EUROPEAN MASTER'S DEGREE
IN HUMAN RIGHTS AND DEMOCRATISATION

Where do Aliens come from?

Political Rights at the Local Level depending on the Country of Origin
A Discrimination according to International Human Rights Standards?

Master Thesis by
Birgit Weyss

Supervisor
Professor Jónatas Machado
University of Coimbra, Portugal

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Abstract

Where do aliens come from? The answer to this question becomes relevant with regard to political rights in local elections conferred to non-nationals. Only very few countries presently confer electoral rights in municipal elections to resident non-nationals. Instead a number of states confer this set of rights only on the basis of reciprocity hence distinguishing between aliens based upon their country of origin.

Transnational migration can be understood as a contemporary phenomenon simultaneously promoted and restricted, depending again upon the migrant's country of origin. International law only formally recognises the dichotomy of national citizen and alien. This once clear distinction has become blurred by the evolving differentiations made by states between different categories of foreigners.

It is at the discretion of a democracy to determine who is or is not allowed to participate in the political process and by ignoring the reality of their growing permanent immigrant populations, democracies across Europe are steadily losing their representative aspect. The differentiation that these states make between resident nationals and resident aliens is challenged by the international human rights system, as the right to participate in the political process is by its very nature a human right. I assert that the right of non-nationals to political participation at the local level is only relative to a certain period of residence providing a necessary degree of integration. It should therefore be conferred unconditional on any other criteria such as nationality or reciprocity.

The British Commonwealth, the European Union and the Community of Portuguese Speaking Countries constitute three political organisations which confer political rights for local elections only to nationals of the particular Member States on the basis of reciprocity. I will critically analyse whether the differentiation between different categories can be justified in regard to the particular purposes and aims these organisations are founded upon.

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Introduction

"In many States the issue appears never to have arisen; the restriction of voting rights to legal citizens is regarded as a reasonable and administratively convenient device for delimiting the electorate, and one which requires no justification."[1]

Democracy cannot be measured in absolute terms. As such there is no truly democratic country as the full realisation of the democratic principle is not practically feasible. An assessment of democracy is, rather, a question of degree. A country therefore can only be democratic to a greater or lesser extent. However, the quality of democracy depends upon the ways in which social problems and conflicts are resolved and mediated within a procedural political discourse. The more inclusive and representative a democracy is, the better it is able to avoid the transfer of conflicts to a non-political level where no procedures exist and which might result in violence and antidemocratic tendencies. In the following chapters I shall attempt to critically examine the quality of democracy within the EU Member States by analysing the right to political participation in local elections of resident non-nationals which in some cases depends solely on the individual's country of origin.

Through the process of integration and internationalisation the role of the state and the concept of citizenship are changing. State sovereignty has been weakened through the increasing transfer of power to international and supranational organisations as well as through the indirect influence of giant transnational corporations. Increasing immigration flows, advanced communication technology and internationally directed education have resulted in a new form of "Völkerwanderung" (migration of peoples). There are various reasons for cross-border movements of the approximately 13 million aliens[2] living in EU-Member States, ranging from humanitarian to political and economic.[3] Western and central European countries in particular experienced a steep increase in the number of foreign nationals residing on their territory as a result of the fall of the Iron Curtain and the war in former Yugoslavia. However, the increased realisation of the freedom of movement promoted

[1] H. Lardy, *Citizenship and the Right to Vote,* in «Oxford Journal of Legal Studies», vol. 75, 1997, pp. 98-99.
[2] According to Article 1 of the "Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live" the term *alien* applies to any individual who is not a national of the state in which he or she resides. Confer:
[3] *Eurostat yearbook 2002. The statistical guide to Europe*, Office for Official Publications of the European Communities Luxembourg, 2002, pp. 82-84.

by growing economic integration in Europe contributed to the aforementioned 13 million foreign residents that presently live in EU-Member States.

The Problem

These transnational movements have resulted in the fact that increasing number of people are facing the circumstances of living in a country without obtaining the appropriate formal citizenship. Addressing this reality of increasing diversity means finding legal mechanisms to ensure mutual respect and to mediate relations across differences.[4] International law only recognises the dichotomy of national citizen and alien, ignoring the increasing number of individuals who enjoy a secure residence status in a foreign country but either cannot or do not want to become formal citizens of that country. Foreign residents who live in a particular country for a period of years cannot simply be categorised as aliens, as the longer they continue to live there, the more difficult it becomes to justify the disparity between their status and that of formal citizens. Thomas Hammar fills this definitional gap by labelling this special category of alien residents "denizens"[5].

Political rights, as opposed to other categories of human rights, generally depend on national citizenship status. Thus, foreign residents are regularly kept outside of the political decision-making process at all levels. This unsatisfactory situation challenges the concept of democracy as the population actually residing in a country or local region at any given time does not correspond with the population that is authorised to vote.

This deficit of democratic representativeness and inclusiveness has been at the centre of numerous political debates and the starting point of international documents such as the 1997 Convention on the Participation of Foreigners in Public Life at Local Level[6]. However, the notion of political integration of non-nationals has also been abused in election campaigns and generally in political propaganda by portraying it as the epitome of foreign interference and consequently a threat to the prevailing culture of the receiving state. Although the great majority of the population might not be hostile to the idea of non naturalised citizens having the right to vote, they are worried and over-cautious what consequences this political inclusion might bring about.

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[4] P. Taran, *Migration, Diversity and Integration – The Evolving Role of International Law,* paper presented at the Euro Summer School 2001 on Management of Ethno-Cultural Diversity in Cecina, Italy.
[5] T. Hammar, *Democracy and the Nation state,* Aldershot*,* Ashgate, 1990, pp.6, 40.
[6] The *Convention on the Participation of Foreigners in Public Life at Local Level* was adopted by the Member States of the Council of Europe on 5 November 1992 and has so far been signed by eight states and ratified by only four: Italy, the Netherlands, Norway and Sweden.

I think that the current rise of nationalist movements and xenophobic tendencies in Europe make it even more urgent to elaborate upon this topic and to explain the importance of the political integration of resident foreign populations. The main aim of my present work therefore is to provide convincing counter-arguments to refute the concept of political exclusion and discrimination of foreign residents regardless of their country of origin.

Political Integration of Resident Foreigners

The right to vote and to participate in government decisions is laid down as a basic human right in several international documents such as the Universal Declaration of Human Rights (UDHR), the Covenant on Civil and Political Rights (CCPR), the Convention on the Elimination of Racial Discrimination (CERD) and the European Convention of Human Rights (ECHR). Yet it is important to emphasise that states have not given up their sovereignty to determine who does or does not belong to the circle of legally recognised citizens[7]. This means states are still free to determine who can vote and who is excluded from political participation.

Concerning the right of non-nationals to vote, there are two different solutions to respond to this exclusion of political rights of resident non-national populations. One is to open access to naturalisation and allow full legal status as citizen after a certain period of residence; the other is to extend voting rights to non-nationals. Both forms are complementary and would contribute to the solution of the democratic lacuna.

A common argument against this extension of voting rights assumes that opening access to naturalisation or even granting legal claims for national citizenship after a certain period of residence, would solve the outlined democratic deficit. Immigrants who then still choose not to attain legal citizenship would hence voluntarily agree on their exclusion from political participation[8]. This argumentation, however, does not address the fact that some countries[9] still refuse to accept dual citizenship which would prevent many immigrants from applying

[7] Confer e.g. Art 1 para. 2 CERD: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."
[8] Especially traditional immigration countries like the US, Canada or Australia do not consider the extension of franchise to non-citizens as they encourage immigrants to naturalize. The right to political participation is therefore used as an incitement for attaining the respective formal citizenship.
[9] Austria, Denmark and Germany are the EU Member States that have pursued the most rigid policy concerning the acceptance of dual nationality. Confer K. Groenendijk, E. Guild, R. Barzilay, *The Legal Status of Third*

for citizenship in their country of residence[10]. Furthermore, even if immigrants voluntarily decide against the acquisition of a particular national citizenship, it would not change the fact that a substantial number of the resident population would still be excluded from the polity purely because of their foreign legal citizenship[11].

