter see A.G. Toth, 'The Law As It Stands on Appeal for Failure to Act', *L.I.E.I.* 1975/2, 65-73.
- 38 See Commission Reply to Written Question 398/74 by Lord O'Hagan (O.J. 1974, C158/10). See also Commission Reply to Written Question 327/75 by Mr Herbert *et al.* (O.J. 1975, C292/3).
- 39 See, for example, J.M. Evans, Immigration Law, Sweet and Maxwell, London, 1976, 91 and S.A. de Smith, Constitutional and Administrative Law, Penguin, London, 1977 (3rd edn), 42. But cf. T.C. Hartley, *op.cit.*, 230-1.
- 40 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R. 1337, 1343.
- 41 In February 1979 the then Home Secretary, Merlin Rees, reaffirmed official reluctance to publish these instructions. 963 H.C. Deb. 5s. c. 222, 19 February 1979.
- 42 Case 167/73 E.C. Commission v. France (1974) E.C.R. 359.
- 43 See the Loi of 13 December 1926 (J.O.R.F. 15 déc. 1926.).
- 44 After this ruling the French Government issued a Circulaire of 29 April 1975 (J.O.R.F., 2 mai, 4471).
- 45 Case 48/75 Jean Noel Rover (1976) E.C.R. 497.
- 46 *Ibid.*, 519.
- 47 Commission Reply to Written Question 387/69 by Mr Berkhouwer (J.O. 1970, C23/3).
- 48 Stb. 1966, No. 387.
- 49 Stb. 1965, No. 40.
- 50 Commission Reply to Written Question 333/72 by Mr Berkhouwer (O.J. 1973, C111/2).
- 51 Bull. E.C. 1-1978, 95.
- 52 Commission Reply to Written Question 401/78 (O.J. 1978, C267/16).
- 53 See, for example, the remarks of Advocate-General Mayras in Case 67/74 Bonsignore (1975) E.C.R. 297, 316.
- 54 Case 50/77 R. v. Pierre Bouchereau (1977) E.C.R. 1999, 2017.
- 55 815 H.C. Deb. 5s. c. 236, 7 April 1971.
- 56 The Times 23 April 1973.
- 57 This order is set out in Van Duyn v. The Home Office (1974) 1 W.L.R. 1107, 1111.
- 58 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R. 1337, 1350.
- 59 Commission Reply to Written Question 398/74 by Lord O'Hagan (O.J. 1974, C158/10).
- 60 For the facts of this case see The Guardian 4 and 25 January 1975, The Sunday Times 12 and 26 January and The Times 23 and 25 January.
- 61 The then Home Secretary, Roy Jenkins, merely stated that he had decided to revoke the deportation order after reviewing all the available information (885 H.C. Deb. 5s. c. 5, 27 January 1975). However, he later rejected the view put to him that his original information had been inaccurate (885 H.C. Deb. 5s. c. 1544, 6 February 1975).
- 62 Written Question 704/74 (O.J. 1975, C86/67).
- 63 Letter from the Director-General of the Commission's Legal Service to the author dated 20 February 1978.
- 64 See, in particular, Décret 70-29 of 5 January 1970 (J.O.R.F., 14 janv., 516) and Circulaire of 24 January 1972 (J.O.R.F., 18 fevr., 1790), both of which were intended to implement Community law in this field.



- 65 Commission Reply to Written question 859/75 by Messrs Giraud and Schriat (O.J.1976,C99/39). The Commission subsequently took the same position in its Reply to Written question 475/76 by Mr Jahn concerning the expulsion of migrants from France (O.J.1976,C294/55).
- 66 Case 31/69 E.C.Commission v. Italy (1970) E.C.R.25,32.
- 67 See also the remark of Advocate-General Warner in Case 31/74 Filippo Galli (1975) E.C.R.68,69-70.
- 68 See, for example, the demand made by Mary Whitehouse in The Times 12 August 1976.
- 69 375 H.L.Deb.5s.c.454, 14 October 1976.
- 70 916 H.C.Deb.5s.c.245, 25 October 1976.
- 71 See the statement by the then Home Secretary to the House of Commons (925 H.C.Deb.5s.c.1438, 9 February 1977).
- 72 For the background to the case see The Times 17 and 18 November 1977.
- 73 939 H.C.Deb.5s.c.013-4, 6 December 1977.
- 74 See J.D.B.Mitchell, 'Lawyers and the European Communities', 22 N.I.L.Q. (1971)156.

Chapter Nine    Enforcement: The Role of the National CourtsIntroduction

The Court of Justice has interpreted Community law as conferring directly on individuals<sup>1</sup> rights of entry and residence enforceable in national courts. Thus a Community migrant faced by an exclusion or deportation order may invoke these rights before a national court. Since these rights may only be restricted on grounds of public policy, public security or public health, the national court concerned will be expected to determine whether the action of the national administration is justified on any of these grounds. In doing so, the court will need to take into account Directive 64/221 and the jurisprudence of the Court of Justice regarding public policy. In fact, the Court has expressly ruled in several Cases, notably Van Duyn<sup>2</sup> and Rutili,<sup>3</sup> that national courts must ensure respect for the relevant provisions of this Directive.<sup>4</sup> Thus if the national court concerned finds that the administration has acted beyond the limits permitted by Community law, it must rule against the administration.

If, however, the provisions of Community law involved require interpretation before they can be applied, the national court may, and under Article 177(3) of the Treaty a national court of last resort<sup>5</sup> must, request a preliminary ruling on the matter from the European Court. The wording of Article 177 would seem, then, to grant a facility to lower national courts and impose an obligation on higher national courts. In practice, however, the distinction is not so clear-cut, and the obligation imposed on higher national courts is less than perfect. It is generally thought that such courts need not request a preliminary ruling when the meaning of the provision of Community law is clear or, in the Commission's words, is "obvious to a lawyer with a modicum of experience".<sup>6</sup>

This exception to the Article 177(3) obligation is usually known

as the "acte clair" exception after the French legal doctrine upon which it is based.<sup>7</sup>

United Kingdom Courts.

In five cases so far the United Kingdom Courts have been confronted by Community law governing the exclusion or expulsion of Community migrants.<sup>8</sup> In Van Duyn v. The Home Office<sup>9</sup> in 1974 the Dutch Scientologist challenged her exclusion from the United Kingdom by invoking Article 48 of the Treaty and Article 3(1) of Directive 64/221. In the Chancery Division of the High Court Vice-Chancellor Pennycuick came to the conclusion that an interpretation of these provisions was necessary to enable him to give judgement.<sup>10</sup> Thus, in accordance with Article 177(2) of the Treaty, he requested a preliminary ruling from the Court of Justice as to whether the two provisions relied upon by the applicant did confer rights upon individuals and as to the meaning of the expression "personal conduct" in Article 3(1) of the Directive.<sup>11</sup> The Court of Justice ruled that the two provisions did confer rights on individuals which national courts were to protect. On the other hand, its interpretation of the concept of public policy and the expression "personal conduct" was not such as to cast doubt upon the legality of the action taken against Van Duyn. Consequently, no need arose for intervention by the Chancery Court.<sup>12</sup>

In the following year in R. v. Secchi<sup>12</sup> the Marylebone Magistrate decided to recommend an Italian migrant for deportation under section 6(1) of the 1971 Immigration Act. The migrant concerned had only worked casually in the United Kingdom and had been convicted of minor crimes. He objected to the Magistrate's decision by invoking Article 48 of the Treaty and Article 3(1) and (2) of Directive 64/221. The Magistrate, however, rejected the defendant's plea on the ground that since he had not done much work during his stay, he could not be considered a "worker" for the

purpose of Article 48 of the Treaty.<sup>13</sup> Thus he was found not to be covered by this provision. Moreover, the Magistrate expressed the view that even if he had been a beneficiary under Article 48 of the Treaty, his deportation would have been permissible on public policy grounds. In coming to this conclusion, the Magistrate interpreted public policy as permitting the deportation of a Community migrant

who has shown by his conduct (1) considerable lack of honesty and propriety which has resulted in the commission of crimes which of their kind are bad ones; (2) an attitude to personal behaviour which is completely alien to what is acceptable in this country and... in any other Member State, and (3)<sup>14</sup> general irresponsibility.

