# Ideas, Norms and European Citizenship: Explaining Institutional Change

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Despite assessments that European Union citizenship, in the Treaty on European Union, was insufficient to induce real institutional change, institutional change has occurred. As an institutional designer and agent of change, the ECJ made tactical interventions in the period 1993–2003 which resulted in incremental-transformative institutional change. The ECJ's phased approach in-between Treaty revisions has strengthened the constitutional importance of European citizenship and the market citizenship template has been superseded by an understanding of European citizenship that privileges citizen status over economic activity. Three phases may be distinguished in this process: judicial minimalism (1993–97), signalling intentions (1998–00) and engineering institutional change (2001–03). An institutional constructivist approach to the judicial institutionalisation of Union citizenship highlights the role of ideas, cognitive templates and norms, in explaining the longitudinal process of its institutional development. It also shows that institutional change is a more complex phenomenon than is generally portrayed. In searching for conceptual tools that explain European judges' decisions not only to bring about qualitative institutional change, but also to ground 'a change' in such a way that future extension is possible, it is argued that a multivariable model entails some promising lines of inquiry into the subject.

The introduction of Union Citizenship by the Treaty on European Union (1 November 1993) shattered prevailing economic approaches to European integration[1] and generated debates concerning issues of polity formation, such as European democracy and legitimacy, European constitutionalism, the formation of a European demos and the design of a European public sphere.[2] As such,

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1 For early accounts, see A. Durand, 'European Citizenship' (1979) 4 ELRev 3; A. Evans, 'European Citizenship: A Novel Concept in EEC Law' (1984) 32(4) AJCL 674; S. Magiera (ed), *Das Europa der Bürger in einer Gemeinschaft ohne Binnengrenzen*(Baden-Baden: Nomos, 1990).

2 See J. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219; J. H. Weiler, 'To be a European citizen- Eros and civilization' (1997) 4 *Journal of European Public Policy* 495; G. de Burca, 'The Quest for Legitimacy in the European Union' (1996) 59 MLR 349; D. Curtin, *Postnational Democracy: The European Union in search of a political philosophy* (The Hague: Kluwer, 1997); C. Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29 CMLRev 1137 and 'Supranational Citizenship and Democracy: Normative and Empirical Dimensions', in M. La Torre (ed), *European Citizenship: An Institutionalist Challenge* (The Hague: Kluwer, 1998); E. Meehan, *European Citizenship* (London: Sage, 1993); T. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4 *Journal of Political Philosophy* 337; T. Kostakopoulou, 'European Citizenship and Immigration after Amsterdam: Silences, Openings, Paradoxes' (1998) 24 *Journal of Ethnic and Migration Studies* 639;

 

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it featured centrally in what has been termed 'the normative turn' in European studies.[3]

Certain scholars saw European citizenship as an important, albeit skeletal, institutional structure on which more flesh had to be grafted. The mere fact that citizenship had 'burst' its statist and national bounds[4] sparked intriguing questions, such as what citizenship might mean in a supranational context, how it may affect the development of a non-statal form of governance and how citizenship per se might be transfigured in analytical and institutional terms.[5] Constructivist approaches addressed these questions and sought to capture the transformative potential of European citizenship.[6] This had much to do with the fact that citizenship was no longer a single status; instead, it was multiple. As Meehan remarked, 'the identities, rights and obligations associated [. . .] with citizenship are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions, alliances of regions'.[7] This unprecedented complexity and, generally speaking, the interaction of nested and interlocking 'old' (ie national) and 'new' (ie supranational) citizenships held out the promise of transforming the scope and nature of 'old' and 'new' citizenships over an extended period of time.[8]

However, this perspective failed to convince. Most scholars saw European citizenship as a purely decorative and symbolic institution, and a mirror image of pre-Maastricht 'market citizenship'.[9] For instance, scholars observed that Union

U. Preuss, 'Two Challenges to European Citizenship' (1996) 44 *Political Studies* 534; J. Shaw, 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22 ELRev 554; A. Wiener, 'Assessing the Constructive Potential of Union-Citizenship - A Socio-Historical Perspective' (1997) 1 *European Integration On-line Papers*, (http://eiop.or.at/eiop/, last visited 18 March 1998); A. Wiener and D. V. Sala, 'Constitution-making and Citizenship Practice - Bridging the Democracy Gap in the EU?' (1997) 35 *Journal of Common Market Studies* 595; R. Bellamy and D. Castiglione, 'The communitarian ghost in the cosmopolitan machine: constitutionalism, democracy and the reconfiguration of politics in the New Europe' in Bellamy and Castiglione (eds), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Aldershot: Avebury, 1996).

3 Weiler (1997), n 2 above.

4 I borrow this metaphor from D. Heater, *What is Citizenship?* (Polity Press: Oxford, 1999).

5 See Meehan, n 2 above; E. Meehan, 'Political Pluralism and European Citizenship', in P. Lehning and A. Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (London: Routledge, 1997); G. Delanty, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 (3) *Citizenship Studies* 285; S. O'Leary, *European Union Citizenship: The Options for Reform* (London: IPPR, 1996).

6 T. Kostakopoulou, 'Nested "Old" and "New" Citizenships in the European Union: Bringing Forth the Complexity' (2000) 5 *Columbia Journal of European Law* 389; T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester: Manchester University Press 2001); A. Wiener, *Building Institutions: The Developing Practice of European Citizenship* (Oxford: Westview, 1998); J. Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 *Modern Law Review*; U. Vogel, 'Emancipatory politics between universalism and difference: Gender perspectives on European Citizenship', in P. Lehning and A. Weale (eds), *Citizenship, Democracy and Justice in the New Europe*, (London: Routledge, 1998) 142.

7 Meehan, n 2 above, 1.

8 A. Evans, 'Nationality Law and European Integration' (1991) 16 ELRev; Kostakopoulou (2001), n 6 above.

9 M. Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995); J. d'Oliveira, 'Union Citizenship: Pie in the Sky?' in A. Rosas and E. Antola (eds), *A Citizens' Europe: In Search of a New Order* (London: Sage, 1995); P. Lehning, 'European Citizenship: a mirage?' in P. Lehning and A. Weale (eds), *Citi-*

citizenship had added little substantially new to existing Community law, with the exception of electoral rights at European Parliament and local elections and the right to diplomatic and consular protection. Others argued that since European citizenship was essentially a mercantile form of citizenship designed to facilitate economic integration, it would only be relevant to 'favoured EC nationals', that is, to a minority of European citizens who possess the necessary resources required for intra-EU mobility.[10] Reflecting the subtle influence of the intergovernmentalist repertoire, certain authors have proceeded to dismiss Union citizenship as empty rhetoric or a lofty proposal designed to enhance either the Union's social legitimacy or the Commission's promotional agenda. Notwithstanding their differences, all these perspectives entail a minimalist conception of European citizenship. Generally speaking, minimalism focuses on a few and selective characteristics of the whole, thereby bracketing the context out of which European citizenship emerged and the context that its institutional development may help create. On the basis of the above assessments, minimalist European citizenship was not enough to induce real institutional change. Despite such assessments, however, institutional change has occurred.

The aim of this paper is twofold. First, I wish to chart, analyse and explain the process of the institutional development of Union citizenship. In what follows, I argue that in the period 1993–2003 the European Court of Justice (ECJ) made tactical interventions, which procured incremental - transformative institutional change. By adopting a phased approach, the ECJ has strengthened the constitutional importance and substance of European citizenship in-between Treaty revisions. The judicial institutionalisation of Union citizenship does not only show that much of the 1990s' literature on European citizenship incorrectly underestimated its conceptual resources and wide-ranging transformative potential, but it also has important implications for European integration theory.[11] In this respect, the second aim of the paper is to show that the study of European citizenship could be incorporated into and contribute to the general and theoretical concerns of the study of European integration by providing the context for an institutional constructivist perspective.

Constructivism is built on the premise that reality is neither objective nor given. Rather, it is constructed and produced through discursive politics which,

*zenship, Democracy and Justice in the New Europe* (London and New York: Routledge, 1997) 175; T. Downes, 'Market Citizenship: Functionalism and Fig-leaves' in R. Bellamy and A. Warleigh (eds), *Citizenship and Governance in the European Union* (London: Continuum, 2001) 93.

10 This is because they are either active economic actors or self-sufficient and in possession of sickness insurance under the 1990 residence Directives; Council Directives 90/364 on the right of residence (OJ L180/26), 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L 180/28); and 90/366 on the right of residence for students (OJ L 180/28). The latter was replaced by Directive 93/96 (OJ L317/59). The recent European Parliament and European Council Directive of 29 April 2004 on the right of citizens of the Union and their Family Members to move and reside freely within the territory of the Member States (2004/38/EC), which repeals the above mentioned Directives, introduces three separate categories of residence rights and establishes an unqualified right of permanent residence after five years of continuous legal residence in the host Member State; OJ 2004 L 158/77 (30 April 2004).

11 For a discussion about the emergence of European citizenship norms, see Meehan, n 2 above; Wiener, n 2 above and Kostakopoulou, n 2 above.

in turn, succeed in sedimenting these constructions within institutions thereby endowing them with 'naturalness' and objectivity. However, instead of paying attention to the totality of a society's rules, identities and accounts and situating precepts and concepts within the wider social order, institutional constructivism highlights and refines the role of institutions in the process of the construction of reality. Ideas, concepts, precepts, norms and strategies are nested in, shaped by and altered by institutions and the institutional power to shape, mould and extend the above via discursive practices and strategies that create new intersubjectively shared meanings is a powerful tool. On this particular point, Haas and Haas observed that 'the constructivist ontology invests institutions with a political potential that is mainly overlooked by scholars from other approaches'.[12] Institutions are thus catalysts for change and agents of change, rather than unitary entities with fixed preferences that are difficult to change.

Although at first sight institutional constructivism could be seen as blending social constructivism with the sociological institutionalist approach of treating institutions as independent variables including ideas, norms and values that constitute identities and preferences, this view overlooks the subtle, but important, differences among these perspectives. For instance, institutional constructivism attributes greater salience to the institutional creation of reality and is much clearer about the role of institutions in the construction of ideas, norms, cognitive templates, identities and accounts than social constructivism.[13] At the same time, by emphasising actors' creative capacities to construct and transform discursive landscapes, which inform and shape, but do not determine their identities, it helps overcome the structuralist bias inherent in the institutionalist literature, as attested by its emphasis on stable, reproductive processes and patterns of behaviour,[14] institutional 'stickiness'[15] and the privileging of structure over agency.[16] This approach thus opens up space for an actor-based theory of non-linear, incremental and transformative institutional change. Agents have the capacity to capitalise on the normative surplus of meaning and the progressive possibilities already present in

12 P. M. Haas and E. B. Haas, 'Pragmatic Constructivism and the Study of International Institutions' (2002) 31 *Millennium* 573, 576.

13 My account is different from J. Checkel's 'middle ground' constructivism; 'The Constructivist Turn in International Relations Theory' (1998) 50 *World Politics* 324.

14 See S. P. Huntington's chapter in R. E. Goodin (ed), *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996).

15 P. Pierson, 'The Limits of Design: Explaining Institutional Origins and Change' (2000) 13 *Governance* 474; D. C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990). See also the path dependence literature characterising non rational choice historical institutionalist variants, whereby past choices determine later developments and restrict subsequent decisions; S. Steinmo, K. Thelen and F. Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992). But compare S. Bulmer and M. Burch, 'The "Europeanisation" of central government: the UK and Germany in historical institutionalist perspective', in G. Schneider and M. Aspinwall (eds), *The Rules of Integration* (Manchester: Manchester University Press, 2001). Bulmer and Burch depart from deterministic accounts of historical institutionalism by arguing that Europeanisation has transformed the character of government in Bonn/Berlin and Whitehall.

16 Notwithstanding the existence of variations, it is generally acknowledged that sociological institutionalism privileges structure over agency, whereas historical and rational choice institutionalisms exhibit a stronger structural determinism. On the three institutionalisms, see P. Hall and C. R. Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936.