For any number of reasons, aliens may decide not to acquire citizenship of their resident countries. However, this fact fails to establish any valuable justification for this kind of exclusion or discrimination. Considering that in most countries immigration rates exceed naturalisation rates, democracy is becoming ever less representative without any progressive response to these demographic changes[12]. Although only the acquisition of national citizenship confers the full set of political rights, still the argument of extension of voting right on the municipal level does not lose its foundation but contributes to political integration on a somehow preliminary phase. Both approaches finally lead to the enhancement of the political process and to the representativeness of democratic decisions and therefore have to be seen as complementary.

Robert Blackburn states in this context that contemporary concepts of democracy and citizenship are two sides of the same coin, and what is fundamental to both is the principle of equality between citizens, and the equal right of each individual to political power regardless of property, rank, sex, race or creed. As a matter of scope I limited my present work to the political dimension of the right to vote. However, one has to bear in mind that the right to vote, and to be chosen for political office, is of itself no guarantee of other basic rights and freedoms. In particular, the operation of democracy depends heavily upon the quality of freedom of expression, and the collective right of the electorate to an informed choice at elections delivered through a fair and balanced media. Ultimately, political equality is never real unless it is accompanied by other basic rights affecting social and economic power.[13]

Country Nationals who are Long-Term Residents in a Member State of the European Union, Centre for Migration Law, University of Nijmegen, Netherlands, April 2000, p. 110.

[10] According to a recent poll by the Centre for Turkey Studies in Essen in Germany 62 percent of the Turks in Germany want to acquire German citizenship but at the same time do not want to have to give up their Turkish citizenship, which would mean forfeiting any claim to property in Turkey.

[11] R. Bauböck, *Changing the Boundaries of Citizenship*, in R. Bauböck (ed.), *From Aliens to Citizens. Redefining the Legal Status of Immigrants in Europe*, Aldershot, Avebury, 1994, p. 5.

[12] R. Bauböck, citied from a draft version of chapter 3, p. 5: *Citizenship Policies and Political integration*, in A. Aleininkoff, D. Klusmeyer, *Citizenship Policies for an Age of Migration,* Carnegie Endowment for International Peace, 2002.

[13] R. Blackburn, *The Right to Vote,* in R. Blackburn (ed.), *Rights of citizenship,* London, Mansell, 1993, pp. 95-96.

National and International Legal Situation

The legal situation in EU-Member States concerning naturalisation law and the right of third country nationals to vote differs greatly. According to international law every country may determine who shall be regarded as holding nationality of that state.[14] However, through the Treaty of Amsterdam, the European Community was granted the power to adopt measures inter alia on issues such as immigration and legal residence of third country nationals.[15] The EU therefore will have the main competences concerning the legal residence of third country nationals. This will have a crucial impact on their political integration as far as it is based upon residency rather than formal citizenship-status. While the national differences between EU-Member States has grown less and less important, the gap between the legal status of communitarians and non-communitarians has become ever greater. This is especially true regarding the right to vote in municipal elections, a right guaranteed in most Member States only to legally recognised nationals and EU citizens. The right to political participation at this level depends not on the nationality of the country of residence but on the individual's country of origin.

Europe seems to be a good setting to analyse the different treatment of foreigners concerning political rights because in addition to the framework of the EU, there exist other political organisations (such as the British Commonwealth or the Community of Portuguese Speaking Countries) that grant voting rights only to certain categories of foreigners depending upon their particular country of origin.

Justified Differentiation or a Case of Discrimination?

What are the justifications for this differentiation? Are they necessary in a democratic society? Are they in the interests of national security or public safety? Is there a need to distinguish between formal citizens and "the others" in order to protect the cultural interests and traditions of a state?

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[14] Article 1 Convention Concerning Certain Questions Relating to the Conflict of Nationality, adopted in 1930 in The Hague. Note that although this Convention has only been ratified by 20 states it is being considered as customary law. Article 3 of the European Convention on Nationality, adopted in 1997 in Strasbourg, in force since 1 March 2000. Confer the opinion of the European Court of Human Rights in *Chahal* [1996] EHRR European Court of Human Rights judgment 15.11.96, para. 73. Confer further: *Nottebohm Case (Liechtenstein v. Guatemala),* judgement of the ICJ of 6 April 1955.

[15] Article 63(3)(a) of the TEC provides that the Council is to adopt measures relating to "conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion". Article 63 (4) ECT provides the legal basis for the Council to adopt "measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States".

It is my intention to analyse in my present work whether the reasons used to justify these outlined differentiations are defensible with regard to human rights principles, above all the principle of non-discrimination. I will start by elaborating the distinction between nationals and foreigners regarding political rights in the context with the concept of nation-state and citizenship. As a second step I will then analyse potential justifications for the differentiation between different categories of aliens and the inherent dangers and problems that such an approach might entail.

I will continue by using international human rights treaties and principles to give a possible solution for a different approach to a general tendency of political and economic integration that further blurs the distinction between nationals and aliens.

Approach and Methodology

I am going to approach these questions by starting with the relationship of human rights and citizen rights and by stressing the tension between inclusiveness and exclusiveness that forms the theoretical background of the whole discussion of the political participation of aliens. It can be observed that human rights increasingly overlap with rights once granted only to formal citizens. However, the enjoyment of political rights in general still mainly depends upon the acquisition of national citizenship. I will therefore take a closer look at the notions of nation-state and citizenship and analyse the criteria of distinguishing nationals from the so-called "others". By challenging the argument that cultural homogeneity is necessary to uphold loyalty within a population I will elaborate on the issues of demos and ethos. I will further continue by substantiating that demos and membership should be understood primarily in civil and political terms instead of ethno-cultural ones. I conclude the theoretical part by discussing the concept of citizenship as delinked from the state and therefore existing on a parallel supranational, as well as intranational or sub-national level. Giving legal examples such as the European citizenship, regulated in Articles 17-22 of the Treaty of Maastricht[16], I will argue that several parallel and overlapping political communities exist with different forms of participation and different membership criteria. Those different criteria also face a distinct benchmark concerning their justifiability which permits differentiations between members and "the others".

[16] Ex Article 8-8c TEC

In the second part I am going to discuss different political organisations that confer certain political rights exclusively to a certain category of foreigners stemming from other Member States. I begin with the principle aims European Union citizenship is intended to achieve and the effect it has on the development of a "European"[17] identity. I will analyse whether this process of identification is primarily based on the exclusion of "commonly" defined non-Europeans and whether there exist alternative approaches to bring the Union closer to its citizens. After describing the concept of Union citizenship I will compare it with the British Commonwealth and Community of Portuguese Speaking Countries which similarly distinguish between different categories of aliens with regard to certain political rights.

In the third part I tackle the issue of this differentiated treatment of aliens through the principle of democracy and non-discrimination. As only the latter is actually acknowledged as a legally enforceable human right I will further elaborate on the notion of equality and analyse the reasons of economic integration or cultural commonness that are put forward to justify legal differentiations. I will base my line of reasoning on the arguments that I developed in the first part and on legal provisions in international human rights documents. The previous parts I and II are supposed to provide a sound basis for the argument and approach I develop in the third part. Any differentiation between non-nationals concerning political rights that is based on cultural ties or economic interests amounts to a form of legal discrimination.

[17] This identity of course can only become truly European if all European States are included and equally recognised in this process of identity formation.

Part I:
Theoretical Preliminaries:
Tension between Inclusiveness and Exclusiveness

1.1 Citizen Rights versus Human Rights

The realisation of political rights of resident foreigners points out the ambiguous relationship between citizen rights and human rights, which includes aspects of state sovereignty, citizenship and nationality as a special link between the individual and the state. There is a clear tension between the universalistic notion of human rights encompassing all human beings and the need of the sovereign state to distinguish precisely between members and others, establishing and applying an exclusionary set of membership criteria.

Since 1945, commonly referred to as the starting point of the internationalisation of human rights, the concept of state sovereignty has changed greatly. Human rights were no longer established as the core of citizenship as in the 1789 French "Déclaration des Droits de l'Homme e du Citoyen" but became enshrined in international law. This resulted in the fact that individuals became subjects of international law further implying that every human being obtains rights independently of their citizenship status. Another central achievement of this internalisation process was that human rights violations were no longer seen as exclusively a matter of the internal affairs of a sovereign state but instead a legitimate concern for the international community. This development marks a significant decoupling of human rights from traditional notions of citizenship.