This interpretation of public policy is broader than that now favoured by the European Court. Therefore, although the Magistrate may have decided the Case on a different point, his remarks regarding public policy do illustrate the need for national courts to seek preliminary rulings on this concept from the European Court. If they do not do so, migrants before them risk being expelled in circumstances other than those permitted by Community law.

In November 1977 in R.v. Pierre Bouchereau<sup>15</sup> a French migrant came before the Marlborough Street Magistrates Court. On the occasion of his second conviction for possession of drugs the Magistrate gave Bouchereau notice of his intention to recommend him for deportation under section 6(1) of the Immigration Act. In response, the defendant invoked Article 48 of the Treaty and Directive 64/221. Thereupon, the Magistrate decided to request a

preliminary ruling from the Court of Justice as to whether Article 3(1) and (2) of the Directive concerned judicial recommendations for deportation. In addition, he sought an interpretation of the public policy concept. The Court of Justice ruled that the Directive did cover such recommendations. Moreover, it will be recalled that the Court interpreted public policy as allowing for deportation only when the migrant concerned posed a "genuine and sufficiently serious threat to a fundamental interest of society". Following this ruling by the Court of Justice, the Magistrate decided that possession of a relatively small quantity of drugs did not constitute such a threat. Consequently, he felt that Community law did not permit him to recommend the defendant for deportation.

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Next, in April 1979 in R.v. Secretary of State for Home Affairs, ex p. Santillo<sup>17</sup> the Queen's Bench Division of the High Court requested a preliminary ruling on the interpretation of Article 9(1) of Directive 64/221, when the United Kingdom administration sought to give effect to a judicial recommendation for the deportation of an Italian migrant four years after the recommendation had been made. According to Article 9(1), where there is no right of appeal to a court of law, or where such an appeal may only be made in respect of the legal validity of the decision, a decision ordering expulsion may not be taken before an "opinion" has been obtained from a body independent of the administration. The European Court ruled that normally a judicial recommendation would constitute such an "opinion". However, the Article 9(1) safeguard will only be effective, if the opinion of the competent authority is sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors to be taken into consideration. Consequently, a lapse of time amounting to several years between the recommendation for deportation and the decision by the administration is liable to deprive the recommendation of its function as an opinion within the

General willingness on the part of United Kingdom courts to request such rulings when faced by Community law governing the exclusion or expulsion of Community migrants. However, Bouchereau and Pieck were concerned with the exercise of judicial discretion as regards the making of a recommendation for deportation under section 6(1) of the Immigration Act. Only Van Duyn and Santillo were directly concerned with questions of judicial review of administrative action against Community migrants.

In the former Case the ruling given by the European Court was not such as to cast doubt on the legality of the action taken by the administration. Consequently, no need arose for intervention by the Chancery Court. However, preliminary rulings are universally accepted as binding the courts which requested them. Therefore, provided the courts remain ready to request preliminary rulings from the Court of Justice, it would seem that they will come to review exercise of the "conducive" power against Community migrants for compatibility with Community law. Even so, the Santillo case suggests that successive rulings from the Court of Justice may be necessary before full effect is given to Community law in this field by United Kingdom courts.

Problems have also occurred in cases before courts in other member States. An important ruling was given by the Belgian Conseil d'Etat in Corveleyn v. Etat belge<sup>20</sup> in 1968. Here the Belgian Justice Minister had decided to deport a Frenchwoman who had behaved impeccably in Belgium but who had a prior criminal conviction in France. She applied to the Conseil d'Etat to annul the Minister's decision on the basis of Directive 64/221, and the Conseil found for her on the grounds that

rien, ni dans la législation ni dans la réglementation, n'empêche le Ministre de la justice de se conformer à l'article 3 de la Directive;....il lui suffit de s'abstenir de renvoyer automatiquement un étranger lorsqu'il a fait l'objet de<sup>21</sup> condamnations pénales .

The Conseil based its decision on Article 3 of Directive 64/221. Of particular significance was Article 3(2) of the Directive, which

stipulates that a public policy measure may not be based solely on a criminal conviction. The Conseil observed that there was no provision in national law which was contrary to Article 3. Given this, the Conseil took the view that the Minister was obliged to respect Article 3 and that it could enforce this obligation at the instance of an individual. Consequently, the deportation order was annulled as being based solely on the applicant's criminal conviction incurred in France.

This ruling certainly demonstrated a willingness of the part of the Belgian Conseil d'Etat to review administrative action against Community migrants for compatibility with Community law. However, it must be noted that the Conseil expressly referred to the absence of conflicting national law. The implication to be drawn from this is that the Conseil would not have required the administration to respect Directive 64/221 if this Directive had conflicted with Belgian law. If, on the other hand, the Conseil had requested a preliminary ruling from the European Court, the latter might well have anticipated its subsequent jurisprudence and ruled that the effect of this Directive cannot be limited by conflicting national law. It was, therefore, as a result of the Conseil's failure to request a preliminary ruling that the European Court was not given the opportunity to establish at this stage that national courts must review administrative action against Community migrants for compatibility with Community law, irrespective of any conflicting national law.

A less favourable approach to Community law in this field was adopted by the West German Bundesverwaltungsgericht in May 1973.<sup>22</sup> The administration had decided to deport an Italian migrant convicted of manslaughter in order to deter other migrants from committing such offences. The deportee challenged the order on the basis of Article 3 of Directive 64/221, which had been



implemented by Article 12(4) of the 1969 Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft.<sup>23</sup> The BVerwG found that Article 12(4) of the AufenthG/EWG permitted the deportation of a Community migrant for general preventive reasons. In view of this, the BVerwG considered that Article 3 of the Directive could be interpreted as allowing such a measure. Thus the BVerwG interpreted Article 3 of the Directive by reference to national implementing legislation instead of respecting its obligation under Article 177(3) of the Treaty to refer doubtful points of Community law to the European Court.

In July of the following year the Cologne Verwaltungsgericht heard a Case involving similar facts. The VG, however, felt that a question of Community law was raised and decided to request a preliminary ruling from the Court of Justice. The latter Court was asked whether Article 3(1) and (2) of Directive 64/221 prohibited deportation for general preventive reasons. The preliminary ruling was duly delivered in February 1975 in Bonsignore. The Court of Justice ruled, of course, that Article 3(1) and (2) of the Directive prohibits the deportation of a Community migrant "for the purpose of deterring other aliens."<sup>24</sup>

In July 1975 a further Case came before the BVerwG involving an Italian migrant.<sup>25</sup> He had been convicted of unlawful import of a pistol and a customs fraud. On the basis of these convictions, the administration had decided to deport him to deter other migrants from committing such offences. By the time this Case reached the BVerwG the deportation order had been revoked by the administration because of the ruling of the Court of Justice in the Bonsignore Case. Nevertheless, the BVerwG did take the opportunity formally to reject its own earlier ruling of May 1973 in favour of that rendered by the Court of Justice in Bonsignore.

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It was, therefore, as a result of the willingness of the Cologne VG to request a preliminary ruling from the European Court that the EVerwG came to accept the need to review national administrative action against migrants for compatibility with Community law. Such instances as this lead commentators to express the view that the application of Community law in this area would be assured through the willingness of lower national courts to request preliminary rulings from the European Court.<sup>26</sup>

Subsequent developments, however, may require this view to be re-assessed. In the first place, the European Court gave a notable ruling in Foglia v. Novello in 1979.<sup>27</sup> The Pretura of Bra in Italy, faced with a civil dispute involving the imposition of a French tax on Italian wine imports, had requested a preliminary ruling from the European Court. The latter, however, took the view that the case had only reached the Pretura because of clauses deliberately inserted in the contracts between the parties and their carrier with a view to having the compatibility of the French tax with Community law tested. This was treated as an "artificial expedient", and, in the absence of a "genuine dispute" between the parties, the Court was not prepared to give a preliminary ruling. As a result, national courts can no longer be sure of obtaining rulings from the European Court and may, for this reason, become less willing to refer such questions to the Court.