 

accepted logics and existing conceptual resources nested within institutions in order to develop new conceptions, to construct and extend norms and to act in complex environments. On this basis, institutional change is not iterative, that is, reproducing the same ideas, norms, patterns and practices. It is, instead, more fluid, contingent, unpredictable and, more importantly, transformative.[17]

For the purpose of the discussion, I adhere to a broad definition of institutions as 'legal arrangements, routines, procedures, conventions, norms and organisational forms that shape and inform human interaction'.[18] Institutionalisation, in turn, may be defined as the incremental and long-term process by which an institution acquires meaning, specificity and value.[19] The process of the institutionalisation of Union citizenship shows that norms and ideas are not intervening variables that simply alter the conditions under which preference-driven choice occurs.[20] I define norms as intersubjectively held, prescriptive beliefs about a specific mode of behaviour or outcome. Given that theories of European integration in general have much to say about how and why institutions are created, but little to say about how, why and under what conditions they continue to change once they are institutionalised (institutional change as institutional develop-

17 Following Hall and Taylor's distinction, although sociological institutionalism explains both institutional design and compliance, it has difficulties in explaining how and why norms change thereby effecting institutional change. Historical institutionalists argue that significant change is associated with critical junctures. It is worth noting here that Bulmer and Burch have suggested the concept of 'critical moments' which give rise to opportunities for significant change. 'Such opportunities may not be realised or exploited, but if they are, the outcome is a critical juncture at which there is a clear departure from previously established patterns . . . In theory, at each critical moment the opportunities for institutional innovation are at their widest'; Schneider and Aspinwall (eds), n 15 above. Rational-choice institutionalism sees institutional change as the result of changes in the actors or the bargaining power of actors or in the distributional implications of existing institutional arrangements. See also R. Lieberman, 'Ideas, Institutions and Political Order: explaining Political Change' (2002) 96(4) *American Political Science Review* 697. Besides institutionalism, functionalist and neo-functionalist perspectives account for incremental change within an overall stable environment. Change is mostly exogenously induced and threatens to render existing institutions dysfunctional.

18 A. Norgaard, 'Rediscovering Reasonable Rationality in Institutional Analysis' (1996) 29 *European Journal of Political Research* 31, 39. March and Olsen define institutions as 'relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations'; 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organisation* 943, 948. Compare also K. Armstrong and S. Bulmer's definition of institutions as 'meaning formal institutions; informal institutions and conventions; the norms and symbols embedded in them; and policy instruments and procedures'; *The Governance of the Single Market* (Manchester: Manchester University Press, 1998) 58.

19 The term 'specificity' refers to the clear differentiation of an institution from others, while the term 'value' captures the centrality that an institution acquires. Polsby had added 'internal complexity' as a characteristic of the institutionalisation of organisations; N. W. Polsby, 'The Institutionalisation of the US House of Representatives' (1968) *American Political Science Review* 145. See L. D. Longley, 'Parliaments as Changing Institutions and as Agents of Regime Change: Evolving Perspectives and a New Research Framework' (1996) 2 *Journal of Legislative Studies* 24. See also R. L. Jepperson's essay in W. W. Powell and P. J. DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (Chicago: Chicago University Press, 2001).

20 According to rationalist accounts, judicial preferences are exogenous to any judicial process underway. For an assessment, see A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) ch 1.

ment),[21] the study of the institutionalisation of Union citizenship highlights the salience of ideas, cognitive templates and norms in explaining the longitudinal process of institutional development as well as the contribution that an institutional constructivist perspective can make to the study of institutional change.

The discussion is structured as follows. In the first section I uncover existing templates for conceptualising European Union Citizenship, while in section 2 I analyse its judicial institutionalisation by distinguishing three phases; namely, judicial minimalism (1993–97), signalling intentions (1998–00) and engineering institutional change (2001–03). In searching for conceptual tools that capture the key factors that influence European judges' decision not only to effect qualitative institutional change, but also to bring about 'a change' in such a way that extension of the change is possible in the future, I put forward a model that reflects the weight of various variables on judicial decision-making. The latter together with the dynamics of institutional change and the implications of the study are discussed in the final section.

## MODELS OF EUROPEAN CITIZENSHIP: UNCOVERING TEMPLATES

The scope and dynamics of institutional change depend on quasi-objectified ways of seeing European citizenship and its role in the evolving Community legal order. These normative and interpretive frames are important because they shape perceptions, priorities, and understandings of the meaning of citizenship and its implications. Five conceptualisations of European citizenship may be noted, as follows:

*Market Citizenship*

Drawing on the individualistic variant of liberalism, this mode depicts European citizenship as comprising a core of entitlements designed to facilitate market integration.[22] This owes much to the generalised belief that 'the Union is still predominantly a market and most of its freedoms to move are of interest only to property and commodity owners'.[23] Such an approach draws on the liberal conception of citizenship as a status bestowed on morally autonomous individuals who pursue their chosen forms of life.[24] This conception, however, overlooks that economic transactions do not take place in a vacuum. Instead, they are embedded within a social and political context. The latter does not only regulate them but, rather crucially, shapes the frames through which economic transactions are

21 Institutionalism has been more successful in accounting for institutional stability than for institutional change; J. Stacey and B. Rittberger, 'Dynamics of formal and informal institutional change in the EU' (2003) 10 *Journal of European Public Policy* 858, 859.

22 M. Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More (eds), *New Legal Dynamics of European Integration* (Oxford: Clarendon, 1995).

23 See K. Von Beume, 'Citizenship and the European Union' in K. Eder and B. Giesen (eds), *European Citizenship, National Legacies and Transnational Projects* (Oxford: OUP, 2001) 61, 80.

24 On the liberal conception of citizenship, see I. Berlin, *Four Essays on Liberty* (Oxford: OUP, 1969); R. Bendix, *Nation-Building and Citizenship* (New York: Wiley, 1964); J. Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971); T. H. Marshall, *Citizenship and Social Class* (1949).

understood. Rights related to economic transactions thus have implications for a broader spectrum of socio-political relations. This has been made clear by the European Court of Justice, which has pronounced the right to free movement as an intrinsic part of affirming workers' human dignity and a means for the improvement 'of their living and working conditions and promoting their social advancement'.[25] Arguably, if European citizenship is conceived of as a 'market citizenship',[26] then it does not, presumably, require the full range of 'constitutional essentials'.[27] Adding new rights to European citizenship might lead to 'rights saturation',[28] and attribute 'a fake legitimacy on the essentially autocratic mode of governance of the Union'.[29] However, such arguments sidestep the fact that European citizenship is not a freestanding institution that is emptied of political content. In fact, a cursory glance at the ECJ's jurisprudence suggests that free movement rights have turned 'aliens' into associates, opened up possibilities for the Community nationals' active involvement and participation in the socio-political life in the Member State of residence, and have activated redistributive policies designed to enhance their effective exercise.[30]

*Civic Republican European citizenship*

A civic republican model of European citizenship would champion an expressly political, dynamic and participatory conception of citizenship.[31] This model draws on the civic republican conception of citizenship as practice; that is, as active engagement and participation in common affairs.[32] Such a conception would necessitate the strengthening and expansion of both formal and informal participatory mechanisms in the EU coupled with reforms to remove constraints on access to citizenship, and initiatives to increase transparency and accountability in decision-making.[33] A civic republican approach to European citizenship could take either the form of liberal communitarianism, thereby praising belonging, solidarity and fairness in a political community, or of a thicker notion of citizenship – one that embodies a common identity, common political values and shared final ends. Whereas the latter form raises the spectre of Euro-national-

25 See Advocate General Trabucchi's Opinion in Case C 7/75 *F* v *Belgian State* [1975] ECR 679, and Advocate General Jacobs' Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191.
26 Everson, n 9 above.
27 d' Oliveira, n 9 above.
28 Weiler, n 2 above, 501.
29 R. Baubock, 'Citizenship and National Identities in the European Union' (1997) 4 *Harvard Jean Monnet Working Paper* 97.
30 This coheres with the sociological paradigm of citizenship which views citizenship as an institution that contains capitalist inequalities and social rights as a precondition for full membership in a community; Marshall, *Citizenship and Social Class*, n 24 above.
31 R. Bellamy and D. Castiglione, 'The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined' in A. Follesdal and P. Koslowski (eds), *Democracy and the European Union* (Berlin: Springer-Verlag, 1998); E. Tassin, 'Europe: A Political Community?' in C. Mouffe (ed), *Dimensions of Radical Democracy. Pluralism, Citizenship, Community* (London: Verso, 1992).
32 M. Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (London: Routledge, 1990); S. Mulhall and S. Swift, *Liberalism and Communitarianism* (Oxford: Blackwell, 1996).
33 Compare A. Heritier, 'Elements of democratic legitimation in Europe: an alternative perspective' (1999) 11 *Journal of European Public Policy* 269.

ism[34] with all its undesirable repercussions for ethnic migrants, refugees and their families, the former clearly recognises peoples' various subject positions and their engagement in various projects and associative relationships at the local, national or supranational levels.[35] Undoubtedly, both variants would be criticised by those who value the cultural particularity of national communities and believe that the territorial nation state is the natural locus of democracy and citizenship.

**Deliberative European citizenship**

This model is strongly associated with Habermas' emphasis on creating a supranationally shared political culture based on the rule of law, separation of powers, democracy, respect for human rights, and so on. Such a political culture would guarantee the flourishing of equally legitimate cultural forms of life.[36] The model is based on a strong notion of participatory democracy[37] and champions active dialogic participation and the flourishing of a European public sphere. In practical terms, this would seem to require, among other things, the development of European political parties, the recognition of the right of association within the context of the Union citizenship provisions and the disentanglement of demos from ethnos.[38]

Although these reforms are worthwhile, constitutional patriotism fails to convince scholars and observers for several reasons. It will suffice to mention only two here. First, constitutional principles are not ethically neutral; they have a particularistic anchoring in so far as they are rooted in interpretations derived from the perspective of the nation's historical experience and the majority culture. Although this does not preclude critique and the mutual adjustment of political culture, it does confine critical exchanges within the 'architectonics of the constitutional state'. Within such a context, migrants are expected to 'engage in the political culture of their new home',[39] as it has been defined by the dominant group. Migrants should not, publicly, call into question the culturally and historically specific understandings embodied by it.

Secondly, Habermas tends to assume that 'pre-constituted' individuals enter the public sphere in order to devise the rules that bind them, and that agreement on these rules is possible under conditions of undistorted communication. Since the worlds people inhabit are multiple, fragmentary and contradictory, and the pro-

34 By putting emphasis on a shared citizenship identity, common heritage and a shared way of life, this approach champions a particularistic identity which undercuts egalitarianism.

35 F. Mancini, 'Europe: The Case for Statehood' (1998) 4 ELJ 29.

36 J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1; *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity, 1996); 'Reply to Grimm' in P. Gowan and P. Anderson (eds), *The Question of Europe* (London: Verso, 1997). See also Closa, 1998, n 2 above.

37 Compare A. Heller and F. Feher, 'Citizen Ethics and Civic Virtues' in A. Heller and F. Feher (eds), *The Post-modern Political Condition* (Cambridge: Polity, 1988); J. Cohen and A. Arato, *Civil Society and Political Theory* (Cambridge MA: MIT Press, 1992).

38 Kostakopoulou, 2000, n 6 above.

39 Habermas, 1992, n 36 above, 17.

spects for unimpeded communication are rather slim in the real world - even more so in the EU where communication and deliberation is often seen by participants as an opportunity to hold on to their entrenched positions in order to meet domestic political expediencies and not to succumb to the force of the better argument, a deliberative model of citizenship would appear to have limited chances of success. Instead of conditioning the European polity on a supranational political culture, it might thus be preferable to start from the premise of heterogeneous, internally differentiated and contested communities taking part in an ongoing quest for procedures, principles and institutions, which accommodate their differences and meet their common needs and aspirations.