How do human rights contribute to the discussion about citizenship?

It is seen as a principle of international law that states are sovereign concerning the definition of their citizens including respective entrance, and residence, and naturalisation-criteria.[18] Concerning political rights states have never missed the opportunity to introduce, in parallel to the right to political participation a complementary restriction regarding potential restrictions and exceptions concerning foreigners. In 1966 the European Court of Human Rights expressed that "[a]s the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations

[18] See footnote 14.

including the European Convention on Human Rights, to control the entry, residence and expulsion of aliens."[19]

I want to show in the following how the international acceptance of basic human rights and principles not only influences and where necessary confronts the state in *how* it treats people under its jurisdiction but also in determining *who* can enter, reside and ultimately become a citizen.

There are three important obligations that international human rights law imposes upon states regarding an individual's choice of residence country.[20] First, the well-established principle of admission to the state of which one is a national is contained, in Article 13 UDHR, Article 12 CCPR and Article 3 of Protocol No. 1 of the ECHR. Article 8 ECHR further provides that a claim to remain on the territory of a state can be founded upon the continuous enjoyment of an individual's family life. Third, persons are entitled to remain on the territory of a state of which they are not nationals if the only alternative is to return them to a place where they fear inhuman and degrading treatment or punishment[21] or persecution on defined grounds.[22] Human rights, especially the principle of non-discrimination further stipulate that every person enjoys the same rights and therefore should be treated equally regardless of nationality, colour, gender or political affiliation.[23] Exceptions are only admissible if justifiable reasons exist that provide for a different treatment. The European Convention on Nationality of 1997, for example, sets out important principles and rules on the acquisition and loss of nationality and prohibits states from applying discriminatory standards on grounds of sex, religion, race, colour or national or ethnic origin[24]. States like Germany were heavily criticised for exclusionary legislation on naturalisation and citizenship that was based above all on the notion of an ethnically homogenous "Staatsvolk" excluding, for example, second- and third-generation immigrants.[25] In January 2000 Germany finally

[19] Case of *Chahal v. the United Kingdom,* [1996] EHRR European Court of Human Rights judgment 15.11.96, para. 73.
[20] K. Groenendijk, E. Guild, R. Barzilay, *The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union, Centre for Migration Law, University of Nijmegen, Netherlands, April 2000, p. 4.*
[21] Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 ECHR.
[22] See in particular: principle of "non-revoulement" contained in Article 33 of the Convention relating to the Status of Refugees and Article 3 ECHR.
[23] Article 21 UDHR, Article 25 CCPR, Article 5 lit. c) CERD, Article 7,8 CEDAW, Article 3 of Protocol No. 1 to the ECHR, Article 23 of the Convention of Human Rights of the OAS, Article 13 of the African Charter of Human and Peoples' Rights.
[24] Article 5 European Convention on Nationality.
[25] I personally dislike the expression of "second- or third-generation immigrants" as it carries the implication that immigration is something that sticks to a person through generations. The main part of the Austrian population would be part of the third- or forth immigrant generation. Nevertheless, I have reluctantly decided to employ this expression as it is commonly used to refer to the problems of the descendents of immigrants.

changed its 1913 "Reichs- und Staatsangehörigkeits-gesetzes", and adopted the new nationality law that increased the possibilities of "newcomers" to naturalize. The report on the legal status of third country nationals in EU Member States even mentions Germany as having put one of the most liberal naturalisation laws in the EU into force.[26]

Furthermore the Convention on Nationality recognises the importance of multiple nationality in regard to facilitating the integration of permanent residents. Although Article 14 only obliges states to accept multiple nationality in three cases, it still constitutes a major break with the previous position of avoiding undesirable multiple nationality as far as possible, an agenda once broadly pursued by Council of Europe (CoE) Member States and laid down in the 1963 Convention on the Reduction of Cases of Multiple Nationality.

The internationalisation of human rights one could say challenged states not only "[…] by reference to what happens within the polity […], but also by reference to the boundaries that it sets with the rest of the world, the extent to which those boundaries are treated as permeable, fuzzy or negotiable, and the manner in which 'strangers' are treated at the boundary as well as internally."[27]

Another important fact concerning the relation between citizen rights and human rights is that historically the latter has continuously limited the former; rights once guaranteed exclusively to citizens have become increasingly superseded by the concept of human rights granted to everyone irrespective of national origin. In other words, rights once associated with belonging to a national community have become increasingly abstract, and legitimated at the transnational level.[28] This continually ongoing process of enlarging the once exclusionary scope of citizen rights to incorporate a broader understanding of human rights is aided by the empowerment of marginalized groups and, in this case, of resident immigrants. Referring to human rights, such as the right to cultural identity or the right to participate in the political decision-making process, can give their arguments much greater clout in public debate. The increasing awareness of the uneven drawing of boundaries between national and foreign residents boots/ encourages to the critical discussion and rethinking of the exclusionary notion of ethno-cultural citizenship.

[26] Groenendijk, Guild, Barzilay, op. cite. note 20, p. 49.
[27] J. Shaw, *Sovereignty at the Boundaries of the Polity,* Paper submitted to the ECPR joint session, Political Participation of Immigrants and their Descendants in post-war Western Europe, Turin, March 2002, p. 3.
[28] Y. Soysal, *Identity, Rights, and Claims-Making: Changing Dynamics of Citizenship in Postwar Europe,* in *Metropolis International Workshop*, Lisbon, Luso-American Development Foundation, 1999, p 309.

States have always been cautious not to relinquish their sovereign right to determine who can join the national political community. This further explains the lack of any international framework regulating principles for granting national citizenship. I argue that the evolving system of international human rights standards limits the state's sovereignty in this regard especially through the right of non-discrimination and the right to democracy.

It is not the human rights system alone that blurs the classic concept of the sovereign nation-state. The process of integration and internationalisation presents an ongoing further challenge to the traditional assumption of an homogenous democracy, complete with common language, culture and particular descent. In the following chapter I will try to further elaborate on the challenge that the increased transnational movement of citizens presents to the traditional concepts of citizenship and nation-state.

1.2 The Notion of Citizenship and Nation-State

Citizenship, as the criteria defining membership in a political community, forms the basis of the discussion of inclusiveness and exclusiveness, specifically whether or not non-nationals should be authorised to vote and participate in political life. The lively debate about the meaning and definition of citizenship shows that this term is at the centre of the whole political concept[29]. Judith Shklar appropriately put it "there is no notion more central in politics than citizenship, yet none more variable, or contested in history."[30] In addition, political theorists such as Will Kymlicka and Wayne Norman have stated and observed that, "almost every problem in political philosophy involves relations among citizens or between citizens and the state."[31]

So why is there still no authoritative definition of the term citizenship? Most probably, the answer is because it is a political question, rather than one of empirical or logical observation. Consequently, the scope of the term's application revolves around the inclusive and exclusiveness of these others. According to Judith Shklar it is a debate over the scope and the extent of recognition accorded to various non-national forms of collective life.[32]

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[29] Confer: L. Bosniak, *Citizenship Denationalized,* in «Indiana Journal of Global Legal Studies», vol. 7, 1999, pp. 447-453.
[30] J. Shklar, *La citoyenneté américaine: la quête de l'intégration*, Paris, Cahmann-Lévy, 1991, p. 1.
[31] W. Kymlicka, W. Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, in «ETHICS», vol. 104, 1994, pp. 352, 353.
[32] Shklar, op. cite, note 30, p. 1.

Citizenship can be described as the practice which regulates the relationship of individuals to the bodies of governance to which they are subject. The bundles of rules determining the powers, liabilities, rights and immunities define the relationship between the individual and the state.[33] The normative justification for political rights conferred through formal citizenship status are based on the general maxim that those affected by the exercise of public power should be able to influence that power through participation in the equal and fair election of representative bodies.