Secondly, even if the lower national courts do remain willing to refer to the European Court cases concerning the exclusion or expulsion of migrants, this may not in itself be sufficient to overcome the reluctance of higher national courts to intervene against administrative action in this area. In

October 1976 Hill and Holzappel the French Conseil d'Etat heard an application by a Briton and a West German against a decision of the Prefect of Les Alpes de Haute-Provence refusing them a first residence permit and thus requiring them to leave France. The applicants argued that this decision had been made without a prior hearing and reasons being given. Community migrants were entitled to the benefit of these procedural safeguards under Articles 6 and 9 of Directive 64/221 and Article 11 of Décret<sup>28</sup> 70-29 of 5 January 1970, which had been enacted in part implementation of the Directive. Commissaire du Gouvernement Guillaume advised the Conseil that it could annul the Prefect's decision on the basis of Community law or national law.<sup>29</sup> The Conseil also referred to Directive 64/221 but chose to annul the decision for breach of Article 11 of the 1970 Décret.<sup>30</sup> In the view of the two French commentators, this ruling left open the question whether individuals could invoke provisions of Directive 64/221 before the Conseil.<sup>31</sup> However, the full implications of this ruling did not become apparent for another two years.

In 1977 Daniel Cohn-Bendit, the West German ex-student leader, challenged before the Paris Tribunal Administratif the refusal of the Interior Minister to revoke a deportation order originally made against him because of his role in the 1968 disturbances. He argued that under Article 6 of Directive 64/221 he should be given reasons for the Minister's refusal. Article 11 of the 1970 Décret,

it may be noted, only refers to refusals to grant a first residence permit. In the case of a refusal to revoke a deportation order Article 6 of Directive 64/221 had not been implemented in French Law. Consequently, the applicant had to rely purely on Community law. The Tribunal decided to request a preliminary ruling from the Court of Justice as to whether Article 6 of Directive 64/221 covered refusals to revoke a deportation order and whether it required reasons to be given at the time of the refusal.

The Minister then applied to the Conseil d'Etat to overrule the lower Court. Judgement was given in Cohn-Bendit<sup>32</sup> in December 1978. Commissaire du Gouvernement Genevois advised the Conseil either to apply Article 6 of the Directive or to request a preliminary ruling from the European Court. The Conseil, however, found it clear from Article 189 of the Treaty that provisions of Directives could not be invoked in challenge to individual administrative measures. Since the matter was found to be clear, the Conseil felt that it was not obliged to request a ruling under Article 177(3). It is true that Article 189(3) provides for Directives merely to bind Member States as regards the result to be achieved. Thus Directives might seem to represent no more than instructions to the Member States to take certain action. However, in Putili the European Court had expressly ruled that provisions of Directive 64/221 could be invoked in challenge to individual administrative measures.<sup>33</sup> Therefore, the Conseil d'Etat had little justification for its finding. In fact, the Conseil would seem to have abused the acte clair exception in order to avoid having to request a preliminary ruling from the European Court.

The Conseil then went on to suggest that provisions of Directive 64/221 could be invoked in challenge to implementing

regulations. The Conseil is thought to have meant by this that it would go so far as to entertain an action for exception <sup>34</sup> d'illégalité on the basis of this Directive. Thus a Community migrant faced with a deportation order could disobey it, wait to be prosecuted and then argue that the order was unlawful as being based on regulations which did not adequately implement this Directive. In effect, then, the Conseil might come to review an individual administrative measure for compatibility with Directive 64/221. However, an unsuccessful challenge of this kind would leave the migrant concerned liable to criminal penalties. In the case of failure to comply with a deportation order a maximum of <sup>35</sup> three years imprisonment may be imposed. In practice, a migrant is likely to be deterred from challenging a deportation order by fear of incurring such a penalty. Consequently, the Conseil's approach would provide migrants with a lesser degree of protection than that envisaged by the European Court.

Nevertheless, it is possible to draw a comparison between the Cohn-Bendit ruling and some recent rulings of the European Court. In Enka, for example, the latter Court found that individuals could invoke Article 10(2)(d) of Directive 69/74 <sup>36</sup> when challenging the adequacy of national measures taken in implementation of this Directive. <sup>37</sup> However, the fact that the European Court interpreted this particular provision in this way does not mean that it would retreat from its view that provisions of Directive 64/221 may be invoked in challenge to individual administrative acts. At most, the Enka ruling could be said to render the effect of Directive 64/221 in the national legal systems less clear and a request for a preliminary ruling more desirable.

The Cohn-Bendit ruling, therefore, demonstrates that the willingness of lower national courts to request preliminary rulings from the European Court may not in itself be sufficient to overcome the reluctance of higher courts to intervene against administrative action in this area. In the United Kingdom the House of Lords has never had the opportunity to consider Community law governing the exclusion or expulsion of migrants. The Court of Appeal has only had the opportunity to do so in Santillo, and here this Court may well have failed to apply the relevant law in accordance with the ruling of the European Court. There is, then, little reason to believe that the Court of Appeal would be any more willing than the French Conseil d'Etat to break with its tradition of restraint in this area.

In principle, Article 169 of the Treaty offers a solution to such problems. The procedure contained in this provision enables the European Commission in specified circumstances to seek a declaratory ruling from the European Court to the effect that a Member State is in breach of Community law. The Court has ruled that action under this provision may be taken in relation to breaches committed by "constitutionally independent"<sup>38</sup> institutions of a Member State. Thus it is generally thought that the Article 169 procedure could be employed where a national court has infringed Community law.<sup>39</sup> The Commission agrees that this is so in principle but, in practice, does not regard this procedure as a suitable means of dealing with national judicial decisions incompatible with Community law.<sup>40</sup>

Instead, the Commission prefers to rely on informal pressure. This preference may be attributed to two factors. First, it would be a very sensitive matter for the Commission to initiate legal proceedings in relation to a judicial decision. In fact, it is generally thought that the independence of the national judiciary would be brought into question.<sup>41</sup> Thus the Commission could expect to encounter resistance from lawyers and politicians alike in the Member State concerned. Secondly, even if the Court of Justice were to deliver a declaratory ruling to the effect that a national court had infringed Article 177(3), it is difficult to see how such a ruling could be implemented by the Member State concerned. For these two reasons, the Commission has preferred to rely on obtaining the sympathetic co-operation of national courts.

In the past, this approach has enjoyed a degree of success. In the well-known Semoules Case<sup>42</sup> of March 1968 the French Conseil d'Etat failed to refer a question of Community law to the Court of Justice for interpretation in accordance with Article 177(3) of the E.E.C. Treaty. Instead, it chose to give precedence to French law over Community law. The Commission responded with informal action only.<sup>43</sup> Two years later a further Case involving the relationship between Community law and French law came before the Conseil. Regulation 1028/68<sup>44</sup> required national support-buying office to buy all lots of 50 tons or more of a particular cereal that were offered. Under French law, however, such purchases would only be made for those registered with the support-buying



office. The Conseil decided to ask the European Court for a preliminary ruling on the question whether the above Regulations required the office to purchase "all" such lots.<sup>45</sup> The apparent success of informal action of this kind has been noted by some commentators.<sup>46</sup> However, the Cohn-Bendit decision casts doubt on the lasting effectiveness of informal action against national courts.

On the other hand, the Commission has frequently discussed the application of Community law in this area with the French administration,<sup>47</sup> and these informal contacts seem to have been successful. Specifically, despite the ruling of the Conseil d'Etat against Cohn-Bendit, the administration admitted him to France shortly afterwards. Informal contacts between the Commission and the United Kingdom administration<sup>48</sup> also seem to have been successful, and the Home Secretary is currently giving "active consideration" to the possibility of amending administrative practice so as to deal with the problem raised by the Santillo case. In particular, it is envisaged that where a migrant has been imprisoned for such a term as might deprive the original recommendation for deportation of its quality as an "opinion" for the purposes of Article 9(1) of the Directive, the matter may be referred back to the convicting court for a further recommendation.<sup>49</sup> This case, then, would suggest that, for the moment at least, the implementation of Community law governing the exclusion or expulsion of migrants may be secured through amendment of administrative practice rather than judicial intervention. In these circumstances, the application of this law in individual cases will remain in some doubt.

## Conclusion

National courts are now expected to break with their tradition of restraint in the face of challenges to the exclusion or expulsion of aliens and review administrative action against Community migrants for compatibility with Directive 64/221 and the jurisprudence of the European Court regarding public policy. It is particularly important that they should do so, because they are much better placed than the European Commission to ensure respect for this jurisprudence in individual cases.