*Corrective European Citizenship*

If a deliberative European citizenship is incapable of eliciting subjective identification with the EU, the mixed approach adopted by Weiler and others may be a more attractive one.[40] This approach shares the normative premise of constitutional patriotism, but, at the same time, it appreciates the ethno-cultural traditions of Member States. As such, it reflects the fusion between liberal and communitarian approaches that characterised political theory in the 1990s and the development of communitarian liberalism.[41] National identities are valued as symbols for collective action, resources for identity building and markers of intergenerational projects promising collective immortality. According to Weiler, a European civic public can co-exist with national publics without threatening to displace them. Whereas national citizenship would be the realm of affinity and nationhood, European citizenship would be the realm of law and Enlightenment ideals.[42] Double membership of individuals in national organic and supranational, value-driven communities would tame nationalism, which is prone to expressions of intolerance and xenophobia.[43] On this reading, European citizenship 'serves as a civilising force which keeps the eros of nationalism at bay'.[44] True, Weiler makes concrete suggestions for empowering European citizens by enhancing their participation in the process of European governance, such as the European legislative ballot coinciding with elections to the European Parliament, Lexcalibur, the creation of a European Constitutional Council and so on.[45] However, the crux of the point is that the notion of corrective European citizenship as a rational overlay of deeply rooted national identities and a check on the dysfunctions of national political processes tends to overrate 'the embeddedness' of individuals within national cultures and, consequently, underrates the prospects of their transformation into European Union citizens.

40 Weiler, 1997, n 2 above.
41 J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); C. Taylor, *Liberalism and the Moral Life* (Cambridge MA: Harvard University Press, 1989).
42 Weiler, 1997, n 2 above.
43 *ibid* 508–509; See also J. H. Weiler, 'European Citizenship – Identity and Differentity' in M. La Torre (ed), above n 2, 1–24.
44 Weiler, 1997, n 2 above, 527.
45 *ibid*; Weiler, 1998, n 43 above, 20–24.

Bellamy and Castiglione also share the idea of a corrective European citizenship. They argue that in the European 'mixed commonwealth' communitarian commitments and distinctive identities can coexist with a cosmopolitan regard for universal principles of rights and fairness (cosmopolitan communitarianism).[46] But this begs the question of whether the tension generated by these opposing elements can be so easily overcome. The subjugation of European citizenship by quasi-nationalist definitions of membership does not rule out the possibility that the Europeanisation of the nation-state may be accompanied by the 'nationalisation' of the European supranational community. The exclusion of third country nationals from Union citizenship and the Schengenising of migration law and policy are also good cases in point.

*Constructive European Citizenship*

This approach conceives of the EC/EU as the product of evolutionary and reflexive institutional design.[47] It draws on radical theories of citizenship, namely, on feminist, post-structuralist and post-colonial perspectives. Radical theories of citizenship diverge from both conventional liberal and communitarian approaches in so far as they regard citizenship not as an issue of either the Right (individual rights) or the Good (the community), but as a matter of calling into question the constructed senses of community and the self underlying such politics.[48] Accordingly, European citizenship is conceived of as both a process and a project to be realised as the 'grand conversation' about the political restructuring of Europe continues. This means that the meaning of European citizenship exceeds the rights enumerated in Articles 17 *et seq* EC. This owes much to the fact that European citizenship has called into question traditional ways of thinking about membership and community, and entails possibilities for new transformative politics beyond the nation-state.

Several reforms could actualise the potential of Union citizenship. First, Article 18 EC could entail a directly effective right, thereby disentangling the rights to free movement and residence from either economic status or self-sufficiency and possession of sickness insurance. Secondly, the rules on residence could be updated.[49] Thirdly, formal and informal mechanisms of participation[50] could be strengthened with a view to giving Union citizens full franchise in their State of residence. Fourthly, European citizenship could be disentangled from state

46 Ballamy and Castiglione, n 2 above, 267.

47 G. Ross, *Jacques Delors and European Integration* (Cambridge: Polity Press, 1995) 6; G. Marks et al, *Governance in the European Union* (London: Sage, 1996); J. Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-modern?' (1996) 43 *Journal of Common Market Studies* 29.

48 I. M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); C. Pateman, *The Sexual Contract* (Oxford: Blackwell, 1988); P. Gilroy, *There Ain't no Black in the Union Jack: The Cultural Politics of Race and the Nation* (London: Hutchinson, 1987).

49 J. Monar, 'A Dual Citizenship in the Making: the Citizenship of the European Union and its Reform' in La Torre (ed) n 2 above, 167.

50 Proposal for a Council Decision establishing a Community action Programme to promote active European citizenship (civic participation), COM/2003/0276/ final.

nationality, and be conditioned on domicile. This would lead to the inclusion of approximately 13 million long-term resident third country nationals (TCNs) within its personal scope.[51] The inclusion of TCNs into Union citizenship has been defended on several grounds: the need to remedy the civic inclusiveness deficit of European political membership;[52] the creation of a European 'open republic';[53] concern about the social integration of TCNs and social harmony within the Union;[54] a commitment to a liberal democratic order which sets limits to the community's right of collective self-determination;[55] dual citizenship;[56] and the need to eliminate divergent conditions of access to European citizenship owing to different nationality laws.[57] Fifthly, given the dynamic and open ended character of European citizenship, new provisions could be added within its ambit, such as the protection of social rights and the development of an anti-poverty strategy, the promotion of forms of substantive equality between the sexes, consumer rights, the protection of health and the environment, and the rights of association and assembly. Finally, European citizenship could be made meaningful to citizens who have never exercised their Community law rights of free movement, thereby wearing down the 'purely internal' rule.[58]

Inspiring as these reforms and challenges might be for some, it is true that national executives see them as mission impossible. There is, on the whole, a generalised apprehension about decoupling European citizenship from nationality. But if the goal of European citizenship is to transform the residents of Europe whose lives have been monopolised by national collectivism into critical Union citizens, then the European political community should be disentangled from quasi-nationalist trappings. This would make both majority and minority communities rightful shapers and makers of the public culture and Europe's possible futures. In addition, there is a pressing need to ensure inclusiveness in the practice of European citizenship by decoupling enjoyment of the rights of movement and residence from socio-economic status, and by making European citizenship meaningful even to immobile European citizens by providing a set of rights that could make a difference to their lives.

51 National executives have succeeded in grafting their notions of who the Europeans are in the emerging European institutions. Although EC Treaty referred to workers of the Member states as recipients of the free movement rights, the Member States' interpretation of article 48 EC as referring to workers qua nationals became sedimented, thereby cancelling out of existence alternative juridical options (i.e., conditioning free movement on domicile). This made almost 'natural' the confinement of special rights and, subsequently, of Union citizenship to nationals of Member States.

52 Kostakopoulou, n 6 above.

53 R. Hofmann, 'German Citizenship Law and European Citizenship: Towards a special kind of European nationality?' in La Torre (ed) n 2 above, 149.

54 A. C. Oliveira, 'The Position of Resident Third Country Nationals: Is It Too Early to Grant them Union Citizenship?' in La Torre (ed) n 2 above.

55 R. Rubio Marin, 'Equal Citizenship and the Difference that Residence Makes' in M. La Torre (ed) n 2 above, 226.

56 Monar, n 49 above.

57 M-J. Garrot, 'A New Basis for European Citizenship: Residence?' in La Torre (ed) n 2 above, 232.

58 N. N. Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time To Move On?' (2002) 39 CMLRev 731.

## THE INDETERMINATE TRAJECTORY OF EUROPEAN CITIZENSHIP: THE DIFFERENCE THAT EUROPEAN JUDGES MAKE

### Phase 1. 1993–1997: Judicial Minimalism[59]

National courts provided the initial fora in which the meaning and full implications of European citizenship were to be tested. In *R* v *Secretary of State for the Home Department, ex parte Adams*,[60] *R* v *Secretary for the Home Department, ex parte McQuillan*,[61] and in *R* v *Secretary of State for the Home Department, ex parte Vitale*[62] the issue of the direct effect of Article 18 EC was raised but, unfortunately, no definite answer was reached. In Adams, the reference was withdrawn when Mr Adams' exclusion order was lifted, and in Vitale no preliminary ruling reference was made to the European Court of Justice. It is true to say that the latter adopted a cautious approach in 1993–1997. Undoubtedly, the Court was aware of the constitutional significance of Union citizenship. In its Report on *Citizenship of the Union*, the Commission had stated that European Citizenship had led to a conceptual metamorphosis of the Community rights of free movement and residence 'by enshrining them in the Treaties themselves'.[63]

Advocate General Leger, in his opinion in *Boukhalfa*, also pinpointed the 'promise' of Union citizenship inherent in the constructive model outlined in the previous section:

> . . .Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in the concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to Citizens of the Union being treated absolutely equally, irrespective of nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same Member State.[64]

But the European Court of Justice opted for a 'consolidating', rather than 'constitutionalising' approach to Union citizenship, that is, European citizenship was used as a supplementary basis in order to reaffirm existing Community law. Although European judges knew that Union citizenship was not a market citizenship, they, nevertheless, embarked upon a process of 'adaptive stabilisation' of its meaning. In *Uecker and Jacquet*, the Court ruled that Article 8 was not intended to alter the scope ratione materiae of the Treaty so as to cover internal situations.[65]

59 I borrow the term from C. Sunstein's, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge MA: Harvard University Press, 1999).
60 [1995] All ER (EC) 177.
61 [1995] 4 All ER 400.
62 [1996] All ER (EC) 461.
63 COM(93) 702 Final, 21/12/93.
64 Case C-1214/94 *Boukalfa* v *Federal Republic of Germany* [1996] ECR I-2253.
65 Cases C-64 and 65/96 *Kari Uecker* and *Vera Jacquet* v *Land Nordrhein-Westfalen* [1997] 3 CMLR 963; [1997] ECR I-317.

In *Skanavi*, the question of whether holders of driving licences need to exchange their licences for licences in the host Member State within one year of taking up normal residence in order to remain entitled to drive a motor-vehicle there was answered by recourse to Article 52 EC (Article 43, on renumbering), and not Article 8a EC (Art 18, on renumbering).[66] Similarly, in *Stober and Pereira* the Court saw Article 52 EC, coupled with Reg 1408/71, as the key Article in deciding that German legislation, which required the children of self-employed workers to reside in Germany in order to qualify for dependent children's allowance, was incompatible with the Treaty.[67] In *Kremzow*, European citizenship was invoked, but without success.[68] The Court confirmed its treatment of purely internal situations by ruling that the sentence of imprisonment imposed on *Kremzow* by an Austrian criminal court did not fall within the scope of the application of the Treaty.

How can one thus explain the judicial minimalism during the period 1993–1997? It is true that European judges were well aware of national executives' apprehension about the possible implications of Union citizenship. Such fears found expression in the Danish opt out Declaration which stated 'nothing in the TEU implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of the nation-state. The question of Denmark participating in such a development, therefore, does not arise'.[69] European judges also knew that Member State would be wary of the movement of non-active economic actors without strong assurances that such persons would not become a burden on their social welfare services. Furthermore, various governmental proposals in circulation, which were designed to limit the authority and independence of the ECJ prior to the 1996 Intergovernmental Conference, had alerted the ECJ to national executives' dissatisfaction with its influential institutional operation. Evidently, European citizenship's time had not come. European judges saw radical change as difficult, premature and costly in view of post-Maastricht reactions and governmental opposition. As a consequence, the conceptual resources inherent in the institution of Union citizenship were not utilised.

Besides the fact the political climate did not favour change, it is true to say that the cases considered by the European Court of Justice during the first phase did not provide an opportunity for institutional change. The cases did not bring forth a real dissonance between European citizenship norms and concrete reality, and settled jurisprudence offered coherent and complete answers to the questions posed, thereby making reliance on Union citizenship provisions indirect and subsidiary. In sum, in the period 1993–1997, there was neither an interest nor an opportunity for bringing about qualitative change in the meaning and implications of Union citizenship.

66 Case C-193/94 *Skanavi* and *Chryssanthakopoulos* [1996] 2 CMLR 372; [1996] ECR I-929.
67 Joined Cases 4/95 and 5/95 *Stober and Pereira* v *Bundesanstalt Fur Arbeit* [1997] 2 CMLR 213; [1997] ECR I-511.
68 Case 299/*95 Friedrich Kremzow* v *Austria* [1997] ECR I-2629.
69 OJ C348/4, 31/12/94.