The democratic principle and the concept of citizenship share an essential yet paradoxical relation. With regard to the state, the attainment of legal citizenship, and hence nationality, distinguishes between those legitimised to take part in political decision-making within a democracy and those excluded. Like a cat chasing its own tail, the paradox is that the question of how the demos should be designed in a democracy is determined by the political community, which in turn depends upon the composition of the citizenry of the state, the very demos itself. Thus the determination of who actually makes up the demos cannot be made by democratic means but is, along with other procedural rules, a set pre-condition for the practical functioning of a democracy. However, many state constitutions, for example Germany, do not precisely address the question of the composition of the "Staatsvolk".[34] This nevertheless, can mean that although this essential issue is left open for regulation through simple legislation[35] it must be interpreted according to the principles of the constitution which further should be in line with internationally recognised human rights standards. One of the main functions of a constitution therefore, in my opinion, is to ensure that the majority culture does not enact discriminatory regulations on the basis of cultural distinctions or identities. I will return to this crucial issue in the chapter "demos and ethos".

The common approach to the concept of citizenship is to equate it with nationality. In the Convention on Nationality of the Council of Europe, the terms "citizenship" and "nationality" are used to denote the same thing, namely the legal connection between a person and a state. However, there are countries in which "state" and "nation" are not synonyms, and citizenship

[33] A. Føllesdal, *Third Country Nationals as European Citizens: The Case Defended,* in D. Smith, S. Wright (eds.), *Whose Europe? The turn towards democracy, Oxford, Blackwell, 1999, pp. 107-108.*

[34] Neither Art. 16 nor Art. 116 Grundgesetz entail explicit criteria concerning the German legal citizenship. Confer : K. Hailbronner, in «Neue Zeitschrift für Verwaltungsrecht», 1999, p. 1275.

[35] Surprisingly the German Constitutional Court took the view that the simple legislator has a broad margin of appreciation, as the constitution does not include any explicit definition of the scope of legal citizenship. See decision of the Bundesverfassungsgericht 89, 155 (52) This legal interpretation however has not been confirmed by any previous or later decisions of the Court.

can apply to several legally recognised nationalities. Many problems could certainly be solved by making a clear distinction between the two sets of rights; "citizenship rights" being those linked with residence in a given geographic area and other rights linked with possession of a given cultural, civic and national identity. Nationality refers to membership in cultural community having a variety of common ethnic, linguistic, religious or historical roots terms. As such the concept of citizenship includes a much broader indication than simply membership in a particular political community. The reason for the disregard of this crucial difference between nationality and citizenship lies, I think, in an obsolete adherence to, or belief in, the concept of the nation-state.

One of the first things taught in jurisprudential studies is that a state, in order to exist, needs a defined territory, a "permanent population" and an effective government.[36] This could lead us to the conclusion that without the concept of a clearly defined legal citizenship -such as in the case of granting typical citizen rights to foreigners – there can be no defined state population, which would further imply that states would ultimately disappear from the international arena. This highly undesirable outcome, the blurring of the entire concept of current international law, is used as the main argument in favouring policies of restrictive citizenship. As I have outlined, although states are confronted with many challenges such as internationalisation, privatisation and decentralisation, they are still the central actors in the international legal arena and essential for international order, peace and for the promotion and protection of human rights.

I will attempt to refute the argument that a broader concept of citizenship would lead to the dissolution of states, and propose, rather, that ultimately, states can only exist when they finally abandon the idea of an homogenous "Staatsvolk" and adapt to the increasing movement of individuals and societies.

1.3 Demos and Ethos

The relationship between demos and ethos, or in other words, between the concept of national homogeneity and an open and ethnically neutral society, is at the heart of the discussion about the inclusive and exclusiveness of political communities. The great difference between nationality laws in different European states can be seen as a result of this tension. Contrary to the "state", which implies a legal and political organisation in control of a certain territory, the

[36] See Article 1 of the 1933 Convention on Rights and Duties of States.

"nation" is a cultural community of people believing that they have a common heritage and a common destiny.[37]

According to Randall Hansen and Patrick Weil nationality law "[…] gives institutional expression to the state's prerogative of inclusion and exclusion […]."[38] In the present chapter I am going to analyse the legitimacy of applied criteria concerning the design of suffrage boundaries.

I consider it highly important to keep cultural and political spheres separated, in order to assure a sustainable and progressive concept of citizenship. The alternative would be to block naturalisation of resident immigrants, exclude them from the political arena and consequently affirm the nation's identity by "sheltering" the historically developed political-cultural form of life from outside influence. As can be observed in some European countries this process leads to a "ghettoisation" of immigrants and moves conflicts to a sphere outside the legally determined procedures of democratic discourse. Eventually this form of exclusion leads to the rise of violent conflicts and xenophobic tendencies in receiving countries. Furthermore reality has shown that closed borders have not only failed in preventing people from poorer countries from entering EU-Member States but rather have led to an increase in both human trafficking and illegal immigration. This growing lack of congruence between "Staatsvolk", or the formally recognised members of the state, and the actual population permanently living within the state's borders jeopardises the democratic legitimacy of political decisions. This fact becomes increasingly relevant when considered in relation to the ongoing immigration flow and demands for legal reforms in EU member countries. There is no single solution to this problem, however I think that politics of exclusion lead in the wrong direction as they serve only to harden borders in a futile attempt to freeze the status quo instead of responding to new realities.

I shall continue to argue for the inclusion of foreign residents into the political community by trying to refute the idea that a common ethnicity or culture is a necessary condition (or, in other words, that a homogenous population is necessary) to convey the feeling of mutual loyalty necessary for a stable and durable democracy.

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[37] S. Castles, *Multicultural Societies*, London, SAGE, 2000, pp. 188, 189.

[38] R. Hansen, P. Weil, *Introduction: Citizenship, Immigration and Nationality: Towards a Convergence in Europe?,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU,* New York, Palgrave, 2001, p.1.

Many, including political sociologists such as Gellner[39], and among others, the German Constitutional Court[40] hold the opinion that the homogeneity of the people is a necessity for the functioning of the state. This view is mainly based on the assumption that a state cannot operate unless its citizens share a certain sense of loyalty towards one another and understand or see themselves as a collective identity. The main question that arises at this point is whether the possession of a common history, cultural origin or tradition is the only way to satisfy the intrinsically human need to belong and self-identify? Or to put it in other words, can the feeling of mutual loyalty only originate in a community with common cultural roots? The strength in this form of nationalism lies in the strong emotional component that seemingly answers existential questions of individual and collective identification. Thomas Hammar describes the increase of nationalism as the replacement of religious belief that once was considered the source of continuity, identity and meaning.[41]

I think that the concept of cultural homogeneity as precondition for the formation of a democratic state can be easily undermined by looking at the different concepts of inclusion of typical immigrant countries like the USA, Canada or Australia and even countries like France and the UK, which follow a very different approach in this respect. Another example refuting this concept can be found in the governments of former colonies. Their colonisers determined their territorial boundaries with less regard for the actual cultural groups inhabiting the land than for their pens, rulers and brandies. Although conflicts between different ethnic populations were a widespread result of this arbitrary border-drawing, democracy, together with other forms of decentralisation like federalism are able to unify and harmonise different cultural groups. Another interesting objection lies in the fact that there are approximately 8000 languages spoken in the world, yet there are only 191 states. This fact alone leaves little, if any, room for the arguments requiring cultural homogeneity as a precondition for statehood.

To better understand the position of claiming the necessity of a common cultural and ethnic identity I want to briefly review the historical origins of this argument.