So far the national courts in the United Kingdom have generally proved willing to request preliminary rulings from the European Court in such cases. On the other hand, there is doubt as to whether they courts are equally ready to intervene against administrative action on the basis of such preliminary rulings. The experience of other Member States suggests that a solution to this problem might be found in the readiness of lower courts to request preliminary rulings from the European Court or the application of informal pressure by the Commission. However, the Cohn-Bendit ruling by the French Conseil d'Etat indicates that neither solution will necessarily be effective. In fact, in view of the Santillo ruling, it would seem that the application of Community law in this area may depend on the result of informal contacts between the Commission and the United Kingdom administration rather than on intervention by the judiciary. As long as this remains the case, however,

the freedom of political activity of Community migrants in the  
United Kingdom is likely to be in jeopardy.

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- 1 In Case 48/75 Jean Noel Royer (1976) E.C.R. 497,511 the Court expressly ruled that Article 48(3),52 and 59 of the Treaty conferred such rights on Community migrants.
- 2 Case 41/74 Van Duyn v. The Home Office (1974) E.C.R. 1337, 1549.
- 3 Case 36/75 Rutili (1975) E.C.R. 1219,1235.
- 4 See also Case 48/75 Royer (1976) E.C.R. 497,517.
- 5 For discussion of the courts covered by this expression see K.Lipstein, The Law of the European Economic Community, Butterworths, London, 1974, 329 and G.Bebr, 'Directly Applicable Provisions of Community law: The Development of a Community Concept', 19 I.C.L.Q. (1970) 257-272. With reference to the United Kingdom, in particular, see L.Collins, European Community Law in the United Kingdom, London, 1975, 104-6.
- 6 See Commission Reply to written Question 608/78 by Mr Krieg (O.J. 1979, C28/8).
- 7 See M.Lagrange, 'The European Court of Justice and National Courts. The Theory of the Acte Clair. A Bone of Contention or a Source of Unity', 8 C.M.L.Rev.(1971) 312-24.
- 8 In addition to the Cases which will be mentioned in the text, the following may be noted. In Case 175/78 R.v. Vera Ann Saunders 1979 2 C.M.L.R. 216 the European Court, on a request for a preliminary ruling from the Bristol Crown Court, ruled that a judicial prohibition on a United Kingdom Citizen residing in England or Wales for three years did not come within the scope of Community law and, in particular, did not infringe Article 48(3)(b) of the Treaty.
- 9 Van Duyn v. The Home Office (1974) 1 W.L.R. 1107.
- 10 Ibid., 1115.
- 11 Ibid., 1116.
- 12 1975 1 C.M.L.R. 583.
- 13 Ibid., 392-3.
- 14 Ibid., 394.
- 15 Case 30/77 (1977) E.C.R. 1999.
- 16 The Daily Telegraph, 14 November 1977.
- 17 1980 2 C.M.L.R. 308.
- 18 1980 3 C.M.L.R. 212.
- 19 1980 3 C.M.L.R. 220.
- 20 R.C.D.I.P. (1970) 503.
- 21 Ibid., 508.
- 22 9 EUR (1974) 164.
- 23 EGEL. I, 927.
- 24 Case 67/74 Bonsignore (1975) E.C.R. 297,307.
- 25 EuGRZ. (1975) 475.

- 26 G. Tebr, 'Article 177 of the EEC Treaty in the Practice of the National Courts', 26 I.C.L.Q. (1977) 241-232, 232.
- 27 1981 1 C.M.L.R. 45.
- 28 J.O.R.F., 14 janv., p. 516.
- 29 Dall. 1977, J. 316, 317.
- 30 Ibid., 317.
- 31 L. Nauwelaers and I. Fabius, 33 A.J.D.A. (1977) 130-2.
- 32 Dall. 1979, J. 155.
- 33 Case 36/75 (1975) E.C.R. 1219, 1235.
- 34 G. Isaacs, 'Le Juge Administratif Français et les Directives Communautaires', 15 C.D.E. (1979) 207-230.
- 35 Article 27 of Ordonnance 45-2658 of 2 November 1945 (J.O.R.F., p. 7225).
- 36 J.O. 1969, L58/7.
- 37 Case 38/77 (1977) E.C.R. 2203, 2213.
- 38 Case 77/69 Commission v. Belgium (1970) E.C.R. 237, 243; Case 8/70 Commission v. Italy (1970) E.C.R. 961, 966 and the remarks of Advocate-General Warner in Case 30/77 Bouchereau (1977) E.C.R. 1999, 2020.
- 39 See, for example, H.A.H. Audretsch, Supervision in European Community Law: Observance by Member States of their Treaty Obligations, North-Holland, Amsterdam, 1978, 63.
- 40 See Commission Reply to Written Question 708/78 by Mr Krieg (O.J. 1979, C28/8).
- 41 Commission Reply to Written Question 349/69 by Mr Westerterp (J.O. 1969, C20/3). See also the view of the Legal Affairs Committee of the European Parliament in the Merchiers Report (P.E. Doc. 94/69, 24).
- 42 1970 C.M.L.R. 395.
- 43 H.G. Schermers, 'The Court of Justice: Promoter of European Integration', 22 A.J.C.L. (1974) 444-484.
- 44 J.O. 1968, L176/1.
- 45 SYNACOMEX (Dall. 1971, J. 576).
- 46 H.G. Schermers, id op., 484.
- 47 See, for example, Commission Reply to Written Question 155/68 by Miss Lulling (J.O. 1968, C115/2).
- 48 See, for example, Commission Reply to Written Question 398/74 by Lord O'Hagan (O.J. 1974, C158/10).
- 49 Santillo 1980 2 C.M.L.R. 285, 324.

CONCLUSION and BIBLIOGRAPHY

Conclusion

During the 1970s the notion of European citizenship gained considerable prominence. This notion entails for Community nationals the same political rights and freedoms in the Community as a whole as they enjoy in their own Member States under their national constitutions. However, the efforts of the Community institutions to give effect to this notion have been impeded because the failure of the Member States fully to accept this notion has prevented the Council from wholeheartedly co-operating in the necessary legislative action.

Nevertheless, notable progress is being achieved. The Commission has submitted to the Council a proposal to grant all Community nationals the right of entry and residence in a Member State other than their own, provided only that they are able to support themselves. This proposal presents few problems for the Member States and is unlikely to be rejected by the Council. However, the introduction of full freedom of movement requires not only the grant of such rights but also the abolition of entry formalities. The creation of a full passport union has been delayed by arguments regarding the appearance of the proposed uniform European passport. On the other hand, informal Commission action combined with relevant rulings of the Court of Justice have lead to important reductions in entry formalities. Further progress depends on whether the Commission can convince the authorities in all the Member States that passport control does not offer an effective means of detecting terrorists and other criminals.

As for freedom of political activity, the Court of Justice has made a major contribution towards securing this freedom by severely limiting the circumstances in which Member States may

exclude or expel Community nationals for political reasons. Further progress requires the abolition or at least amendment of national legislation restricting their political activity. This could be secured through the enactment of Community measures guaranteeing full freedom of political activity for them, as the European Parliament has advocated. However, the attitude of the Council to the Commission's proposal for Directive 64/221 suggests that the Council would be too concerned with the preservation of national sovereignty to approve such measures. Therefore, the most practical solution at the moment may be for the Commission to take informal action to ensure that provisions such as section 3 (2) of the United Kingdom Aliens Restriction (Amendment) Act 1919 are not applied in the case of Community nationals.

As far as political rights are concerned, little concrete progress has been achieved. This lack of progress results from the determination of the Council to leave this matter in the hands of the Member States. Thus the Council prefers the question of electoral rights and the right of access to public office to be studied by the Working Group on Special Rights rather than the Community institutions proper. Since the Working Group has failed to reach agreement, little progress has been possible. Nevertheless, if an appropriate case were to come before the European Court, this Court might well interpret existing Community law so as to entitle Community nationals to hold certain public offices as trade union representatives or as members of other representative bodies within the undertaking. Moreover, the European Parliament may be expected to propose granting Community nationals the right to vote and stand as candidates in direct elections in the host Member State, when it comes to draw up a uniform procedure to govern these elections.



Finally, the Commission is apparently contemplating the submission to the Council of a proposal to grant Community nationals the right to participate in local elections and to hold public office at this level in the host Member State.

Even if the above developments do occur, European citizenship will only be fully realised, if the relevant substantive law is effectively enforced. The enforcement of Community law is a task shared by the Commission and the national courts, which are expected to review national administrative action for compatibility with Community law at the instance of individuals.