**Phase 2. 1998–2000: Signalling Intentions**

Although the European Court of Justice did not derive new rights of residence directly from Article 18 EC in the second phase, it, nevertheless, highlighted the constitutional importance of European citizenship by bringing citizens within the scope of the protection afforded by the non-discrimination clause (Article 12 EC). The political climate was conducive for a constructive conception of Union citizenship and the extension of citizenship norms. In its second report on *Citizenship of the Union*, the Commission had stated that Union citizenship 'raised citizens' expectations as to the rights that they expect to see conferred and protected'.[70] The European Parliament's Resolution on the Commission's second report also noted that Union citizenship constitutes 'the guarantee of belonging to a political community under the rule of law'.[71] Finally, in its Communication to the European Parliament and the Council on the follow-up to the recommendations of the High-Level Panel on the Free Movement of Persons, the Commission had also stated that free movement rights

> are becoming an integral part of the legal heritage of every citizen of the European Union and should be formalised in a common corpus of legislation to harmonise the legal status of all Community citizens in the Member States, irrespective of whether they pursue a gainful activity or not.[72]

To this end, the Commission proposed a Council Regulation amending Council Regulation 1612/68 and a Council Directive amending Council Directive 68/360 on 12 November 1998.[73] Both proposals were designed to adapt the provisions of Council Reg 1612/68 and Council Dir 68/360 to the new socio-economic and political conditions of the Union, and provided a right of residence for third country national spouses of Union citizens who have resided in a Member State for three consecutive years on the event of the dissolution of marriage.[74]

This discursive interaction and the Commission's entrepreneurship provided impetus for judicial activism. In *Martinez Sala* the ECJ held that lawful residence of a Community national in another Member State is sufficient to bring her

70 COM (97) 0230.
71 COM 97 0230 C4-0291/97, OJ C 226, 20.7.1998, 61.
72 COM (98) 0403 final.
73 Proposal for a European Parliament and Council Regulation Amending Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (COM(1998) 394 - COD 98/0229; OJ C 344, 12.11.1998, OJ C 344); Proposal for a European Parliament and Council Directive Amending Directive 68/360/ EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (COM(1998) 394 COD 98/0230) OJ C 344. Other legislative initiatives include: Proposal for a European Parliament and Council Decision establishing an Advisory Committee on freedom of movement and social security for Community workers and amending Council Regulations (EEC) No 1612/68 EEC 1408/71 (COM (98) 0394 OJ C344, 12/11/1998 final) and Commission Proposal for a Council Regulation amending Regulation 1408/71 as regards its extension to nationals of third countries (COM (1997) 561 final, submitted on 10 December 1997.) The ECJ has extended the personal scope of the Regulation to refugees and stateless persons resident in a Member State and to their non-EU relatives on the grounds that such an inclusion is ancillary to Article 42 EC objectives and the international obligations of the MS; Cases C-95/99 to 98/99, *Khalil, Chaaban*, *Osseili and Nasser*, and C-180/99 *Addou*, Judgement of 11 October 2001.
74 Articles 10(4) and 4a(1) respectively.

within the scope of ratione personae of the provisions of the Treaty on European citizenship. Sala, a Spanish national who was a lawful and long-term resident in Germany and received social assistance under Federal Social Welfare Law,[75] was refused a child raising allowance on the ground that she did not possess a residence permit. The allowance was a non-contributory benefit granted to non-German nationals who had a dependant child, but did not have a full time job. If Sala were a worker or a self-employed person under Regulation 1408/71, her treatment would activate Articles 39 or 42 EC respectively. If the national court concluded that Sala did not fall in either of these categories, her status as a Union citizen, lawfully residing in another Member State, could bring her within the personal scope of the Treaty. By examining the material scope of the Treaty the Court also concluded that the allowance came within the scope of EC law, as either a social advantage under Council Regulation 1612/68 or a family benefit under Regulation 1408/71, thereby activating the non-discrimination clause (Article 12 EC).[76] Hence, the Court stated that, since Sala had been authorised to reside in Germany, the requirement of the 1985 Federal Law that a Community national had to produce a residence permit in order to receive a child-raising allowance, when that state's own nationals were not required to produce any document of that kind, amounted to unequal treatment prohibited by Article 12 EC. In other words, Sala was entitled to receive non-discriminatory treatment on the grounds of nationality as a European citizen lawfully residing in another Member State.

By putting 'flesh on the bones of European Union Citizenship', the Court displayed its capacity to attach a new constructive meaning to the status of citizenship of the Union, thereby overriding the interests of Member States.[77] More importantly, it did so by calling into question the link between the existence of citizen status and economic activity or self-sufficiency.[78] And although the Sala ruling raised expectations that benefits reserved for active economic actors (workers) under Council Regulation 1612/68, such as social advantages, could be granted to job-seekers, in *Collins* the Advocate General foreclosed this possibility by suggesting that 'Community law as it now stands does not require that an income-based social security benefit, intended for jobseekers, be provided to a citizen of the Union who enters the territory of a Member State with the purpose of seeking employment while lacking any connection with the State or link with the domestic employment market'.[79]

75 Sala was protected by the European Convention on Social and Medical Assistance; European Treaty Series 14; Case C-85/96 *Sala* v *Freistaat Bayern* [1998] ECR I-2691.

76 As Shaw and Fries have argued, if a provision is not covered by the rules of the free movement of workers, establishers and service providers, Article 12 EC provides an alternative route: 'Citizenship of the Union: First Steps in the Court of Justice' (1998) 4(4) *European Public Law* 533–59. The Court's jurisprudence concerning article 12 EC includes: Case 185/87 *Cowan* [1989] ECR 195; Case C-43/95 *Data Delecta* [1996] ECR I-4661; C-323/95 *Hayes* [1997] ECR I-1711; Case C-122/96 *Saldanha* [1997] ECR I-5325); Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-172/98 *Commission* v *Belgium* [1999] ECR I-3999; and Case C-411/98 *Ferlini* [2000] ECR I-8081.

77 S. O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68.

78 As the Advocate General stated, 'the limitations in Article 8a itself concern the actual exercise but not the existence of the right', Case C-85/96 at para 18.

79 Case C-138/02 *Brian Francis Collins* v *Secretary of State for Work and Pensions*, Opinion of Advocate General D. Ruiz-Jarabo Colomer on 10 July 2003. The ECJ confirmed that the right to equal treatment under Article 39(2) EC in conjunction with Articles 12 and 17 EC did not preclude legislation which made entitlement to a jobseeker's allowance conditional on a residence requirement, in

In *Bickel and Franz* the Court held that the right to free movement in Article 18 EC would be enhanced if citizens of the Union were able to use a given language to communicate with the administrative and judicial authorities of a state on the same footing as its nationals.[80] As potential recipients of services and EU citizens exercising their right to free movement, Bickel and Frantz fell within the scope of the Treaty and could thus rely on Article 12 EC to challenge their unequal treatment based on nationality. In this respect, the right to use their mother tongue in criminal proceedings in the Italian province of Bolzano, a right that was available to German speaking residents of Bolzano, was derived from Article 12 EC. As A. G. Jacobs stated in his opinion, Union citizenship implies a 'commonality of rights and obligations uniting Union citizens by a common bond transcending member state nationality.[81]

Following *Sala* and *Bickel and Frantz*, the Court used its settled jurisprudence in order to resolve issues relating to Union citizenship. In *Donatella Calfa*, the Court applied Articles 48, 52 and 59 EC without recourse to Union citizenship.[82] In *Wijsenbeek*, Advocate General Cosmas went a step further to suggest that Article 18 is directly effective. However, the Court remained silent on this issue, despite the fact that the Commission had made the same submission. The environment was not conducive for radical institutional change. Adhering to the corrective template of Union citizenship (section 1), the Court ruled that Member States were entitled to exercise frontier controls to distinguish EC citizens from other travellers and that Article 14 EC had no direct effect. In the absence of common rules governing the crossing of the external frontiers of the EU, Mr Florius Wijsenbeek did not, therefore, have the right to cross borders without being subject to passport controls.

In *Kaba*, the Court gave a conservative interpretation of Article 7(2) of Council Regulation 1612/68, by stating that national legislation which imposes differential residency requirements for the spouses of Community nationals and the spouses of nationals who are 'present and settled' in the UK for the grant of indefinite leave to remain does not constitute discrimination on the grounds of nationality.[83] It relied on the 'objective difference' between persons enjoying an unqualified right of residence and Community nationals whose right of residence is limited by the Treaty and secondary legislation. And although it refrained from addressing directly the question whether 'indefinite leave to remain' constitutes a social advantage within the meaning of Article 7(2) of Regulation 1612/68, it stated that even if the former right constituted a social advantage, British legislation did not contravene Community law.[84] It is noteworthy here that the Court reiterated its decision in the second reference for a preliminary ruling made by the Immigration Adjudicator. It ruled that the qualified right of residence enjoyed by

so far as it could be justified on the basis of objective considerations that were independent of nationality and met the test of proportionality; Judgement of the Court of 23 March 2004.

80 C-2774/96, 24 November 1998.

81 *ibid* at paras 23–24.

82 Case C-348/96 *Danatella Calfa* [1999] ECR I-0011.

83 Case C-365/98, Judgement of the Court of 11 April 2000, [2000] ECR I-2623.

84 *ibid.* For a critical view, see S. Peers, 'Dazed and Confused: family members' residence rights and the Court of Justice' (2002) 26 ELRev 76.

Community nationals cannot be compared to the unqualified right of residence enjoyed by persons who are 'present and settled' in the UK under UK immigration rules.[85]

In July 1998, the Court took issue with the political participatory aspects of Union citizenship. The Kingdom of Belgium had failed to comply with the Council Directive 94/80 EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by Union citizens in the Member State in which they reside and to transpose it into national law within the prescribed period. Although the Belgian Government submitted that the non-transposition was due to the need to revise Article 8 of the Belgian Constitution and that progress had been made in implementing the Directive, the ECJ dismissed the defence concerning difficulties in the internal legal system in accordance with its jurisprudence, and ruled that Belgium had failed to fulfil its obligations under the first paragraph of Article 14 of the Directive.[86]

Finally, in *Elsen* the Court highlighted the importance of Union citizenship.[87] Elsen, a German national who had transferred her residence form Germany to France and acquired the status of frontier worker employed in Germany, was refused validation of the periods spent rearing her son as periods of insurance for the purpose of an old age pension on the grounds that the child rearing had taken place in another Member State. The Court ruled that although Member State retain the power to organise their social security schemes, they must, nonetheless, comply with Community law and in particular with the Treaty provisions on freedom of movement for workers or Union citizenship. The German provisions put Community nationals, who had exercised their Community law rights of free movement and resided in anther Member State while continuing to work in Germany, at a disadvantage. The Court thus used Union citizenship in conjunction with Articles 39 and 42 EC in order to highlight the constitutional importance of free movement.

The Court's rulings in this phase show that institutional change is not a linear, unidirectional process. In *Sala* the Court seized the opportunity to give more substance to Union citizenship,[88] whereas in *Kaba* it acknowledged the Member States' competence in enlarging or narrowing the scope of the right of residence on the basis of nationality and migration law differentials. In *Sala*, nationality would not justify differential conditions in the enjoyment of an allowance, whereas in *Kaba* nationality was a relevant factor in determining migration

85 Case C-466/*00 Kaba* v *Secretary of State for the Home Department*, Judgement of the Court of 6 March 2003.

86 Case C-323/97 *Commission* v *Kingdom of Belgium*, Judgment of the Court of 9 July 1998.

87 Case C-135/99 *Ursula Elsen* v *Bundesversicherungsanstalt fur Angestellte*, Judgment of the Court of 23 November 2000.