Throughout European history the development of states was followed by a parallel process of the creation of a feeling in the citizenry of belonging to those states. National identity, particularly in the cases of Italy and Germany, was something constructed in order to

[39] E. Gellner, *Nations et Nationalisme,* Paris, Éditions Payot, 1983, p 11. “Le nationalisme est essentiellement un principe politique, qui affirme que l’unité nationale doivent être congruentes."
[40] Confer the decision of the German Federal Constitutional Court on the implementation of the Treaty of Maastricht of 10 Dec. 1993, BverfGE 89, 155-213 [C I 2 b2)], Az: 2 BvR 2134/92 and Az: 2 BvR 2159/92.
[41] Hammar, op cite., note 5, pp. 60- 62.

strengthen the ties between the different principalities and city states.[42] Jürgen Habermas further describes nation-state and democracy as twins and both born in the French Revolution and influenced by the notion of nationalism.[43] An evolution in the role of sovereign political power occurred in the aftermath of the Revolution of 1789 and in response to the Napoleonic attempt to annihilate the historical states. The dynastic systems characterised by roles of absolute power were replaced by states whose political poser was derived from their sovereign citizens, and neither from above nor from "outsiders.[44]

Although it may have been necessary at that point in time to unify people through reference to their common origin and history, the present situation in Europe is no longer comparable and is challenged by comparing problems such as increasing transnational movements of people. The ideas of citizenship and nation-state are neither ancient, nor in any sense given entities. They are, rather, fluid concepts constructed by politicians, poets, artists and the community over a period of time and exposed to the continuous influences of sociological change and circumstances.[45]

Again, looking to history, I would like to draw attention to the secularisation process that took root during the religious conflicts of the Thirty Years' War in the 17th century and finally rescinded the requirement that all subjects belong to the same religion.[46] The separation of church and state as laid down in the Treaty of Westphalia was mainly driven by the political conflicts about religious beliefs which were then transferred to the private sphere thus resulting in individual freedom of religion. In the same way how Samuel Puffendorf asserted that a common religion constitutes a necessary foundation of any state, the same argument seems to be presently used to argue that an homogenous ethnic and cultural origin is necessary for an operative state.[47] Considering the sad increase of civil conflicts between different ethnic groups, especially in the aftermath of the Cold War, it consequently seems

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[42] J. Weiler, *Der Staat »über alles«: Demos, Telos und die Maastricht-Entscheidung des Bundsverfassungs-gerichts*, in «Jahrbuch des öffentlichen Rechts», vol. 44, 1996, p. 113.

[43]. J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a. M., Suhrkamp, 1993, p. 634.

[44] Confer: Hansen, Weil, op. cite., note 38, p.14. "German jus sanguinis became trapped in a logic of ethnicity following the unification of the German Empire in 1871 and the annexation of Alsace-Lorraine. Ethnicity, German culture and ancestry became the means of justifying this annexation, as did, for France, Rénan's conception of the nation as a daily plebiscite."

[45] Hammar, op cite., note 5, p.203.
Confer: TSER EURCIT Project Final Report, *European Citizenship and the Social and Political Integration of the European Union,* R. Bellamy (project co-ordinator), 2001, p. 38.

[46] Since the Reformation, adherence to the dynasty's religion has been the absolute requirement for citizenship or membership of many states in Europe. See: Hammar, op cite., note 5, p. 62.

[47] According to Samuel Puffendorf, only those who believed in God could be expected to behave as good and virtuous subjects.

equally essential to keep state issues separate from ethnically dominated areas. These issues could be transferred to the individual and private sphere and protected through rights such as non-discrimination and the right to enjoy one's culture, among many others.

In addition to being a reflection of the universal content of basic rights, each legal system is also an expression of a particular form of life and not merely a reflection of the universal content of basic rights.[48] Through political discourse within democratic procedures, legally entitled participants decide the way in which they wish to be defined or understood as citizens of a specific republic, inhabitants of a specific region or heirs to a specific culture. They choose which traditions they wish to perpetuate and which they want to discontinue and how they want to deal with their history, one another, nature, and so on. Certainly of course the bureaucratic choices such as the selection of an official language and public holidays[49] or decision about a school's curriculum, affects the nation's ethnic self-understanding. Because ethnic-political decisions are an inevitable part of politics, and because their legal regulation expresses the collective identity of a nation of citizens, they can spark cultural battles in which disrespected minorities struggle against an insensitive majority culture. The origin of the battle however lies not in the fact of the ethnic neutrality of the legal order but rather in the fact that every legal community and every democratic process for actualising basic rights is inevitably permeated by issues of ethnicity and cultural influence.

Ultimately it is the constitution that establishes the rules of the game for the democratic process and guarantees that the laws and their interpretation and application do not become culturally or ethnically discriminatory. As previously outlined, the principles concerning the scope of demos form, a basic part of democracy in general. Habermas argues that the neutrality of the law vis-à-vis internal ethnical differentiations stems from the fact that in complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedures for the legitimate enactment of laws and the legitimate exercise of power[50]. He continues "[c]itizens who are politically integrated in this way share the rationally based conviction that unrestrained freedom of communication in the political public sphere, a democratic process for settling conflicts, and

[48] Confer: J. Habermas*, Struggles for Recognition in the Democratic Constitutional State,* in A. Gutman (ed.), *Multiculturalism – Examining the Politics of Recognition*, New Jersey, Princeton University Press, 1994, p.124. Whereas legislative decisions must be understood as actualising the system of rights, policies must be seen as an elaboration of that system. This means that the shaping of citizens' political opinion and will is oriented to the idea of actualising rights and therefore cannot be equated with a process by which citizens reach agreement about their ethical-political self-understanding.

[49] In most EU-Member States public holidays mainly correspond to the religious holidays of the majority religion.

the constitutional channelling of political power together provide the basis for checking illegitimate power and ensuring that administrative power is used in the equal interest of all."

The legal system of a democratic state cannot be entirely separated between demos and ethos, but is "ethnically permeated", reflecting the political will and the form of life of a specific legal community. It is one of the main purposes of a constitution to lay down the general principles and possibilities to actualize individual basic rights and to finally prevent that the ethos of a dominant cultural group in a country comes into conflict with human rights principles. Naturalisation law as a fundamental or even prerequisite element of democracy should therefore in general not depend on any ethnic or cultural differences[51].

Another important question, arising in the context of immigration and the integrity of citizenship, is to what extent a democratic constitutional state can demand that immigrants assimilate. Habermas' answer to this question is that a political community in a democratic and constitutional state can only preserve their identity as far as it is based upon the constitutional principles anchored in the political culture, and not on the basic ethnic orientations of the cultural life predominant in that country.[52] This further means that political assimilation does not include assimilation that penetrates to the level of ethnical-cultural integration with the resulting deeper impact on the collective identity of the immigrants' culture of origin. Marco Martiniello further analyses the extent of so-called "necessary assimilation" and points out that a certain confusion surrounding the unity of the nation and its cultural uniformity underlies today's debate and understanding of citizenship. He believes this misconception revolves around replacing the social bond between an individual and the community with a cultural bond.[53] Politics of assimilation, although based on the idea of inclusion of the so-called "others", can limit and threat the individual sphere and freedom of "new-comers" planning to relocate in the respective country. Political integration must be strictly separated from cultural integration as no one, irrespective of nationality and origin, should be forced to sever his or her cultural ties to their home country and internalise the new cultural traditions including religion, identity and a general set of values. True integration can only be described as a mutually voluntary process, and one that conflicts neither with the right

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[50] Habermas, op. cite., note 48, p. 135.
[51] Confer: Habermas, op. cite., note 48, p.137. "[…] political integration of 'others' must remain 'neutral' with respect to the differences among the ethical-cultural communities within the nation."
[52] Habermas, op. cite., note 48, p.137.
[53] M. Martinello, *European citizenship, European identity and migrants: towards the post-national state?;* in R. Miles, D. Thränhardt (eds.), *Migration and European integration: the dynamics of inclusion and exclusion,* London, Printer Publishers, 1995, p. 66.

to respect for private and family life[54], nor with the rights of freedom of thought, conscience and religion[55]. Therefore naturalisation law that sets cultural assimilation as a precondition to the acquisition of formal citizenship violates the outlined rights. It is further interesting to note that Article 31 of the Convention on the Protection of the Rights of All Migrant Workers requires that States Parties "shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin." Only the acceptance on basic fundamental values and democratic procedural rules, in my regard, form an entrance-condition for membership in the political community on the national level.