The further realisation of European citizenship, therefore, depends on two factors. The first is the attitude of individuals. Unless they assert their rights and freedoms before national courts, the European Court will be unable to continue its work in developing the content of European citizenship and national courts will be unable to fulfil their task of ensuring respect for the relevant Community law. Moreover, the support of individuals for the work of the European Parliament is vital. With such support the Parliament will feel more confident in pressing proposals for migrant participation in direct elections and in urging the Commission to present the Council with similar proposals regarding local elections.

The second factor concerns the attitude of the Member States. So far, they have proved unwilling to support the creation of European citizenship at the expense of their national sovereignty. Unless the Member States modify their attitude, the Council will be reluctant to approve the enactment of the necessary Community measures, and national courts, particularly the higher ones, may be reluctant to fulfil their task of enforcing the relevant Community law.

In short, the future of European citizenship depends on the desire of the people of Europe to become citizens of Europe and on the willingness of the Member States to accept the degree of political integration entailed by the creation of such citizenship. Developments in the last decade suggest that if these two political conditions are satisfied, Community law offers an adequate means of creating European citizenship. In the present decade the Member States will face the problems of international recession, energy shortages and deteriorating East-West relations. These problems may convince the Member States of the need for Western European unification. If so, legal means and political opportunity will coincide so as to allow for the creation of full European citizenship should the people of Europe genuinely wish to become European citizens.

## BIBLIOGRAPHY.

National Official Documents

- Bullock Report on Industrial Democracy, Cmnd.6706.
- Correspondence Arising out of the Meeting of the Foreign Ministers of the Governments of Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands Held at Messina on June 1-2, 1955. Cmnd.9525.
- Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft, Deutscher Bundestag 2 Wahlperiode 1953, Drucksache 3440.
- The European Communities. A Glossary of Legal Terms Appearing in the French Text of the Treaties Establishing the European Atomic Energy Community, the European Coal and Steel Community and the European Economic Community and Related Documents, H.M.S.O., 1962.
- Le Grand-Duché de Luxembourg et la Communauté Economique Européenne. Marché Commun, Service Information et Presse, Luxembourg, 1957.
- La Politica dell'Impiego nella C.E.E. Memorandum Presentato al Consiglio dei Ministri degli Affari Sociali della Comunità Economica Europea dal Ministero del Lavoro e della Previdenza Sociale, Ministero del Lavoro e della Previdenza Sociale, Rome, 1971.
- Presidenza del Consiglio di Ministri. Servizio Informazioni, Comunità Economica Europea, Rome, 1958.
- Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Comité Intergouvernemental Créé par la Conférence de Messine, Brussels, 1956.
- Rapport sur le Projet de Loi (No.4676), J.O.R.F., Documents Parlementaires. Assemblée Nationale XII. 1956-57, Annexe 5226.
- Second Report from the Select Committee on Direct Elections to the European Assembly, H.C.515-1, 1975-76.

Books.

- J.-M. Auby and R. Drago, Traité de Contentieux Administratif, L.G.D.J., Paris, 1964.
- H.A.H. Audretsch, Supervision in European Community Law. Observance by the Member States of Their Treaty Obligations. A Treatise on International and Supranational Supervision, North-Holland, New York, 1978.
- H. Batiffol, Le Droit International Privé, L.G.D.J., 1967.
- G. Bebr, Judicial Control of the European Communities, Stevens, London, 1962.
- E.E. Bergsten, Community Law in the French Courts: The Law of Treaties in Modern Attire, Nijhoff, The Hague, 1973.
- I. Berlin, Four Essays on Liberty, Oxford Univ. Press, 1969.
- G. Bernini, Profili di Diritto della Comunità Europea, Morano, Naples, 1969.
- A. Bleckman, Europarecht. Das Recht der Europäischen Wirtschaftsgemeinschaft, Carl Heymans, Cologne, 1976.
- J. Bodin, De Republica Libri Six, Jacob Dupuis, Paris 1586.
- W.R. Bohning, The Migration of Workers in the United Kingdom and the European Community, Oxford Univ. Press, 1972.
- W. Bongen, Schranken der Freizügigkeit aus Gründen der Öffentlichen Ordnung und Sicherheit im Recht der Europäischen Wirtschaftsgemeinschaft, Duncker and Humblot, Berlin, 1975.
- M. Borris, Ausländische Arbeiter in einer Grossstadt, Europäische Verlagsanstalt, Frankfurt am Main, 1973.
- M. Bouvard, Labor Movements in the Common Market, Praeger, New York, 1972.
- L.J. Brinkhorst and H.G. Schermers, Judicial Remedies in the European Communities: A Case Book, Stevens, London, 1969.
- A. Campbell, Common Market Law, Longmans, London, 1969.
- A. Campbell and D. Thompson, Common Market Law. Texts and Commentaries, Stevens, London, 1962.
- H. Capitant, Vocabulaire Juridique, P.U.F., Paris, 1976.
- L. Cartou, Le Marché Commun et le Droit Public, Sirey, Paris, 1959.
- L. Cartou, Organisations Européennes, Dalloz, Paris, 1967.
- D. Cepede et al., Le Marché Commun, Eds. M-Th. Genin, Paris, 1957.
- G. Chesne, L'Etablissement des Etrangers en France et la Communauté Economique Européenne, L.G.D.J., Paris, 1962.
- La Circolazione dei Lavoratori nella C.E.C.A., Ministero del Lavoro e della Previdenza Sociale, Rome, 1957.
- D. Collins, The European Communities, The Social Policy of the First Phase, Martin Robertson, London, 1975.
- L. Collins, European Community Law in the United Kingdom, Butterworths, London, 1975.
- G. Debeyre, Traité de Droit Administratif, Dalloz, Paris, 1952.
- Droit des Communautés Européennes. Les Nouvelles, W.G. Ganshof van der Meersch, ed., Larcier, Brussels, 1967.
- J. Errera et al., Euratom. Analyse et Commentaire du Traité, Les Eds. du Libraire Encyclopedique, Brussels, 1958.
- J.M. Evans, Immigration Law, Sweet and Maxwell, London, 1976.
- U. Everling, Das Niederlassungsrecht im Gemeinsamen Markt, Vahlen, Berlin, 1963.

Festschrift für Walter Hallstein zu Seinem 65 Geburtstag, E.von Caemmerer, ed., Klostermann, Frankfurt am Main, 1966.

E.Forsthoff, Lehrbuch des Verwaltungsrechts, Beck, Munich, 1966 (9th edn).

S.Frohlich, Niederlassungsrecht und Freizügigkeit in der E.W.G. und E.F.T.A., Polygraphischer Verlag, Zurich, 1964.

D.J.Gilstra et al., Leading Cases and Materials on the Law of the European Communities, Kluwer, Deventer, 1977.

G.S.Goodwin-Gill, International Law and the Movement of Persons Between States, Clarendon Press, Oxford, 1978.

E.Grabitx, Europäische Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft, Europa Union Verlag, Cologne, 1970.

B.Granotier, Les Travailleurs Immigrés en France, Maspero, Paris, 1970.

J.A.G.Griffith, The Politics of the Judiciary, Manchester Univ. Press, 1977.

H.von der Groeben et al., Kommentar zum E.W.G.Vertrag, Nomos, Baden-Baden, 1974(2nd edn).

H.Grotius, De Jure Belli ac Pacis Libri Tres, Apud Joannem Janssonium, Amsterdam, 1651.

Grundrechtsschutz in Europa, H.Mosler, ed., Springer, Berlin, 1976.

E.B.Haas, The Uniting of Europe. Political, Economic and Social Forces. 1950-1957, Stanford Univ. Press, 1968.

W.Hallstein, United Europe Challenge and Opportunity, Oxford Univ. Press, 1962.

W.Hallstein, Der Unvollendete Bundesstaat. Europäischen Erfahrungen und Erkenntnisse, Econ. Verlag, Dusseldorf, 1969.

T.C.Hartley, E.E.C. Immigration Law, North-Holland, New York, 1978.

Zur Integration Europas. Festschrift für Carl Friedrich Ophuls aus Anlass seines Siebsigsten Geburtstags, W.Hallstein and H-J.Schlochauer, eds, C.F.Muller, Karlsruhe, 1965.