88 Compare here D. Wincott's assessment of the quiet, routine and salient process of advancing integration in-between the grand bargains negotiated by national governments; 'Institutional Interaction and European Integration: Towards an Everyday Critique of Liberal Intergovernmentalism' (1995) 33 *Journal of Common Market Studies* 4. Hence, Rasmussen's assessment that the Court shifted to a more 'self-restrained' course in post-Maastricht Europe does not apply to the field of Union citizenship; H. Rasmussen, *European Court of Justice* (Copenhagen: Gadjura, 1998); N. Reich, 'The "November Revolution" of the European Curt of Justice: Keck, Meng, and Audi Revisited' (1994) 34(3) CMLRev 459.

statuses. Undoubtedly, there exists an important difference between the two cases. As *Sala* had been legally authorised to remain in Germany, the ECJ had to decide whether it would allow a European citizen resident to be treated differently than German nationals. In the absence of any justification, Sala's unequal treatment contravened Article 12 EC. *Kaba*, on the other hand, raised the spectre of ECJ's direct interference with states' competence in the field of migration control. Although European judges knew that the introduction of citizenship of the Union raised expectations that citizens of the Union will enjoy equality, at least before Community law, and in *Sala* they capitalised on the opportunity to transcend the language of the European citizenship provisions by advancing a new constructive interpretation, they were also aware of the strong criticism they would ultimately face if indefinite leave to remain were granted to the spouses of Community nationals resident in Britain. This leads me to argue that although the judges' interests did not coincide with the preferences of national executives and Union citizenship exerted a normative pull,[89] other variables, such as the anticipated costs of an integrationist ruling and the organisational climate, played a crucial role in the judicial decision-making process. As a result, institutional change in this second phase was not as robust as would have been anticipated. In *Sala* and *Bickel and Frantz*, the ECJ signalled its intention in a powerful way to advance the Union citizenship norm. It was not until a year later that the ECJ drew on the transformative potential of Union citizenship (section 1) and moulded skeletal norms into concrete, binding rules which became locked in and difficult for governments to change. By so doing, the ECJ's expansive logic to the strengthening of Union citizens' rights would initiate a process of vertical normative socialisation through which national executives would have to embrace the constructive interpretation of Union citizenship and the new practices set in motion by it.

**Phase 3. 2001–2003: Engineering Institutional Change**

In this phase European citizenship norms not only matter, but also European judges become more explicit as to the ways they matter in opposition to the preferences of Member States.[90] Acknowledgement of the fundamental status of Union citizenship is accompanied by new normative templates and a policy-oriented approach, despite the absence of societal mobilisation and sustained pressures for policy reform by organised interests.[91]

On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed at the European Council meeting in Nice.[92] Article 45 of

89 J. H. H. Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (1992) 31 *Journal of Common Market Studies* 39; A–M. Burley-Slaughter and W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) *International Organisation*; A. Stone Sweet and T. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *American Political Science Review* 63.

90 See G. Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market' (1992) 46 *International Organisation* 533; G. Garrett, R. D. Kelemen, and H. Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 *International Organisation* 149.

91 Compare L. Conant, *Justice Contained* (Ithaca: Cornell University Press, 2002).

92 [2000] OJ C364.

the Charter entailed the possibility of extending Union citizenship to 'nationals of third countries legally resident in the territory of a Member State'. Article 45 thus signalled that the 'declaration' phase of Union citizenship had been superseded by a 'proposal' phase, that is, by a willingness on the part of Community institutions to suggest concrete measures for institutional reform. In May 2001, the Commission presented a proposal for a European Parliament and Council Directive on the right of citizens and their family members to move and to reside freely within the territory of the Member State.[93] The Commission's proposal sought to prepare the ground for a comprehensive and coherent set of rules on the free movement of all Union citizens and their families, irrespective of economic motives. The draft directive, which explicitly referred to the 'new legal and political environment established by citizenship of the Union',[94] suggested a 'phased' approach to the disentanglement of residence from economic activity, whereby non-active economic actors would have to satisfy the self-sufficiency and possession of sickness insurance conditions in the first four years of residence in the host state. Thereafter, non-active economic actors would enjoy a permanent and unqualified right of residence and 'virtually complete equality of treatment'.[95] According to the Commission's proposal, the right of permanent residence would entail security of residence by providing immunity from expulsion and access to social welfare in the host Member State.[96]

Although these initiatives were not associated with the existence of a 'critical juncture', that is, of a critical moment of crisis which could be resolved by shaking off the institutional past,[97] they, nevertheless, provided impetus for constructive interpretations of Union citizenship and the extension of citizenship norms by the European Court of Justice. It thus comes as no surprise that in *Grzelczyk* Advocate General Alber stated that: 'Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic actors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. The only 'limitations and conditions' attached to freedom of movement now are imposed on grounds of public policy, public security and public health'.[98] Let me now chart the process of transformative institutional change in more detail.

93 COM (2001)257 final; Brussels 23.5.2001.
94 COM (2001) 257 final, para 1.3 of the explanatory memorandum.
95 *ibid* Article 14.
96 *ibid* Articles 26 and 21(1).
97 Critical junctures play an important role in historical institutionalist analysis, n 15 and n 17 above.
98 Case C-184/99 [2001] ECR I-6913 at para 52. Compare A. G. Geelhoed's statement that in special cases in which a right to move and reside does not exist under other provisions of EC law, it can be derived directly from Article 18(1) EC; Case C-413/99 *Baumbast and R* v *Secretary of State for the Home Department*, Opinion delivered on 5 July 2001. In *Commission* v *Italy* (Case -424/98 [2000]ECR I-4001), the Court ruled that the condition of economic self-sufficiency entailed by the three Residence Directives (ie, 93/96, 90/365, 90/364) has the meaning of resources that are higher than those below which the host state grants social assistance to individuals. If the state does not grant social assistance then the resources required must be higher than the level of the minimum social security pension paid by that state.

In *Kaur*, the first case considered by the ECJ, the ECJ reaffirmed the Michelletti ruling.[99] It upheld the validity of the 1972 and 1982 declarations on the definition of the term UK national for Community law purposes made by the UK Government[100] and stated that 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.[101] As Kaur, a British overseas citizen under the 1981 British Nationality Act, did not have the right of abode in the United Kingdom, she was excluded from the personal scope of the EC Treaty.

In *Grzelczyk*, the ECJ clearly demonstrated why and how the institution of European citizenship matters. Grzelczyk, a French national studying physical education in Belgium, who during his first three years of his study had supported himself through various jobs, applied to the CPAS for payment of minimex, a minimum subsistence allowance paid in Belgium. This would enable him to complete his university studies. CPAS granted Grzelczyk the minimex. However, when the CPAS applied to the Belgian state authorities for reimbursement of the payments, the application was declined on the ground that Grzelczyk was not a Belgian national. Mr Grzelczyk challenged this refusal before a Labour tribunal. A. G. Alber suggested that the student could be seen as a worker and, as such, he would be entitled to minimex under Article 7(2) of Council Regulation 1612/68.[102] But the Court disagreed. Rejecting the minimalist perspective associated with the model of market citizenship (section 1), it stated that 'Union citizenship is destined to be a fundamental status of nationals of the MS, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[103] Since Union citizens can rely on Article 12 EC in all situations that fall within the material scope of the EC Treaty (*Sala*), Article 12 EC read in conjunction with Union citizenship led the Court to rule that students studying in another Member State can rely on the non-discrimination clause in claiming social advantages. This ruling seems to overrule Brown in so far as the latter judgement was used to exclude students from general social assistance (and not only maintenance grants).[104] Students who satisfy the requirements outlined in Article 1 of Directive 93/96 (ie, self-sufficiency and possession of sickness insurance), but whose circumstances might change later can rely on social advantages within the meaning of

99 Case C-369/90 *Micheletti and Others* v *Delegacion del Gobierno en Catanbria* [1992] ECR I-2143; Case C-192/99 *R* v *Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237.

100 The first declaration was made at the time of the signature of the Treaty of Accession of 22 January 1972. The second declaration was submitted by the UK in 1982, following the enactment of the 1981 British Nationality Act.

101 *Kaur*, above n 99, para 19.

102 As the work Grzelczyk pursued was sufficiently genuine and effective, he fell within the Community law definition of worker. The interruption of his work did not result in loss of worker status. Compare Case C-413/01 *Franca Ninni-Orasche* v *Bundesminister fur Wissenschaft, Verkehr und Kunst*, Judgment of the Court of 6 November 2003.

103 *Grzelczyk*, above n 84, para 31. Under the Commission's proposed directive, on completion of a four-year educational course in a MS, the self-sufficiency conditions attached on the residence of students would cease to apply, thereby enabling former students to stay on in the host state and to receive social security entitlements on the same basis as nationals (Articles 7 and 8(4)).

104 Case C-197/86 *Brown* v *Secretary of State for Scotland* [1988] 3 CMLRev 403.

Article 7(2) of Council Regulation 1612/68.[105] Although Directive 93/96 makes it clear that students should not be a burden on the social assistance system of the host state (Article 1) and are not entitled to receive maintenance grants (Article 3), the Court observed that the provisions of the Directive do not preclude its beneficiaries from receiving social assistance benefits. Indeed, it can be argued that a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member State must be recognised, particularly in cases of temporary economic difficulties. In such cases, beneficiaries would not be an 'unreasonable' burden on the host Member State. The Belgian rules thus contravened Articles 12 and 18 EC, and Council Directive 93/96/EEC.

*Grzelczyk* gave the Court the opportunity to advance the normative debate on the meaning and implications of Union citizenship. Instead of replicating the established cognitive structures and settled rules, the Court gave a broad and liberal interpretation to the provisions of Directive 93/96, thereby calling into question the link between economic activity and residence in certain circumstances (ie, temporary economic difficulties). This gave 'a strong appearance of case law moving away from the grant of particular rights to particular groups of (economic) actors and instead embracing a powerful mission of protection of individual rights'.[106] By so doing, it initiated a wider learning process which could not but alter beliefs, perceptions and the behaviour of actors at the national level, since students who face temporary economic difficulties would have to be seen as associates and 'belongers' to the host community, rather than as strangers and a problem. Interestingly, the Court did not extend the application of Article 7(2) of Council Reg 1612/68 to all Union citizens, irrespective of their worker status. Nor did it disentangle residence from economic status by deriving a directly effective right from Article 18 EC – an approach that the Court followed in *Baumbast* (see below). Rather, it transformed Union citizenship into a building block of the evolving EU legal order, by giving prominence to the principle of equal treatment that strikes at its heart.

*D'Hoop* gave the Court the opportunity to rule that Belgian legislation granting tide-over allowances to Belgian nationals, who have completed their secondary education in Belgian establishments, contravenes Articles 12 and 18(1) EC.[107] Member State D'Hoop, a Belgian graduate who had obtained a baccalaureate in France, was denied a tide-over allowance from the Belgian National Employment Office (ONEM) under the Royal Decree of 25 November 1991. The tide-over allowance targeted young graduates by giving them access to special employment programmes. Although Member State D'Hoop's situation was governed by the provisions concerning free movement of workers (ie, Article 39 EC and Council Regulation 1612/68), her status as a citizen of the Union gave her a right to equal treatment in all situations which fall within the scope ratione materiae of the Treaty. And although D'Hoop was claiming rights against her home state, the link with Community law and the cross border element were evident owing to her

105 See the Case note by A. Iliopoulou and H. Toner(2002) 39 CMLRev 609.
106 S. Weatherill, *Cases and Materials on EU Law* (Oxford: Oxford University Press, 2003) 490.
107 Case C-224/98 *Marie-Nathalie D'Hoop* v *Office national de l'emploi*, Judgement of the Court of 11 July 2002.

completion of secondary education in France. D'Hoop's differential treatment thus came close to discrimination based on nationality, since her situation 'may be assimilated to that of any other person enjoying the rights and liberties guaranteed by the Treaty'.[108] It would contravene EC law if a citizen received in her own Member State treatment less favourable than that she would otherwise enjoy had she not availed herself of the right to free movement. Using the deterrence argument used in *Singh*, the Court ruled that Community nationals might be deterred from leaving their country of origin in order to take advantage of the opportunities offered by the Treaty, which now include the encouragement of the mobility of teachers and students in light of Article 149(2) and Article 3(1) (q) EC.[109] The Court proceeded to argue that the differential treatment was not objectively justified and went beyond what was necessary to attain the objective pursued.