After having examined the problems related to the so-called "permanent population" of a state in context with the culturally and ethnically homogenous definition of the "Staatsvolk,"[56] I want to conclude this section by emphasising the importance of the concept of citizenship on the identification and feeling of belonging of its members. One of the main purposes of citizenship can be seen in its ability to convey a sense of shared civic identity and a certain level of mutual concern amongst citizens to hold the society together. My intention in this chapter was to show that the traditional model of nation-state is no longer tenable as a common and homogeneous culture no longer forms the point of reference in creating the special ties that hold a community together. The importance of cultural identity to a society is without doubt, however it must be kept in mind that culture is neither static nor isolated. It is rather in an ongoing process formed by changing circumstances, a fact which must be taken into account by the legal framework of a state. I furthermore assert that the members of a political community not only agree on the procedures for the legitimate enactment of laws, as reflected in the views propounded by Habermas[57] but also on the common basic values that coincide with universally recognised human rights standards and that form the so-called "Wertegemeinschaft"[58]. I see the consent on both procedural and substantive legal elements enshrined in the constitution, as crucial for liberal democracy. Both form preconditions for a fair and equal discourse and are in this sense mutually inter-dependant.

[54] Art.8 ECHR and Art.17 CCPR.
[55] Art.9 ECHR, Art.18 and 19 CCPR, Art.18 and 19 UDHR.
[56] See decisions of the German Federal Constitutional Court concerning the extension of the right to vote in municipality elections: BVerfGE 83, 60 (concerning Hamburg) and BVerfGE 83, 37 (concerning Schleswig-Holstein) both dated 31 Oct.1990.
[57] Habermas, op. cite., note 48, pp. 135, 136.
[58] Martinello translates the term "Wertegemeinschaft" with the English expression "inclusionary society". See Martinello, op. cite., note 53, p. 153.

"[The] idea of a constitution-making practice links the expression of popular sovereignty with the creation of a system of rights. […] [A] law may claim legitimacy only if all those possibly affected could consent to it after participation in rational discourses. […] Now, if discourses are the place where a reasonable political will can develop, then the presumption of legitimate outcomes, which the democratic procedure is supposed to justify, ultimately rests on an elaborate communicative arrangement: the forms of communication necessary for a reasonable will-formation of the political lawgiver, the conditions that ensure legitimacy, must be legally institutionalised."[59]

1.4 Denationalising Citizenship

In contrast to states, which have clear and fixed political and geographical borders, the populations living within these boundaries are becoming increasingly mobile. Whereas these territorial borders are necessarily mutually exclusive, this is not the case concerning the boundaries defining political communities. After having argued for the neutrality of naturalisation law concerning ethnic characteristics, I will now continue to argue that citizenship exists not only on the state level but can also be understood in a "denationalised way".

As I have outlined above, conventional understanding of citizenship equates the term with national membership. The question, however, is if this is the only appropriate definition, or whether there exists another form of political community membership not coinciding with nationality and the national state. Although the state might typically be considered the primary entity for a political community, I am going to argue that it is not the only one and that there also exist other forms of so-called demoi. The original and broad meaning of citizenship as membership in a political community is intended to be above cultural differences, yet formally it exists only in the context of the national level, based on cultural specificity – the belief in being different to other nations[60].

The separation of demos and state opens up the possibility of imagining multiple and coexisting demoi which contribute to the quality of democratic decision-making as it includes a greater variety of members compared to the exclusively understood concept of national

[59] J. Habermas, *Remarks on legitimation through human rights,* in «*Social Philosophy and Criticism»,* vol.24, no. 2/3, 1988, p.160.
[60] Castles, op. cite., note 37, p. 188.

population. European citizenship was, after all, also introduced to strengthen the democratic legitimacy of the decisions made by EU-organs. Recognising that different levels or forms of democracy outside the conventional state-level exist, it must be further accepted that there also exist different forms of political communities parallel to the circle of formal nationals. Therefore, different forms of democratic systems thus result in differently constituted political communities.

I want to anticipate in this context the three political organisations I am going to elaborate upon in the next chapter. The European Union, the British Commonwealth and the Community of Portuguese Speaking Countries (hereinafter CPLP[61]) can be taken as an example for the process of denationalising citizenship.

Article 8 of the Treaty of Maastricht (now Article 17-22 ECT) introduced the concept of European citizenship, in order to bring this supranational institution closer to its citizens and to encourage the identification with the EU through a so-called "Euroconsciousness".[62] Although one could say that this created a new source of political belonging decoupled from the state-level, it is important to bear in mind that Article 17 TEC refers to the requirement of holding the nationality of a Member State and therefore produces again an indirect link to nationalised citizenship. The boundaries of EU suffrage consequently remain state-centred excluding non-communitarians from the common political community.

In the case of the British Commonwealth and the CPLP it can be equally observed that a decoupling from national citizenship and the territorial state has taken place although in very different forms and for very different reasons. In comparison to the British Commonwealth which conferred nationality without basic citizen rights, in Portugal's relationship with Brazil, nearly the whole set of citizen rights were conferred without nationality. However, in both cases political rights do not depend on the acquisition of the status of a formal national but depend on residence criteria mainly determined by immigration regulations instead of nationality laws.

All three political communities deal, of course in very different stages of development, with the concept of transnational citizenship, further indicating that denationalisation has reached a level including not only national citizens of one state but equally of all other member states. Nationality thus still remains an entrance criteria into the political community,

[61] Comunidade de Países de Língua Portuguesa.
[62] B.S. Turner, *Postmodern Culture - Modern Citizens*, in B. v. Steenberg (ed.), *The Condition of Citizenship*, London, SAGE, 1994, pp. 153, 159.

but it is not solely limited to one exclusive formal citizen status but encompasses the national membership of all other member countries.

Theodora Kostakopoulou has observed that development of the European Union to a complex political community has brought forth the possibility of membership in various overlapping and interacting polities on supranational, national and sub-national levels[63]. Josef Weiler further describes these multiple and co-existing forms of demoi as "concentric circles" in the sense that a person can have a feeling of belonging simultaneously to different political communities.[64] Someone can therefore feel Venetian, Italian and European at the same time. The sense of identity and identification derives in this regard from the same sources of human attachment albeit at different levels of intensity.[65]

1.4.1 Sub-national Citizenship

The denationalisation of citizenship can be understood in two different ways, on the sub-national and transnational level. The criteria for distinguishing between members and "the others" vary according to the respective level. Whereas nationality is a necessary precondition for full membership at the national level, I want to show that this does not need to be the case concerning the municipal level.

The preconditions for formal nationals to vote in municipal elections are generally based on residence in the respective local community. Rainer Bauböck has pointed out an interesting difference between political communities at the national and local level. He states that in contrast to the national level of government, local political communities have no immigration control to distinguish between citizens and non-citizens, as the right of free movement within the borders of a democratic state is not tied to nationality.[66] Legally resident foreigners are therefore generally free to move within the country and to change their residence from one municipal community to another without needing intermediate permission of state authorities. In this regard legally resident foreigners enjoy the same freedom of movement as formal nationals. However this equality ends with relocation. Formal municipal citizenship – the

[63] T. Kostakopoulou, *Towards a Theory of Constructive Citizenship in Europe,* in «The Journal of Political Philosophy», vol. 4, 1996, p. 338.
[64] J. H. H. Weiler, *European Citizenship and Human Rights,* in J. Winter, D. Curtin, A. Kellermann, B. de Witte (eds.), *Reforming the Treaty on European Union – The Legal Debate –,* The Hague, Kluwer, 1995, p. 74.
[65] Ibidem, p. 74.
[66] Bauböck, op. cite., note 12, pp. 9, 10.

requirement for participation at the local level – transfers only for formal citizens. Formal nationals as well as legal resident foreigners generally enjoy equal freedom of movement within national boundaries, and should therefore qualify through residence[67] or in the case of the latter through a certain integrative period of legal residence, instead of nationality.