F.G.Jacobs, European Law and the Individual, North-Holland, New York, 1976.

F.G.Jacobs and A.Durand, References to the European Court: Practice and Procedure, Butterworths, London, 1975.

W.Kanein, Ausländergesetz mit dem übrigen Verschriften des Fremdenrechts, C.H.Beck, Munich, 1974.

P.J.G.Kapteyn and P.Verloren van Themaat, Introduction to the Law of the European Communities After the Accession of New Member States, Sweet and Maxwell, London, 1973.

A.C.Kiss, Répertoire de la Pratique Française en Matière de Droit International Public, Eds du Centre National de la Recherche Scientifique, Paris, 1962.

H.Lauterpacht, The Function of Law in the International Community, Clarendon Press, Oxford, 1933.

R.Lecourt, L'Europe des Juges, Bruylant, Brussels, 1976.

Legal Problems of an Enlarged European Community, M.E.Bathurst, ed., Stevens, London, 1972.

P.Lerebours-Pigeonnière, Droit International Privé, Dalloz, Paris, 1970(9th edn).

La Libera Circolazione dei Lavoratori, Ministero del Lavoro e della Previdenza Sociale, Rome, 1960.

La Libera Circolazione dei Lavoratori, Ministero del Lavoro e della Previdenza Sociale, Rome, 1969.

- La Libre Circulation des Travailleurs dans les Pays de la C.E.E., M. Mazziotti, ed., Giuffrè, Milan, 1974.
- Ligue Européenne de Coopération Economique, Déclaration de la L.E.C.E. sur la Formation du Marché Commun, Brussels, 1955.
- L.N. Lindberg, The Political Dynamics of European Economic Integration, Oxford Univ. Press, 1963.
- K. Lipstein, The Law of the European Economic Community, Butterworths, London, 1974.
- G. Lyon-Caen, Contribution à l'Etude des Modes de Représentation des Interêts des Travailleurs, dans le Cadre des Sociétés Anonymes, E.C. Commission, Brussels, 1970.
- G. Lyon-Caen, Droit Social Européen, Dalloz, Paris, 1972.
- G. Lyon-Caen, Droit Social Européen et International, Dalloz, Paris, 1974 (3rd edn).
- I.A. Macdonald, The New Immigration Law, Butterworths, London, 1972.
- W.H. McPherson and F. Meyers, The French Labor Courts: Judgement by Peers, Univ. of Illinois Press, 1966.
- C. Maestripiéri, La Libre Circulation des Personnes et des Services dans la C.E.E., U.G.A., Heule, 1972.
- G. Marty and P. Raynaud, Droit Civil, Sirey, Paris, 1972.
- P.S.R.F. Mathijsen, A Guide to European Community Law, Sweet and Maxwell, London, 1974.
- J.E. Meade et al., Case Studies in European Economic Union. The Mechanics of Integration, Oxford Univ. Press, 1962.
- J. Megret et al., Le Droit de la Communauté Economique Européenne, Presses Universitaires, Bruxelles, 1970.
- D.P. O'Connell, International Law, Stevens, London, 1965.
- W. Blake Odgers and Walter Blake Odgers, The Common Law of England, Sweet and Maxwell, London, 1920.
- A. Parry and S. Hardy, EEC Law, Sweet and Maxwell, London, 1973.
- D. Prag and E.D. Nicholson, Businessman's Guide to the Common Market, Pall Mall Press, London, 1973.
- S. Pufendorf, De Jure Naturae et Gentium Libri Octo, Apud Andream ab Hoogenhuysen, Amsterdam, 1688.
- G. Rasquin, Les Manquements des Etats Membres des Communautés Européennes Devant la Cour de Justice, U.G.A., Heule, 1974.
- Les Relations Entre Employeurs et Travailleurs sur le Plan d'Entreprise. Formes et Fonctions. Actes de la Session d'Etudes Tenue à Luxembourg du 4 au 6 octobre 1965, E.C.S.C. High Authority, Luxembourg, 1967.
- J.-J. Ribas et al., Traité de Droit Social Européen, P.U.F., Paris, 1978.
- G.G. Rosenthal, The Men Behind the Decisions. Cases in European Policy-Making, Lexington Books, London, 1975.
- C. Rousseau, Droit International Public, Dalloz, Paris, 1965.
- M. Scelba, The European Community and the Development of its Institutions. Speech Delivered in Florence on 26 April 1970, European Parliament, Luxembourg, 1970.
- G. Scelle, Précis de Droit des Gens, Sirey, Paris, 1932-34.
- R. Schiedermaier, Handbuch des Ausländerrechts der Bundesrepublik Deutschland, Metzner, Berlin, 1968.

- R.J. Sharpe, The Law of Habeas Corpus, Clarendon Press, Oxford, 1976.
- M. Sibert, Traité de Droit International Public, Dalloz, Paris, 1951.
- D. Silletti, La Libera Circolazione della Manopera fra gli Stati Membri della Comunità Economica Europea, Giuffrè, Milan, 1967.
- H. Smit and P. Herzog, The Law of the European Economic Community. A Commentary on the E.E.C. Treaty, Matthew Bender, New York, 1976.
- S.A. de Smith, Constitutional and Administrative Law, Penguin, Harmondsworth, 1977 (3rd edn).
- S.A. de Smith, Judicial Review of Administrative Action, Stevens, London, 1975.
- A. Spinelli, The European Adventure. Tasks for the Enlarged Community, Charles Knight, London, 1972.
- E. Stein and F.L. Nicholson, American Enterprise in the European Common Market. A Legal Profile, Univ. of Michigan Law School, Ann Arbor, 1960.
- M. Stewart, Employment Conditions in Europe, Gower Press, London, 1976.
- P. Suet, L'Application Pratique de la Législation du Travail dans les Entreprises, L.G.D.J. Paris, 1970 (2nd edn).
- B. Sundberg-Weltman, Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under The E.E.C. Treaty, North-Holland, New York, 1977.
- Xth International Congress on Comparative Law Budapest 1978, U.K. National Reports Submitted to the Congress, U.K.N.C.C.L., London, 1978.
- A.G. Toth, Legal Protection of Individuals in the European Communities, North-Holland, New York, 1978.
- L-E. Troclet, Eléments du Droit Social Européen, Eds de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1963.
- D.C. Turack, The Passport in International Law, Lexington Books, Massachussets, 1972.
- Università di Firenze. Istituto di Diritto del Lavoro, La Politica Sociale della Comunità Economica Europea, Giuffrè, Milan, 1960.
- D.G. Valentine, The Court of Justice of the European Communities, Stevens, London, 1965.
- G. Vedel, Droit Administratif, P.U.F., Paris, 1973.
- A. Verdoodt, Naissance et Signification de la Déclaration Universelle des Droits de l'Homme, Eds Nauwelaerts, Louvain, 1964.
- M. Waline, Droit Administratif, Sirey, Paris, 1963.
- E.H. Wall, European Communities Act 1972, Butterworths, London, 1972.
- H. Wallace et al., Policy-Making in the European Communities, Wiley, London, 1977.
- D. Williams, Not in the Public Interest, The Problem of Security in a Democracy, Hutchinson, London, 1965.
- U.H. Wittkopp, Wirtschaftliche Freizügigkeit und Nationalstaats Vorbehalte. Eine Untersuchung zu den Artikeln 48 Absatz 4 und 55 Absatz 1 des E.W.G. Vertrages, Nomos, Baden-Baden, 1977.
- E. Wohlfarth et al., Die Europäische Wirtschaftsgemeinschaft. Kommentar zum Vertrag, Vahlen, Berlin, 1960.
- P. You, Le Préambule des Traités Internationaux, Librairie de l'Université de Fribourg, 1941.