The ECJ displayed a truly innovative approach in *Carpenter*. In this case, the principle of respect for family life was elevated at the expense of national migration laws and the settled jurisdictional distinction between purely internal, on the one hand, and Community law governed situations, on the other. In establishing such an interpretive hierarchy, the ECJ was attuned to debates about the legal status of the Charter of Fundamental Rights of the EU and the possibility of accession to the ECHR by the Union. Mrs Carpenter, a national of the Philippines and the spouse of a UK national, challenged the deportation order issued by the Home Secretary. She claimed a right of residence in the UK on the grounds that her deportation would impede her husband's right to provide and receive services in other Member States, since she was looking after his children from his first marriage. The UK authorities maintained that, since Mr Carpenter was a national of the UK living in the UK, the cross-border dimension required under Community law was absent. Both the Advocate General and the Court did not agree with the UK Government's submission, albeit following different lines of reasoning.[110] Whereas Advocate General Stix-Hackl read Directive 73/148 through the lens of the right to respect for family life, and interpreted it as allowing a right of residence for Mrs Carpenter, the Court stated that Directive 73/148/EC applies only to cases where a Community national and the members of his/her family leave the state of origin and reside abroad for the period stipulated in the Directive. But the Court went on to rule that the right of residence of Mrs Carpenter might be inferred from other principles or rules of Community law. Since Mr Carpenter was carrying out a significant proportion of his business abroad, he had activated his right to provide services enshrined in Article 49 EC. The fundamental freedom to provide services 'could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin relating to the entry and residence of his spouse'.[111] Article 49 EC read in light of

108 Case C-115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, [1979] 2 CMLR 357, para 24.
109 Case C- 370/90 *R* v *Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265, [1992] 3 CMLR 358.
110 Case C-60/00 *M. Carpenter*, Judgment of the Court of 11 July 2002, paras 28–30.
111 *ibid*, para 39.

the principle of respect for family life, which is recognised by Community law,[112] must thus be interpreted as precluding Carpenter's deportation.[113]

*Carpenter* is a remarkable case of judicial activism; a derivative right of residence has been implied from a Treaty article (Article 49 EC), thereby overriding restrictive national immigration rules.[114] In light of *Carpenter*, possible extension of residence rights to service recipients and other third country family members of the service provider, such as relatives on the ascending line, cannot be ruled out. By emphasising the principle of respect for family life, the Court established a hierarchy that can influence and guide future interpretive choices and the behaviour of actors. More importantly, it did so on the basis of a constructive interpretation of the situation rather than of purely instrumental calculations. Arguably, critics might point out that the link between Carpenter's right of residence and the perceived impediment to trade is inexact. But the crux of the matter is that the ECJ used the interpretive process in order to reach a solution, which intuitively appears to be the right one, thereby constructing a new institutional reality.

On 25 July 2002, the ECJ had another opportunity to rule on the legality of restrictive measures on the movement and residence of third country national spouses of Community nationals. These issues had been raised in proceedings between the Movement Against Racism, Anti-Semitism and Xenophobia ASBL (Mouvement contre le racism, l'antisemitisme et la xenophobie ASBL, (MRAX)) and the Belgian State. More specifically, MRAX challenged the legality of a Circular of the Ministers for the Interior and Justice of 28 August 1997 on the grounds that it contravened the Community directives on the movement and residence and the principle of respect for family life, which is protected by Community law. Drawing on *Carpenter*, the ECJ emphasised the importance of ensuring protection of the family life of Community nationals. It ruled that while the Member States may demand an entry visa or equivalent documents from family members of a Community national, who are third country nationals, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that such persons must be given every facility for obtaining the necessary visas. This means that a visa must be issued without delay and, if possible, at the place of their entry into national territory.[115]

Accordingly, the Court ruled that the Belgian state's practice of sending back to the border third country national spouses of Community nationals who do not possess the necessary entry documents (ie, an identity document or visa) is disproportionate and unlawful under Community law. Since the residence rights of such persons do not derive from states' authorisation of their entry, but they are based on their family ties, spouses who are able to prove these ties and their identity, and do not represent a risk to the requirements of public policy, public security or public health should not be sent back to the border. Similarly, Member States cannot deny a residence permit or order an expulsion order against such

112 On this, see the provisions of the Council Regulations and directives on the free movement of employed and self-employed persons as well as Article 8 ECHR.

113 Carpenter's deportation could not be justified on public order or safety grounds.

114 G. Barret, 'Family Matters: European Community Law and Third Country Family Members' (2003) 40 CMLRev 369, 406.

115 Case C-459/99, Judgment of the Court of 25 July 2002.

persons on the sole ground that they had entered the territory of the Member State unlawfully (Article 4 of Directive 68/360 and Article 6 of Directive 73/148). Such measures would not only hinder the right of residence of third country national spouses of Community nationals, which is directly conferred by Community law, but they would also be manifestly disproportionate to the gravity of the breach of national migration laws.[116]

Should third country national spouses overstay their visa, the issue of a residence permit to them cannot be made subject to the condition that their visa has not expired, under Articles 3 and 4(3) of Directive 68/360 and Articles 3 and 6 of Directive 73/148. Nor can a Member State expel a third country national spouse of a Community citizen who has lawfully entered the territory but whose visa has expired at the time when application is made for that permit. It is interesting that following the Court's ruling in *MRAX*, and the EP's recommendation, the Commission amended Article 9(2) of the Draft Directive by stating that 'family members may not be refused a residence card solely on the grounds that they have no visa or that their visa has expired prior to submission of the application for a residence card'.[117] Finally, the Court held that the procedural guarantees of Article 9(2) of Directive 64/221 apply to third country national spouses 'who have been refused a first residence permit or issued with an expulsion order before the issue of a permit, even if they are not in possession of an identity document or, requiring a visa, they have entered the territory of a Member State without one or have remained there after its expiry'.[118]

The Court's stance on the mobility rights of third country national family members of Union citizens shows that European judges do not faithfully serve the interests of the Member States, as Garrett had argued.[119] Nor would it be correct to say that the ECJ's strategic interventions are confined to policy areas that have low costs for Member State. The cases examined above show the ECJ did not hesitate to procure institutional change in key areas of 'high politics' drawing on the normative dimensions of Union citizenship and a favourable organisational climate. Its activist stance reflects its interest and capacity to provide principled solutions to problems, thereby advancing a constructive understanding of Union citizenship.[120] This, of course, does not mean that change should come at the expense of national security. On 26 November 2002, the Court relied on Articles 18, 12 and Article 39 EC and ruled that administrative police measures limiting

116 See Case 48/75 *Royer* [1976], Case 159/79 *R* v *Pieck* [1980] 3 CMLR 220 and Case C-363/89 *Roux* [1991] ECR 273, [1993] 1 CMLR 3, para 12. The ECJ's ruling reflects Article 6(4) of the Commission's draft directive (COM (2001) 257 Final; 2001/0111 (COD) Brussels 23.5.2001), which states that 'Whereas Union citizen or family member does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every opportunity to obtain the necessary documents or have them brought to them or to corroborate or prove by other means that they are covered by the right to freedom of movement'.

117 Article 9(2a) of the draft Directive, COM (2003) 199 Final, 15.4.2003.

118 *MRAX*, n 115 above.

119 Garrett, n 90 above.

120 Compare here Pollack's view that the ECJ's activism is a function of the efficacy and the credibility of control mechanisms possessed by the Member States; M. Pollack, 'International Relations Theory and European Integration' (2001) 39 *Journal of Common Market Studies* 241, 229.

Mr Olazabal's right of residence into a particular department of the French territory are not precluded by Community law in so far as they are justified on public order or public security grounds, as defined by Community law and ECJ's jurisprudence.[121] In particular, they must relate to individual conduct, which constitutes a genuine and sufficiently serious threat to public order or security, and must meet the test of proportionality.[122]

In *Baumbast*, the Court went beyond the predictive confines of settled law in order to realise the promise inherent in Union citizenship and to bring about institutional change. It did not only derive a new right of residence for a third country national family member from Article 12 of Council Regulation 1612/68, but it also ruled that Article 18(1) EC has created directly effective rights enforceable in national courts. Mrs Baumbast, a Colombian national, married Mr Baumbast, a German national, in 1990 in the UK. The family had two daughters; Mrs Baumbast's natural daughter who had Colombian nationality and a younger daughter who had both Colombian and German nationality. Having worked in the UK for several years, Mr Baumbast was working for German companies in China and Lesotho. Following Mrs Baumbast's application for indefinite leave to remain in the UK for herself and her family in 1995, the Secretary of State refused to renew Mr Baumbast's residence permit and the residence documents of Mrs Baumbast and her children. Mr Baumbast challenged this refusal before the Immigration Adjudicator. Although the Adjudicator noted that Mr Baumbast was neither a worker nor a person having a general right of residence under Directive 90/364, he ruled that the children had a right of residence under Article 12 of Council Regulation 1612/68 and that Mrs Baumbast enjoyed a right of residence for the period of her children's studies. Following Mr Baumbast's appeal and the Secretary of State's cross-appeal to the Immigration Appeal Tribunal, the case reached the Court. Drawing on the normative principles underpinning Council Regulation 1612/68 and its purpose of facilitating the integration of the Community worker's family in the society of the host MS,[123] the ECJ ruled that Mrs Baumbast's daughters have the right to pursue their studies under Article 10, and 12 of Council Regulation 1612/68. Accordingly, denying permission to remain in the host Member State to a parent who is the primary carer of the child would infringe the migrant child's right to education.[124]

The ECJ's ruling in *Baumbast* mirrors the Commission's suggestion that the children of Union citizens, who are studying in the host Member State and are integrated in its education system, have a right of residence which may be limited to the duration of their studies, irrespective of nationality.[125] Additionally, under

121 Case C-100/01 *Ministre de l'Interieur* v *Aitor Oteiza Olazabal*, Judgement of the Court of 26 November 2002.

122 On the ECJ's jurisprudence concerning the public policy, public security and public health derogations, see P. Craig and G. de Burca, *EU Law* (Oxford: Oxford University Press, 1998).

123 Case C-413/99 *Baumbast, R* v *Secretary of State for the Home Department*, Judgement of the Court of 17 September 2002, para 58.

124 Similarly, R's children also had a right of residence and the right to pursue their education under the same conditions as nationals of the host Member State. The fact that the children of R's first husband did not live permanently with him does not affect the rights they derive from Articles 10 and 12 of Council Regulation 1612/68.

125 Article 12(3) 2001/0111(COD) 2001.

Article 13(2)(b) of the Commission's draft directive a third country national spouse of the Union citizen would retain her/his right of residence in the event of divorce or annulment of marriage if 'by agreement between the spouses or by court order, the spouse, has custody of the EU citizen's children'.[126] Influenced by the opportunity for strategic change contained in the Commission's proposal, the ECJ interpreted Council Regulation 1612/68 in an expansive way in order to reach an equitable solution that respects family life and human dignity. As the Court put it, 'Article 12 cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective'. The Commission, in turn, responded to the Court's ruling in *Baumbast* by amending Article 12(3) of the draft directive:

> The Union citizen's departure from the host Member State shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, at secondary or post-secondary level, for the purpose of studying there, until the completion of their studies.

The third and final question that was referred to the ECJ concerned the direct effect of Article 18 EC. Could Mr Baumbast as a citizen of the European Union enjoy a right of residence in the UK by direct application of Article 18(1) EC? Although the German and UK Governments submitted that Article 18(1) did not create a directly effective right because it was not intended to be a free-standing provision, the ECJ relied on the normative weight of Union citizenship, and ruled that:

> the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the Treaty by virtue of that citizenship. As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently as a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.

In this respect, any limitations and conditions imposed on that right are subject to judicial review and thus 'do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect'.[127] Such an interpretation further weakened the link

126 If the Commission's draft Directive had been adopted, Mrs Baumbast would have probably enjoyed a right of permanent residence since she had met the qualifying residence period of fours years in the UK required under Article 14(2).