What are the justifying reasons to distinguish between resident foreigners and resident nationals, and to only reserve political rights on the local level for the latter? Why is formal nationality a necessary addition to the prerequisite of residency regarding the right to take part in municipal elections? Since a town is a political entity, a polis in the original sense of the word[68], the idea of democracy built on proximity and subsidiarity plays a decisive role in this context. All residents, irrespective of nationality, should have the right and the opportunity to vote in municipal elections. In this way the local community is extended to embrace all those who live in it.[69]

Although at the national level there is an arguably closer link between formal citizenship and participation in procedures for determining the "national will", this is not the case at local level.[70] The regulative characteristic of the concept of formal national citizenship in international law, as well as in national constitutional law, is beyond any doubt, and sets clear normative limits to the extension of political rights to non-nationals. Although it might be desirable from a solely democratic point of view, to confer the whole set of political rights to resident foreigners who are affected by national laws in the same way as resident nationals, one has to bear in mind the legal consequences this might bring about. This wholesale equating of political rights concerning foreigners and formal nationals would ultimately result in the diffusion of the concept of national citizenship, which presently is the only concept that determines the responsibilities and rights between individual and state. International and national constitutional law, despite their continuous process of adaptation and development, are not yet prepared to entirely let loose the concept of formal national citizenship. In my view, the right to political participation is relative to the normative constrictions due to the regulative function of formal national citizenship. In only a few cases can human rights be understood as absolute in their character, but often must be considered alongside other essential interests such as conflicting human rights of others or issues of state security or

[67] For further explanation on the criteria of domicile and residence see Hammar, op cite., note 5, pp. 192-196.
[68] In Greek polis means "city-state". In the ancient Greece a *polis* was essentially an urban centre which ruled over the surrounding countryside.
[69] C.G. Monique, *Should Outsiders Have the Vote?*, in «Le Monde Diplomatique», January 2000. See: http://www.globalpolicy.org/nations/citizen/eurcit1.htm (as of: 15.07.02)

general public interest. However, in regard to municipal politics, the claim of state sovereignty seems unconvincing as neither legislative nor jurisdictional powers are at stake and therefore do not involve the issue of state sovereignty.

In regard to municipal elections I see no convincing argument to exclude resident foreigners from political participation. The expansion of local political rights to resident aliens would consequently entail a wider definition of the municipal electorate than of the national electorate. This of course would mean that the sum of eligible municipal voters would exceed the total number of eligible national voters. Each Member State of the EU in fact already deals with two different electorates on the national and municipal level, whereas the latter encompasses in addition to national residents, resident EU citizens. In order to implement Union citizenship some Member States therefore had to amend their constitutions. This effectively delegitimises any argument of constitutional obstacles against municipal political participation of non-nationals, as this "barrier" has already been freed and hurdled from EU citizens.[71]

The various aspects of daily life in a local community – such as housing, schooling, day-care for children, local amenities, public transport, cultural and sports facilities – are influenced by decisions taken by local authorities. Municipal authorities tend to have strong competences in areas such as public housing, health services and education that affect immigrants in a very direct way as they often belong to low-income groups. Participation in local elections would directly provide political representation in decisions that affect some of their most immediate interests.[72] The inclusion of the entire resident population in local politics is not only crucial in terms of full integration but also for the mediation of conflicts through procedural channels of political discourse which could have an important impact on the political stability of the whole region or country.

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[70] Confer: Explanatory Report of the European Convention on the Participation of Foreigners in Public Life at Local Level which was adopted in Strasbourg on 5 November 1992.

[71] The Amendment of the Belgium constitution in 1999 not only allows resident EU-nationals to vote in municipal elections but further opened the possibility to grant active and passive voting rights in municipal elections to resident third country nationals. In Germany the Constitutional Court has held (BVerfGE 83, 60 and BVerfGE 83, 37, both dated 31 Oct.1990), that the principle of democracy does not allow the legislator to grant any voting rights to non-nationals, as they are not part of the nation's people or "Staatsvolk". However, the exception made for the participation of resident EU-citizens in municipal elections demonstrates, that the principle is no longer applied to all non-nationals. Confer: Groenendijk, Guild, Barzilay, op. cite. note 20, pp. 21, 46.

[72] Confer: Explanatory Report of the European Convention on the Participation of Foreigners in Public Life at Local Level, which was adopted in Strasbourg on 5 November 1992.

Local citizenship at the municipal level has become more and more important in view of the "widening sense of powerlessness" people experience in the face of economic and cultural globalisation. The municipality can be seen as the smallest level of political community and as such especially important in linking the population to their immediate area of life and to actually increasing political engagement and interest at large.

The main objections against the extension of political rights to resident non-nationals in regard to municipal elections stem on the one hand from the claim of state-sovereignty and on the other hand from the fear of "Überfremdung"[73]. One has to bear in mind that the highly sensitive issue of alien suffrage lies at the nerve of national identity and self-determination and therefore might cause fear or worry in the mind of the national population. One imagines a muezzin calling from a minaret replacing the traditional tintinnabulation of the church-bells.

It is essential to take these fears seriously and to ameliorate them through awareness raising and information programmes that draw attention to the rights that each member of the community enjoys including minority rights limiting "outside-interference" in the cultural life of the particular group. Although it is feasible that in some extreme cases it could occur that the actual local population finds itself in a minority situation in comparison with the resident non-national population, this extreme situation cannot be taken as a general justification for the principal exclusion of resident aliens from municipal politics. Rather than the refusal of access to political procedures, potential conflicts between local majorities and minorities should be mediated by ensuring constitutional guarantees, granting, in addition to other human rights, the right to freedom of culture and religion. The same is true concerning another aspect related to "Überfremdung" originating from fears of outside undemocratic and fundamentalist influences. Extremist tendencies detrimental to the political discourse are generally not linked to nationality and can therefore stem from national citizens as well as foreigners. The constitution, by setting out the principles of human rights and democracy, plays a decisive role in this regard, as it provides mechanisms and guarantees that prevent extremist political tendencies from destroying the democratic framework.

Notwithstanding the difficulties experienced, for example in some French and German communities with high concentrations of Turks or Arabs, I disagree that political exclusion forms an appropriate remedy to tackle fears of "outside-influence". Rather, I think it is

[73] The catchword "Überfremdung" has been broadly used in political debate in Austria and Germany to point out the threat of uncontrolled immigration to the national identity and culture. In English "Überfremdung" is commonly translated as "foreign infiltration". The term "Überfremdung" furthermore has a special meaning as it was commonly used in the language of the Nazi-regime.

important to make people aware of their rights and to refute the "Überfremdungs-myth" by pointing out the importance of political participation for the whole resident population and by arguing that it constitutes a human right to participate in local politics that affect issues of daily life and the immediate interests of the whole resident population living together in the same community.

Part II:
Concepts of Granting Political Rights to Non-Nationals

In this second part I want to discuss different political systems to point out the different treatment of aliens according to their country of origin. I chose to elaborate on the framework of European Union, the British Commonwealth and the Community of Portuguese Speaking Countries because they all share a concept of supranational citizenship that confers certain political rights to a select circle of members, defined through nationality of a member state. All three systems treat aliens differently depending which formal nationality they obtain. I want to examine on what grounds those special rights are conferred to members and the reasons put forward to exclude others from obtaining them.

Of the three organisations, the EU is without doubt the most important and elaborated. Due to the somewhat limited scope of the present work, I have decided to focus on EU policies and compare them with the underlying concepts of the British Commonwealth and CPLP.

2.1 European Union Citizenship

European Union citizenship was formalized by the Treaty of Maastricht coming into force in November 1993. This transnational form of citizenship conferred a variety of political rights including the right of free movement and residence within the Union[74], of political participation in municipal and European Parliament elections[75], the right of diplomatic protection outside the Union provided by any other member state[76] and finally the right to petition the Parliament or to appeal to its Ombudsperson[77].

[74] Article 18, ex Article 8a TEU.
[75] Article 19, ex Article 8b TEU.
[76] Article 20, ex Article 8c TEU.
[77] Article 21, ex Article 8d TEU. Note that this right is equally granted to third country nationals who are legally resident in one of the Member States. Confer Articles 194, 195 ECT.

The expression in itself, Union citizenship, might cause the misconception that the European Union determines who qualifies as a Union citizen. However, it is each Member State in fact, that unilaterally decides who is or is not a national and therefore also determines who becomes a Union citizen. Article 17 of the Treaty of Maastricht requires the legal nationality of one of the Member States as a precondition for European Union citizenship and refrains from making a progressive step towards a denationalised understanding of citizenship. Member States insisted on the derivative character of Union citizenship, as they wanted to maintain the exclusive competence in defining who qualifies as a member and who is supposed to stay outside the circle of members.[78] EU-citizenship consequently does not create an independent status of membership, but rather attaches to citizens with the nationality of the Member States.