## Articles.

- P. Allott, 'Exclusion of Aliens and E.E.C. Law', C.L.J. 35(1976)3-6.  
B. Aubenas, 'Quelques Considérations sur les Infractions Contre les Traités de Paris et de Rome', R.M.C. 12(1969)458-64.
- A. Barav, 'Failure of Member States to Fulfil Their Obligations Under Community Law', C.M.L.Rev. 12(1975)369-83.  
G. Bebr, 'Article 177 of the E.E.C. Treaty in the Practice of the National Courts', I.C.L.Q. 26(1977)241-82.  
G. Bebr, 'Directly Applicable Provisions of Community Law: The Development of a Community Concept', I.C.L.Q. 19(1970)257-98.  
D. De Bellescize, 'L'Article 169 du Traité de Rome et l'Efficacité du Contrôle Communautaire sur les Manquements des Etats Membres', R.T.D.E. 13(1977)173-213.  
G. Biscottini, 'Problemi della Circolazione e dello Stabilimento nel Trattato di Roma', Riv.Dir.Int. 53(1970)161-74.  
S.L. Blankenheimer, 'European Communities. Exclusion of Aliens', Vanderbilt Journal of International Law 9(1976)415-23.  
A. Bleckmann, 'Art. 5 E.W.G-Vertrag und die Gemeinschaftstreue', DVBl. 91(1976)483-7.  
A. Bleckmann, 'Considérations sur l'Interprétation de l'Article 7 du Traité C.E.E.', R.T.D.E. 12(1976)469-81.  
M. Bogdan, 'Free Movement of Tourists Within the E.E.C.', J.W.T.L. 11(1977)468-75.  
R. Bonnet, 'L'Europe du Travail Est-Elle Réalisée?' Droit Social (1969)160-71.  
R. Bosscher, 'Preparations for Direct Elections in the Netherlands', C.M.L.Rev. 15(1978)465-72.
- P. Cahier, 'Les Articles 169 et 171 du Traité Instituant la Communauté Economique Européenne à Travers la Pratique de la Commission et la Jurisprudence de la Cour', C.D.E. 10(1974)3-38.  
H. Cassan, 'Chronique de la Jurisprudence Sociale de la Cour de Justice des Communautés Européennes', R.M.C. 21(1978)130-41.  
G. Close, 'Harmonisation of Laws: Use or Abuse of the Powers Under the E.E.C. Treaty?' E.L.Rev. 3(1978)461-80.  
G. Cohen-Jonathan, 'La Cour de Justice des Communautés Européennes et les Droits de l'Homme', R.M.C. 21(1978)74-100.  
G. Cohen-Jonathan, 'Le Parlement Européen et les Droits de l'Homme', R.M.C. 21(1978)384-401.  
E. Colombo, 'Citizens' Rights in the European Community', Europe Documents (28 October 1978)1-3.  
G. Cortese, 'Libera Circolazione e Collocamento dei Lavoratori Italiani nell'Area della C.E.E.', Riv.Dir.Eur. 11(1971)267-74.
- K.A. Dahlberg, 'The E.E.C. Commission and the Politics of the Free Movement of Labour', J.C.M.S. 6(1967-8)310-33.  
H. Desmedt, 'Les Deux Directives du Conseil de la C.E.E. Concernant la Police des Etrangers', C.D.E. 2(1966)55-71.  
M. Distel, 'Expulsion des Etrangers, Droit Communautaire et Respect des Droits de la Défense', Dall. 1977, Chron. 165-72.  
L. Doyen, 'Les Conseils Consultatifs Communaux des Immigrés', Revue du Travail (1972)107-21.  
'Les Droits Fondamentaux et le Citoyen Européen', Annales du Marché Commun 20(1977)21-6.  
G. Druesne, 'La Reserve d'Ordre Public de l'Article 48 du Traité de Rome', R.T.D.E. 12(1976)229-58.  
A. Durand, 'European Citizenship', E.L.Rev. 4(1979)3-14.

O. Dutheillet, de Lamothe and Y. Robineau, 'Chronique Générale de Jurisprudence Administrative Française', A.J.D.A. 35(1979)27-34.  
 D. Duyssens, 'Migrant Workers From Third Countries in the European Community', C.M.L.Rev. 14(1977)501-20.

A.J. Easson, 'Can Directives Impose Obligations on Individuals', E.L.Rev. 4(1979)67-79.

Editorial, E.L.Rev. 4(1979)65-6.

'European Assembly Elections Act 1978', M.L.R. 42(1979)66-72.

S.F. Eynard, 'L'Article 169 du Traité de Rome: Douze Ans d'Application de la Procédure d'Infraction à l'Égard des États Membres de la C.E.E.', Riv.Dir.Eur. 10(1970)99-125.

H.S. Feldstein, 'A Study of Transaction and Political Integration: Transnational Labour Flow Within the European Economic Community', J.C.M.S. 6(1967-8)24-55.

G. Ferrière, 'Le Contrôle de la Legalité des Actes Étatiques par la Cour de Justice des Communautés Européennes', R.G.D.I.P. 71(1967) 879-1008.

A. Fresia, 'La Libre Circulation des Personnes et le Principe de Non-Discrimination dans le Jurisprudence de la Cour de Justice des Communautés', R.M.C. 18(1975)550-64.

W.P. Gormley, 'The Future Role of Arbitrators Within the E.E.C.: The Right of an Arbitrator to Request a Preliminary Ruling Pursuant to Article 177', St.Louis Univ.Law Rev. 12(1968)550-63.

C. Gray, 'Interim Measures of Protection in the European Court', E.L.Rev. 4(1979)80-102.

D. Grisoli, 'The Impact of the European Economic Community on the Movement for the Unification of Law', L.C.P. 26(1961)418-29.

K. Hailbronner, 'Die Freizügigkeit im Spannungsfeld zwischen Staatsräson und Europäischen Gemeinschaftsrecht', DöV. 31(1977) 857-66.

T.C. Hartley, 'The Internal Personal Scope of the E.E.C. Immigration Provisions', E.L.Rev. 3(1978)191-207.

T.C. Hartley, 'Nationality and the Right to Vote in Elections for the European Parliament', E.L.Rev. 4(1979)50-2.

B.A. Hepple, 'Aliens and Administrative Justice: The Dutschke Case', M.L.R. 34(1971)500-19.

G. Isaac, 'Le Juge Administratif Français et les Directives Communautaires', C.D.E. 15(1979)267-90.

H. Knolle, 'Freizügigkeit der Arbeitnehmer. Zur Verordnung Nr.15 der Europäischen Wirtschaftsgemeinschaft', Bundesarbeitsblatt 19(1961)674-9.

R. Kovar, 'La Jurisprudence Relative au Droit d'Établissement', J.D.I. 105(1978)953-66.

R. Kovar, Note on Corveleyn v. Etat Belge, R.C.D.I.P. (1970)503-18.

R. Kovar et al., 'L'Exécution des Directives de la C.E.E. en France', C.D.E. 6(1970)274-302.

J. Kropholler, 'Die Europäische Gemeinschaften und der Grundrechtsschutz', EuR 4(1979)128-48.

- M. Lagrange, 'The European Court of Justice and National Courts. The Theory of the Acte Clair. A Bone of Contention or a Source of Unity', C.M.L.Rev. 8(1971)312-24.
- M. Lagrange, 'Les Pouvoirs de la Haute Autorité et l'Application du Traité de Paris', R.D.P.S.P. 76(1961)4058.
- S-P. Laguette, 'Essai d'une Application de l'Article 55 du Traité C.E.E. à une Profession Libérale: la Profession d'Avocat', R.T.D.E. 2(1966)242-55.
- D. Lahalle, 'L'Insertion des Immigrés dans la Vie Politique', L'Année Sociologique(1975)189-200.
- H.J. Lambers, 'Les Clauses de Revision des Traités Instituant les Communautés Européennes', A.F.D.I. 7(1961)593-631.
- H. Lesguillons, 'L'Extension des Compétences de la C.E.E. par l'Article 235 du Traité de Rome', A.F.D.I. 20(1974)886-904.
- K. Lewin, 'The Free Movement of Workers', C.M.L.Rev. 2(1964-5)300-24.
- D. Loschak, 'Observations sur un Infra-Droit', Droit Social(1976) 43-9.
- D. Loschak, 'Les Ressortissants de la Communauté Européenne', Droit Social(1976)83-8.
- J-V. Louis, 'Mise en Oeuvre des Obligations Internationales de la Communauté dans les Ordres Juridiques de la Communauté et des Etats Membres', R.B.D.I. 13(1977)122-43.
- J-V. Louis, 'Observations sur un Arrêt de la Cour de Justice Capital pour la Politique Commune des Transports', C.D.E. 10(1977)584-92.
- Y. Loussouarn, 'L'Harmonisation du Droit d'Etablissement', R.T.D.E. 5(1969)275-92.
- O. Loy, 'L'Application de la Liberté d'Etablissement dans les Etats Membres de la Communauté Economique Européenne', J.D.I. 95(1968).
- H.H. Maas, 'The English Version of the Treaty of Rome', C.M.R.Rev. 6(1968-69)205-9.
- C. Maestripietri, 'Freedom of Establishment and Freedom to Provide Services', C.M.L.Rev. 10(1973)150-73.
- D. Martin, 'Les Systèmes de Négociation et de Représentation dans l'Entreprise', Droit Social(1976)92-101.
- J.L. Mashaw, 'Ensuring the Observance of Law in the Interpretation and Application of the E.E.C. Treaty: The Role and Functioning of the Renvoi d'Interprétation Under Article 177', C.M.L.Rev. (1970) 258-85 and 423-53.
- G. Keier, 'Die Einzelperson und das Europäische Recht', N.J.W. 29(1976)1557-62.
- J. Mertens de Wilmars and I.M. Verougstraete, 'Proceedings Against Member States for Failure to Fulfil their Obligations', C.M.L.Rev. 7(1970)385-406.
- K. Mišabovic, 'La Comunità Economica Europea e le Migrazioni del Lavoro', Economica Internazionale 30(1977)55-69.
- J.D.B. Mitchell, 'Lawyers and the European Communities', N.I.L.Q. 22(1971)149-67.
- H. Monaco, 'Comparaison et Rapprochement des Législations dans le Marché Commun Européen', R.I.D.C. 12(1960)61-74.