127 See, to that effect, Case 41/74 *Ván Duyn* [1974], paragraph 7. Compare also Advocate General L. A. Geelhoed's statement that '. . .these conditions and limitations may not result in the citizen's right being robbed of substantive content'; Opinion delivered on 5 July 2001. Some commentators,

between economic status and the right to free movement and reflected broader normative aspirations for a constructive understanding of European citizenship that eventually found their way into juridicopolitical reform ten years after the establishment of this institution. As an institutional designer in a complex environment, the ECJ believed in the coherence and viability of the constructive meaning of Union citizenship it was trying to realise, since European citizenship ought to be other than it was. By so doing, it paved the way for what would follow.[128]

In 2003 the Court continued to utilise Union citizenship in a radical way.[129] In *Garcia Avello*, a refusal of the Belgian authorities to register a child of dual nationality with the surname of both parents, following the Spanish pattern of entering the mother's maiden name in addition to the patronymic surname of the father, constituted discrimination on the grounds of nationality prohibited under Articles 12 and 17 EC.[130] And although the Belgian Government submitted that the immutability of surnames is conducive to the social order and integration of non-Belgian nationals into the Belgian society, the Court dismissed this argument, by stating that the children, who enjoyed the status of EU citizens, should not suffer discrimination in respect of their surname and that the Belgian practice was neither necessary nor appropriate for promoting the integration of non-Belgian nationals.

In *Akrich*, the Court ruled that a national of non-EU state who is married to an EU citizen may reside in the citizen's state of origin when that citizen, after making use of her right to freedom of movement, returns to her home country with her spouse in order to work, provided that the spouse has lawfully resided in another Member State.[131] Article 10 of Council Regulation 1612/68 applies only to freedom of movement within the Community, and the spouse of an EU citizen can benefit from it, if (s)he is lawfully resident in a Member state when (s)he moves to another Member State to which the citizen of the Union is migrating or has migrated. In this case, a British citizen, married to a Moroccan national who had been deported to Algeria and whose application for the revocation of the deportation order and for entry clearance to the UK had been refused, moved to Ireland to take up employment as an employed person. When they sought to return to the UK, the Secretary of State considered that the worker and her spouse had misused Community law in order to circumvent national migration law. While acknowledging the Member State's competence in the design and enforceability migration laws, the Advocate General stated that 'the intentions of the worker and his spouse in making use of the rights conferred on them by Com-

however, believe that the court did not confer direct effect on Article 18(1) EC; it merely used the principle of proportionality to strengthen citizenship rights related to free movement.

128 See European Parliament and Council Directive 2004/38/EC below.

129 Other cases in the area of free movement of persons, which have been decided on the basis of existing jurisprudence, include: Case C-405/01 *Colegio de Oficiales de la Marina Mercante Espanola* v *Administracion del Estado*, 30 September 2003; Case C-47/02 *Albert Anker, Klaas Ras, Albertus Snoek* v *Bundesrepublic Deutschland*, 30 September 2003. See also Case C-428/01 *Orfanopoulos and Others*, Opinion of the Advocate General - No 72/2003; 11 September 2003.

130 Case C-148/02 *Garcia Avello* v *Etat Belge*, Opinion of the Advocate General Jacobs delivered on 22 May 2003, and Judgement of the Court of 2 October 2003.

131 Case C-109/01 *Secretary of State for the Home Department* v *Hacene Akrich*, Advocate General's Opinion on 27 February 2003.

munity law are immaterial'.[132] The Court stated Community law would be abused, if individuals who had entered into marriages of convenience in order to circumvent national migration laws, invoked Article 10 of Council Regulation 1612/68. Conversely, in genuine marriages, the fact that the spouses installed themselves in another Member State in order to obtain the benefits conferred by Community law on their return to the Union citizen's state of origin is not relevant to an assessment of their legal situation by the competent authorities of the latter state. Given that Akrich's marriage was genuine and Article 10 of Council Regulation 1612/68 could not be relied upon by virtue of the fact that the spouse was not lawfully resident on the territory of a Member State, the Court stated that his removal from Britain would infringe Article 8(1) of the ECHR (ie, respect for family life) which is protected in the Community legal order according to the Court's case law.[133]

In *Pusa*, Advocate General Jacobs stated that, far from being limited to a prohibition of direct or indirect discrimination, Article 18 EC applies to non-discriminatory restrictions.[134] And building on its case law (ie, *Kraus*, *Gebhard* and *Säger*), the Court stated that 'national legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move (*D'Hoop*, paragraphs 34 and 35). Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'.[135]

On the same day that the Court delivered its judgment, the Directive on the Right of Citizens and their Family Members to move and reside freely within the territory of the Member States was adopted.[136] The Directive remedied the sector-by-sector, piecemeal approach to free movement rights by incorporating and revising the existing Directives[137] and amending Council Regulation 1612/68.[138] Building on the rights-based approach characterising the rights of free movement and enhancing it by giving concrete form to the principle that residence generates entitlements, the Directive gave further substance to Union citizenship by establishing an unconditional right of permanent residence for Union citizens and their families[139] who have resided in the host Member State for a continuous period of five years. The right of permanent residence entails a right of equal treatment with nationals in areas covered by the Treaty which will be extended to

132 Case C-109/01 *Akrich*, Judgement of the Court of 23 September 2003, Proceedings of the European Court of Justice, No 7/03 at 35.

133 *ibid.*

134 Case C-224/02 *Heikki Antero Pusa* v *Osuuspankkien Keskinainen Vakuutusythio*, AG's Opinion of 20 November 2003, paras 18–22. See also the Judgment of the Court of 29 April 2004.

135 *ibid*, para 20.

136 European Parliament and Council Directive 2004/38/EC, OJ 2004 L 158/77.

137 Directives 68/360, 73/148, 72/194, 75/34, 75/35, 90/364, 90/365, 93/96 and 64/221 are repealed with effect from 30 April 2006.

138 Articles 10 and 11 of Council Reg 1612/68 are repealed with effect from 30 April 2006.

139 The definition of a 'family member' includes a registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

 

family members who are not nationals of a Member State and who have the right of residence or permanent residence. In light of the typology of residence rights established by the Directive, shorter periods of residence exceeding three months entail a right of residence for Union citizens and their family members if they: a) engage in economic activity; b) have sufficient resources and comprehensive sickness insurance cover in the host Member States as non-active economic actors and c) are enrolled at a private or public establishment, have comprehensive sickness insurance cover and are self-sufficient in order to avoid becoming a burden on the social assistance system of the host Member State. More importantly, a novel provision of the Directive provides that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled, thereby incorporating the ECJ's ruling in *Grzelczyk*.[140] This provision attests Union citizenship's capacity to change our understanding of community membership and to prompt a rethinking of the meaning of citizenship itself with a view to creating more inclusive forms of political association. Finally, for short periods of residence for up to three months, Union citizens shall have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport. In sum, the new Directive on free movement creates the institutional preconditions for a constructive approach to citizenship, which is more respectful of 'difference' and more inclusive than nationality-based models of citizenship, be they of either liberal or republican or of a deliberative nature.[141] For this reason, the Directive provides that no later than 30 April 2006 the Commission shall submit a report on the application of this Directive together with the necessary proposals on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions.[142]

## THE CONVENTION ON THE FUTURE OF EUROPE AND THE CONSTITUTIONAL TREATY

Despite the visionary ideas and the institutional reforms that transformed Union citizenship in the third phase, it is unfortunate that a much less innovative template found its way in the Constitutional Treaty that was drawn up by the Praesidium of the Convention on the Future of Europe and agreed at the EU summit on 18 June 2004. The final draft which was discussed by the Brussels European Council on 12 December 2003 reflected existing provisions.[143] The first draft text issued on 28 October 2002, had introduced the idea of a dual (European and national) citizenship, in recognition of the multiple allegiances that European

140 *ibid*, Article 14.

141 However, egalitarian processes co-exist with the practice of exclusion of long-term resident third country nationals from the personal scope of Union citizenship.

142 *ibid*, Chapter VII, Article 39.

143 European Council, Presidency Conclusions, Brussels, 12 December 2003; DN: DOC/03/05, 12/12/2003.

citizens have.[144] Although such a provision would not bring about substantive change, it would, nevertheless, enhance the status of European citizenship in a symbolic way. Unlike Article 8 on Citizenship of the Union, Article 7 of the Constitutional Treaty is significant, since it provides for a legally binding Charter of Fundamental Rights by means of its incorporation in Part Two. It also enables the EU to accede to the ECHR by stating that accession to the EU will not affect the Union's competences as defined in the Constitution, thereby overturning the ECJ's judgment in *Opinion 2/94*.[145]

At first sight, the new provisions of Title VI on the Democratic Life of the Union (Articles I-44–47) could be seen as strengthening the deliberative and participatory aspects of Union citizenship by seeking to engage, enhance and extend the participation of civil society and European citizens in the process of EU policy-making. However, the democratic model of governance, as enshrined in the Treaty, confines the principle of democratic equality to citizens, thereby excluding third country nationals residing in the Union, and narrows its scope to receiving 'equal attention from the Union's institutions' (Article I–44). This is further reinforced by Article I–45(3) which states that 'every citizen shall have the right to participate in the democratic life of the Union' and Article I–45(4) which provides that 'European political parties at European level contribute to forming European political awareness and to expressing the will of Union citizens'. Likewise, the provisions entailed by Article I–46 on the principle of participatory democracy do not entail a programme of radical reform and the adoption of a genuinely participatory model of democracy based on 'multi-level' partnerships and the inclusion of all European Union residents. Instead, participatory democracy is used instrumentally to ensure a more inclusive dialogue with and input from citizens and representative associations in policies that affect them. In contrast to the republican model of citizenship outlined in section 1, participation is confined to: a) the opportunity for citizens and representative institutions (not voluntary associations) to make known and publicly exchange their views on all areas of Union action (Article I–46(1)); b) the maintenance of open, transparent and regular dialogue between the Union institutions and representative institutions and civil society (Article I–46(2)); c) broad consultations to be carried by the Commission[146] (Article I–46(3)); and d) the provision for a citizens' initiative to invite the Commission to submit a legislative proposal (Article I–46(4)). Having said this, however, it should be noted here that the updated provisions concerning the transparency of the proceedings of the Union's institutions and

144 CONV 369/02; See also the speech by the Chairman of the European Convention, Valery Giscard d'Estaing at the College of Europe on 2 October 2002; hhtp://european-convetion.eu.int/docs./speeches/3314.pdf, last visited 11 January 2005.

145 *Opinion 2/94* [1996] ECR I-1759. See Articles 7(1) and (2) of the Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome, 18 July 2003, CONV 850/03; See also 'Editorial Comments: Giscard's Constitutional Outline' (2002) 39 CMLRev 1211; 'Editorial Comments: The sixteen articles: On the way to a European Constitution' (2003) 40 CMLRev 267.

146 Compare here the Commission's Communication on *Towards a reinforced culture of consultation and dialogue*, COM (2002) 704.

providing greater access to documents could enhance citizen participation and promote a more deliberative model of European citizenship (section 1).[147]

## IMPLICATIONS AND CONCLUDING REMARKS

Notwithstanding the provisions of the Constitutional Treaty, European citizenship matters. The foregoing discussion has demonstrated that European citizenship is no longer a symbolic institution and the mirror image of 'market citizenship' (section 1). It is thus unfortunate that much of the relevant literature in the 1990s did not recognise that the value of European citizenship existed not so much in what it was, but in what it ought to be. The constructivist template captured the transformative potential of European Union citizenship (section 1). As an institutional designer and agent of change, the European Court of Justice has succeeded in institutionalising European citizenship, that is, in giving meaning, specificity and value to it, thereby establishing new institutional norms which will impact on and modify national legal cultures. In this way, European citizenship develops into a project to be realised as the 'grand conversation' about the political restructuring of Europe continues (section 1). It is true that the Court's rulings in the third phase sit uncomfortably with Garrett's account of the ECJ as an agent of Member States, which reflects the rational preferences of the most powerful states.[148] Nor can they be explained on the basis of the ECJ's institutional interest in increasing its institutional power and prestige.[149] Such approaches tend to sidestep the impact of ideas and norms on actors' self-awareness and the role of institutional actors in processes of concept-formation, meaning-making and norm-extension. An institutional constructivist perspective can thus go some way in unravelling the normative and interpretive frames that provide templates which guide actors' behaviour and the role of institutional actors in constructing and altering beliefs, norms and understandings via discursive practices and strategies as earlier discussed.