- L.A. Mulders, 'Conference Report. Direct Elections and the Future of the European Parliament. Sixteenth Leiden-London Meeting, London 25 June 1977', C.M.L.Rev. 15(1976)69-74.
- W.A.O'Dell, 'Labour Law. Common Market. Public Policy', 5 Virginia Journal of International and Comparative Law 5(1975)589-95.
- B. Olson, 'The Common Employment Market for the Northern Countries', Int.Lab.Rev. 68(1953)364-74.
- C.F. Ophuls, 'La Relance Européene', Euro Ybk. 4(1958)3-20.
- P. Paone, 'Primato del Diritto Comunitario. Disapplicazione del Diritto degli Stati Membri', Riv.Dir.Int. 61(1978)429-68.
- P. Pescatore, 'Les Droits de l'Homme et l'Integration Européene', C.D.E. 4(1968)627-73.
- P. Pescatore, 'Les Exigences de la Démocratie et la Legitimie de la Communauté Européene', C.D.E. 5(1974)499-514.
- H.G. Petersman, 'The Protection of Fundamental Rights in the European Community', Euro Ybk. 23(1975)179-206.
- A-J. Pouyat, 'Freedom of Movement Within the Common Market', Journal of the International Commission of Jurists 9(1968)45-59.
- P. van Praag, 'Aspects Economiques à Long Terme des Migrations Internationales dans les Pays de la C.E.E.', Int.Mig. 9.(1971) 126-36.
- G. Rambow, 'L'Exécution des Directives de la Communauté Economique Européene en Republique Fédérale d'Allemagne', C.D.E. 6(1970) 379-411.
- R. Riegel, 'Zum Anwendungsbereich der Art. 48ff E.W.G.V.', N.J.W. 31(1978)468-70.
- 'Rights of Workers Representatives in Europe', E.I.R.R. (1978) 19-27.
- D. de Ripainseel-Landy, 'L'Application Directe des Décisions et des Directives', C.D.E. 7(1971)445-67.
- M. Robinson, 'Preparations for Direct Elections in Ireland', C.M.L.Rev. 15(1978)187-98.
- H.J. Roethof, 'Round-Table Conference in Florence', C.M.L.Rev. 16(1979)309-10.
- L. Sandri, 'Free Movement of Workers in the European Community', Bull. E.C. 11-1968, 5-6.
- J. Sandri, 'Social Policy in the Common Market', Community Topics 22 3-1.
- M.R. Saulle, 'Recènti Svilúppi della Tutèla dei Dirítta Individuali in Europa', Riv.Dir.Eur. 16(1976)227-34.
- F. Saverio-Baviera, 'Preparations for Direct Elections in Italy', C.M.L.Rev. 15(1978)199-206.
- Lord Scarman, 'The Law of Establishment in the European Economic Community', N.I.L.Q. 24(1973)61-73.
- C. Schachor-Landau, 'Protection of Fundamental Rights and Sources of Law in European Community Jurisprudence', J.W.T.L. 10(1976) 289-300.
- H.H. Scheffler, 'Ausländergesetz und Aufenthaltgesetz/EWG im Licht der neueren Rechtsprechung der Europäische Gerichtshofes', DVBl. 92(1977)90-5.
- H.G. Schermers, 'The European Court of Justice: Promoter of European Integration', A.J.C.L. 22(1974)444-64.
- H.G. Schermers, 'The Law as it Stands on Preliminary Rulings', L.I.E.I. 1974/1 93-112.

H.G.Schermers, 'The Law as it Stands Against Treaty Violations by States', L.I.E.I. 1974/2 111-137.

A.Schmutzer, 'Débats du Parlement Européen de Juin 1965. Primauté du Droit Communautaire et Harmonisation des Législations Nationales', R.I.D.C. 18(1966)93-120.

G.Schrans, 'Note on Corveleyn v. Etat Belge', C.M.L.Rev. 7(1970) 237-40.

I.E.Schwartz, 'Le Pouvoir Normatif de la Communauté Notamment en Vertu de l'Article 235. Une Compétence Exclusive ou Parallèle', R.M.C. 19(1976)280-90.

J-C.Séché, 'Free Movement of Workers under Community Law', C.M.L.Rev. 14(1977)385-410.

I.Seidi-Hohenveldorn, 'Harmonisation of Legislation in the Common Market and the Heritage of the Common Law', J.B.L. (1962)247-57.

P.Selmer, 'Die Öffentliche Sicherheit und Ordnung als Schranke der Arbeitnehmer-Freizügigkeit gemäss Art.48 Abs.3 E.W.G. Vertrag', DöV 20(1967)328-34.

K.R.Simmonds, 'Van Duyn v. The Home Office: The Direct Effectiveness of Directives', I.C.L.Q. 24(1975)419-37.

D.Simon, 'Ordre Public et Libertés Publiques dans les Communautés Européennes. A. Propos de l'Arrêt Rutili', R.M.C. 19(1976)201-23.

S.A.de Smith, 'The Constitution and the Common Market: A Tentative Appraisal', M.L.R. 34(1971)597-614.

E.Stein, 'Assimilation of National Laws as a Function of European Integration', A.J.I.L. 58(1964)1-40.

D.Stephen, 'Immigration. The Challenge of the Common Market. What Will Entry into Europe Mean for Britain's Immigration Policy', Race Today 3(1971)254.

M.Stewart, 'Direct Elections to the European Parliament (with special reference to the United Kingdom)', C.M.L.Rev. 13(1976) 283-99.

B.Sundberg-Weitman, 'Legal Enforcement of Obligations Incumbent Upon Member States Under Treaties of the European Communities', Scand.Studies in Law 19(1975)259-92.

L.Talichet and J.Nancy, 'Les Européens de l'Etranger', L'Europe en Formation (June 1978)5-6.

G.Le Tallec, 'La Police des Etrangers dans les Etats Membres de la C.E.E. et le Traité de Rome', R.M.C. 7(1964)371-80.

D.Thompson, 'Harmonization of Laws', J.C.M.S. 3(1964-5)302-14.

C.Tomuschat, 'La Libre Circulation et le Statut Politique des Ressortissants Communautaires', C.D.E. 12(1976)58-67.

C.Tomuschat, 'L'Ordre Public, Menace Pour la Libre Circulation', C.D.E. 11(1975)302-9.

C.Tomuschat, 'Le Principe de Proportionnalité: Quis Iudicabit? L'Affaire Watson', C.D.E. 13(1977)97-102.

A.G.Toth, 'The Law as it Stands on Appeal for Failure to Act', L.I.E.I. 1975/2 65-93.

A.Touffait, 'Ordre Public dans la Communauté Européenne', Review of the International Commission of Jurists 17(1976)31-40.

P.T.Vegleris, 'Valeur et Signification de la Clause "Dans une Société Démocratique" dans la Convention Européenne des Droits de l'Homme', H.R.J. 1(1968)219-41.