Along this line, I have argued that institutional change in the field of Union citizenship was not a consequence of institutional crises and 'critical junctures', where one set of institutional ideas replaces another. Rather, it occurred in a fluid, quiet, non-linear and transformative manner. The market citizenship template has been superseded by a constructive understanding of Union citizenship which makes the status of European citizenship, – and not economic activity, the core of the new European citizenship policy framework (section 1). This finding is at variance with the institutionalist literature which privileges stability and continuity over change, innovation and risk. It also shows that institutional change is a much more complex phenomenon than is generally portrayed in the literature. Without doubt, the study of European integration would benefit from the articulation of more rigorous theoretical frameworks of institutional change that

147 Article 49 of the Constitutional Treaty updates and amends Article 255 EC by extending the right of access to documents to all the Union's institutions, agencies and bodies.
148 Garrett, n 90 above.
149 D. Chalmers, 'Judicial Preferences and the Community Legal Order' (1997) 60 MLR 164.

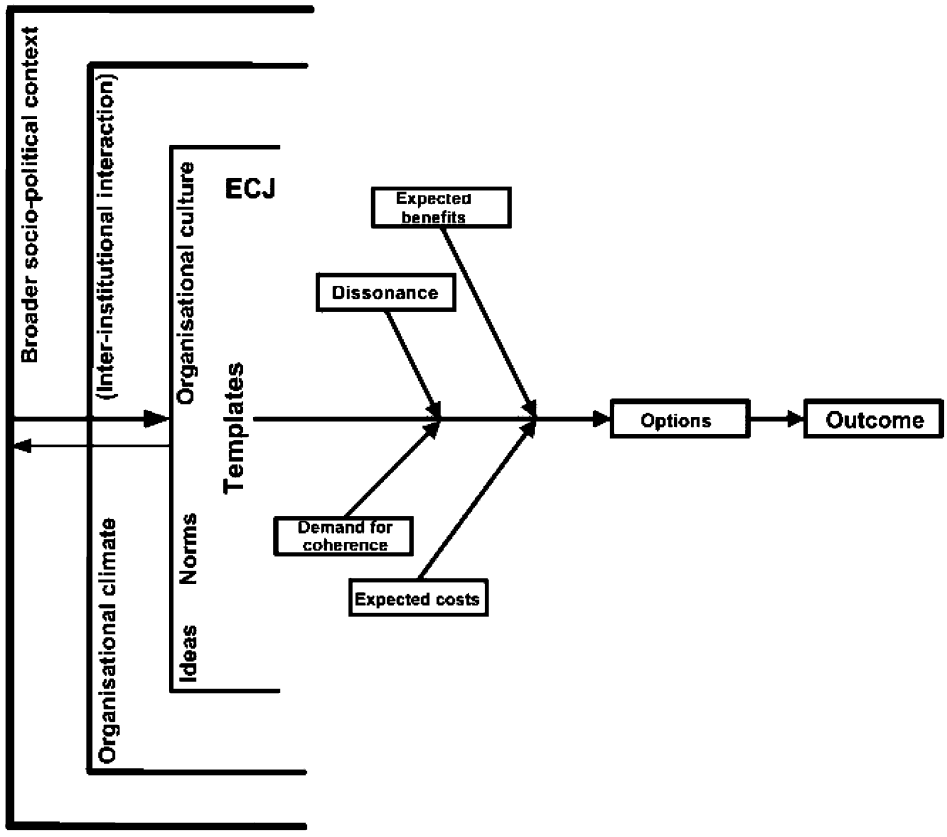


Figure 1: The Anatomy of the Judicial Institutionalisation of Union Citizenship

transcend the contours of old debates and schools of thought and embrace actor-initiated institutional change.

In opposition to existing models or European legal integration, which have been shaped by a 'quest for simplicity', that is, a quest for a single, overriding variable, Figure 1 captures the multiple factors that influence and shape the European judicial process of bringing about incremental – transformative institutional change. Believing that 'Union citizenship is destined to be a fundamental status of the nationals of the Member States' (constructive European citizenship), and in keeping with the norms of European integration,[150] European judges have made principled decisions in dialogue with the Commission and by taking into account the wider organisational climate. Besides normative reasoning and the influence exerted by the constructive template for Union citizenship, the discussion has highlighted the effects of institutional interaction, dialogue, and competition, and the impact of the general organisational climate and critical events, such as the adoption of the EU Charter of Fundamental Rights, on judicial deci-

150 Concerning the ECJ's pro-integrationist interest, see Stone Sweet and Brunell, n 89 above.

sion-making. This shows that the ECJ is not a unit surrounded by a faceless environment, but it operates within a cluster of polymorphous relations. Through flows, meaningful and routinised exchanges and interactions with the broader socio-political structures and other institutions, the ECJ takes part in what may be termed 'a reflexive European circuit'. In this circuit, normative frames, ideas and information about the positioning of other institutions circulate and crosscut organisational boundaries. Although it is difficult to depict the matrix of relationships, the arrows in Figure 1 show that connecting lines among the broader socio-political context, the organisational climate and the ECJ are indispensable.

In the first phase the organisational climate prevented change, as European judges were aware of intergovernmental opposition to it. In contrast, in the second and, even more so, the third phases the organisational climate permitted change. Capitalising upon a favourable climate, in the final phase European judges looked beside the immediate impediments to a unique vision of the future. Existing case law and the demand for coherence could not of itself provide adequate answers to the lacunae of law that confronted them. Unlike *Skanavi*, *Stober and Pereira* and *Kremzow* which could be adjudicated by drawing on existing Community law and reproducing the established cognitive frames, 'staying on track' was no longer an option in cases, such as *Sala*, *Grzelczyk*, *Carpenter*, *MRAX* and *Baumbast*, which revealed the mismatch between European citizenship norms and reality (Figure 1, dissonance). Hence, they proceeded to make brave decisions that adjusted the dissonance between European citizenship's constitutional design and reality, thereby realising the transformative possibilities of European citizenship in the process of interim integration.

To be sure, judicial incrementalism in the field of Union citizenship has been both evolutionary and fragmented. The ECJ did not embark upon a linear, strategic action based upon its interest in inscribing European citizenship into reality. A comparative examination of the three phases of judicial decision-making, as captured by Figure 2, reveals the existence of contradictions and tensions among them and in each of them. More importantly, given the background normative frame of European citizenship (ie, European citizenship as a fundamental status), the foregoing discussion sought to answer the question as to why European citizenship norms were not as consequential in the first two phases as they were in the third phase. The model outlined in Figure 1, in my view, has the distinct advantage of helping us to grasp more clearly why European judges failed to embark upon an innovative legal interpretation of European citizenship in the first and, to some extent, the second phases. For as much as it is true that the ECJ is an autonomous institution,[151] it is important that we are in a position to uncover both the decisional complexity and the weight of the specific factors

151 Compare here Burley and Mattli's (1993) neo-functionalist account of the ECJ, n 89 above. See also K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001). Martin Shapiro has stated that: 'because courts must engage in law making in order to do conflict resolution, and because they must be partially independent in order to do conflict resolution, it follows that no matter what the framers' initial intentions or the subsequent preferences of the other power holders, the court created will yield a certain degree of independent law-making authority' (Winter 2000) *ECSA Review* 3.

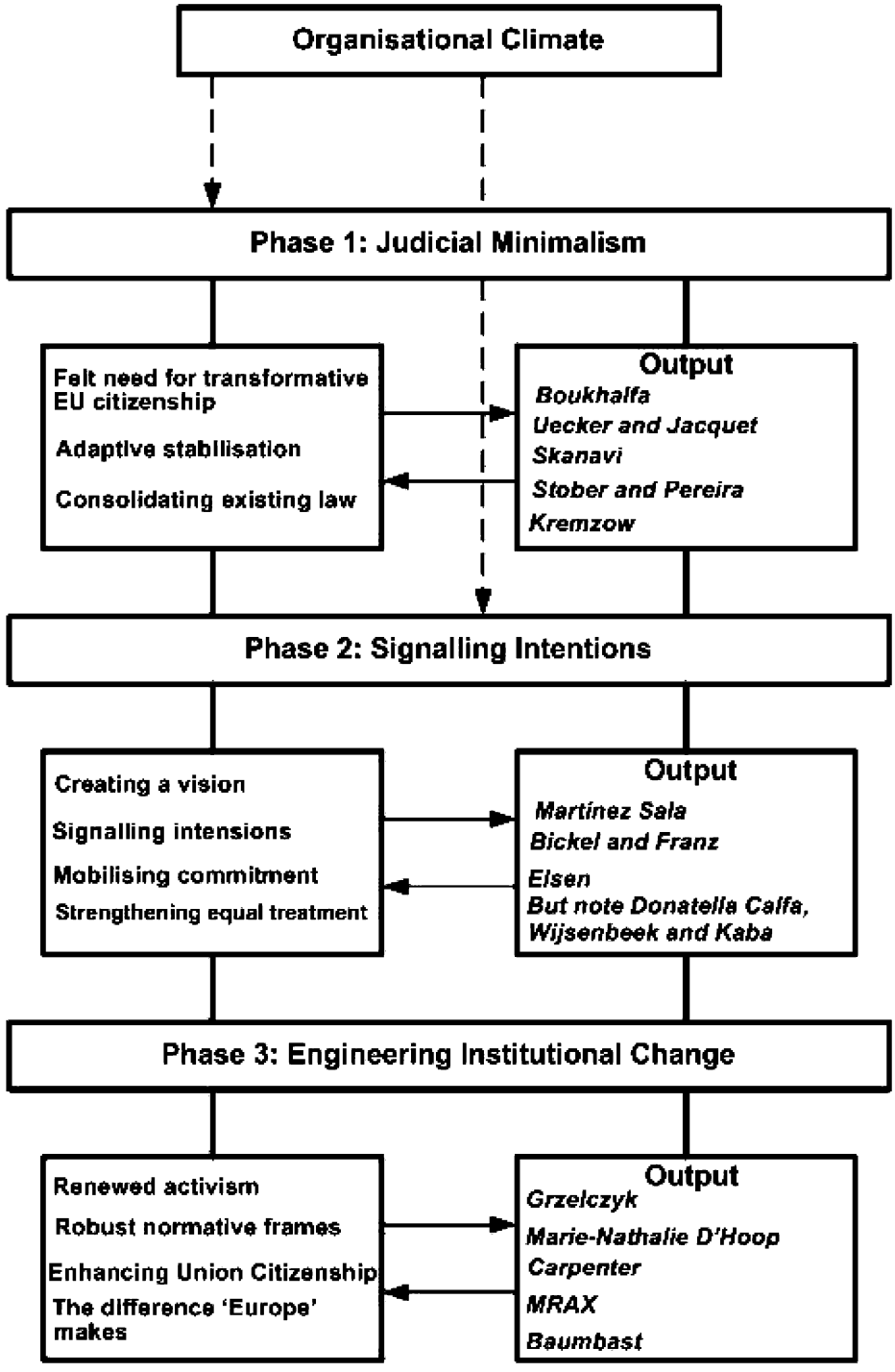


Figure 2: Mapping the process of Institutional Change

affecting the ECJ's institutional autonomy to develop and extend European citizenship norms and to contribute to European polity development.

The judicial institutionalisation of European citizenship is bound to induce further institutional change in law and the wider political environment, as attested by the Commission's legislative initiatives to date. The Court's rulings in *Carpenter*, *Baumbast*, and *MRAX* will gradually find their way into the legislative and policy-making framework in Member States, and constitute a foothold for more to follow in the future. As such, they provide impetus for vertical normative socialisation and social learning. In this respect, scholars and policy-makers alike are no longer justified to be either pessimistic or ambivalent about the promise of Union citizenship. The ECJ has carried through on this promise, despite the prevailing understanding of European citizenship as a purely symbolic institution ten years ago. By adopting a norm-perspective and a phased approach 'in-between' Treaty amendments, the ECJ has enhanced the constitutional importance and substance of Union citizenship in the evolving Community legal order. Without a doubt, European citizenship has come of age.