Nevertheless, the concept of Union citizenship constitutes an important progress concerning the denationalised understanding of citizenship. It recognises the transnational existence of a polity which further means that the concept of citizenship is understood as existing independently from the level of nation-state. Article 17 paragraph 2 EC Treaty explicitly declares that European citizenship complements rather than replaces national citizenship. This is probably the clearest proof of a multi-dimensional understanding of citizenship, composed of two layers of belonging, that is encompassed in a legal supranational document.[79] Looking at the ongoing harmonisation process and at the increasing importance of EU, or rather, EC-regulative authority, there can be no doubt that a transnational political community has been evolving, in particular since the Treaty of Maastricht.

It can be said that the EU has evolved into a political community with the common aim of the creation of an internal market which further led, due to the general abolition of internal border controls, to the creation of common policies in regard to other interests such as traffic issues, environmental concerns, the struggle against organised crime as well as immigration and asylum policies. I think political communities can develop independently and in parallel to national states as they generally develop around common concerns whether on the subnational level concerning issues of immediate concern for the resident population such as schooling, housing or simply refuse collection or on the transnational level dealing with border-crossing issues.

[78] Confer: C. Closa, *The concept of citizenship in the Treaty on European Union,* in «Common Market Law Review», vol. 29, 1992, p. 1148.
[79] Confer: Kostakopoulou, op. cite., note 53, p. 338.

European integration is mainly characterised through an evolving transfer of state functions to the Union. As a consequence claims concerning the deficit of transparent democratic structures and EU-institution legitimacy arose as the shift of national competences and powers has not been accompanied by a redrawing of political boundaries. Whereas it can be said that on the one side there evolved a complex system of community organs and institutions there was no comparable European demos or polity from which legitimacy could derive in a more direct way than through national governments. European Citizenship was understood as a "medicine" in order to bring the territorial boundaries of the EU in line with its political borders. Positioning the figure of the citizen as central to the evolution of the integration process was meant to restore the normative preconception that "good" constitutions are not imposed from above, but emerge from a conjunction of top-down and bottom-up forces involving institutional design and citizen participation.[80]

This transfer of competences led to the fact that the state could no longer be seen as the sole reference point for individual rights, which contributed to the critical rethinking of nationality as the criteria for voting rights. It is increasingly propagated that instead of formal nationality residence over a specified number of years, payment of taxes and compliance with national legal obligations would guarantee, in foreign residents, a sufficient level of attachment and interest in the welfare of the state to be accorded the basic right to vote in municipal elections. A special link of allegiance to the state (through acquisition of nationality) is seen as unnecessary for participation in elections either at the municipal or the European level. Neither directly affect the state's legislative power and therefore do not conflict with any objections based on sovereignty issues. As Síofra O'Leary reflects "[t]he right to vote should be seen first and foremost as a democratic right and not as the expression of a link of allegiance to a state."[81]

2.1.1 European Identity – A Thin Roof based on/ upon fifteen Columns[82]

Through the legal establishment of the European citizenship set forth in Articles 17 to 22 EC Treaty, Europe should become "personalised". Belgian Foreign Minister Van Elslande stated that "Europe cannot be monopolised by economic and technological achievements and

[80] J. Shaw, *Constitutional Settlements and the Citizen after the Treaty of Amsterdam,* Jean Monnet Working Paper, 1998, p. 3.
[81] S. O'Leary, *The evolving concept of community citizenship: from the free movement of persons to union citizenship,* The Hague, Kluwer, 1996, p. 256.
[82] R. Bauböck, *Citizenship and National Identities in the European Union,* in «Jean Monnet Working Papers», no. 4, 1997, point 3. See: http://www.jeanmonnetprogram.org/papers/97/97-04--3.html (as of: 15.07.2002)

neglect, under penalty of losing essential support, the aspirations of its citizens"[83]. Before the introduction of European Citizenship through the Treaty of Maastricht, the EC was confronted with criticism that it only perceives people as workers or providers of services but not as citizens. Article 17 of the TEU defines the status of European citizens through referring to the attainment of national citizenship of any of the Member States.

Citizenship policy is given a central place in debates and proposals on the enhancement of legitimacy of the EU. In fact the legitimacy potential of the present definition of EU citizenship is rather limited and even of an exclusionary and divisive character in regard to third country nationals. According to Jo Shaw the EU should both capture popular support by acquiring social legitimacy and through incorporating a certain body of values and standards conventionally associated with liberal democracies subject to the rule of law.[84] Robert Miles states in this context that the construction of an European identity involves a pattern of exclusion of the "other".[85] For long-term residents stemming from third countries the aspiration to a deeper integration and acceptance in the host state has been countered by the decision of each Member State to give an enhanced common status to a privileged class of non-nationals. The evolution of European citizenship hence reinforces the physical and social exclusion of people without the "right" nationality. Although, I agree that any concept of membership has an inevitable flipside, namely the need of demarcation as a means of identification drawing the line between members and "others", I think a system only avoids being called discriminatory if the line between insiders and outsiders is drawn in an equal and consistent way. Etienne Balibar even argues that we are presently witnessing the development of what one may call a "European racism".[86]

The exclusionary concept of European Union citizenship with regard to third-country nationals is used to argue that the ethno-cultural basis of the concept of national citizenship, which is supposed to confer solidarity and loyalty to the members to hold the political community together, is indirectly transferred to the European level.[87] Weiler argues, by criticising the German Federal Constitutional Court, for a foundation of European Union

[83] Europe Documents, n° 775, pp. 3-5.
[84] J. Shaw, *European Citizenship: The IGC and Beyond,* European Integration online Papers, vol.1, no. 1, 1997, p. 1.
[85] R. Miles, D. Thränhardt (eds.), *Inclusion and Exclusion: Migration and the Uniting of Europe,* London, Pinter.
[86] E. Balibar, *Es Gibt Keinen Statat in Europa: Racism and Politics in Europe Today*, in «New Left Review», 1991, no. 186, pp. 5-19.
[87] Martinello, op. cite., note 53, pp. 153- 154.

citizenship in "shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences."[88]

In line with this criticism I want to outline an inconsistency I perceive in the concept of EU citizenship. The so-called "Unionsbürgerschaft" is by definition composed by citizens who do not share the same nationality. The substance of citizenship that Europeans share can therefore not be based on the ethnic understanding of national identity but in a commitment to the shared values of the Union as expressed in its constituent documents referring to the common constitutional tradition of all Member States. The main discrepancy I see is that EU citizenship in fact, depending on the status of formal nationality of one of the Member States, fails in fact to establish a harmonised and unified system of membership criteria to the polity of the European Union. Rainer Bauböck brings it to the point by posing the critical question "[h]ow can fifteen different procedures of admission lead to a single and common status of membership?"[89] His answer refers back to the present limitations of the content of Union Citizenship. Bauböck concludes by describing Union citizenship as a thin roof resting on the separate and differently-shaped columns of national citizenships.[90]

I think it is important to bear in mind that the process of European integration, of which the establishment of Union citizenship forms a crucial part, is in fact not about creating a European nation or people, but about creating an ever closer Union among the peoples of Europe.[91] Europe's strength and fascination, in fact, lies in its ethnic, linguistic and cultural diversity which is, nevertheless, bound by a shared consent of values that developed through the course of history.[92] I would roughly delineate those values as referring to the notions of individualism, gender equality and the welfare state as well as the triad of democracy, the rule of law and human rights. European citizenship is, therefore, not aimed towards creating a homogenous population with a unified and "europeanised" culture, but either designed to confer a certain feeling of belonging and to promote identification with the supranational political system of the EU. It was furthermore intended to encourage a kind of stakeholder sentiment among Union citizens and consequently promote active engagement in the political

[88] J.H.H. Weiler, *The Selling of Europe: The Discouse of European Citizensip in the IGC 1996,* in «Jean Monnet Working Paper», no. 3, 1996.
See: http://www.jeanmonnetprogram.org/papers/96/9603-Demos.html (as of: 15.07.2002)
[89] Bauböck, op. cite., note 82, chapter 3.
[90] Ibidem, chapter 3.
[91] J.H.H. Weiler, European C*itizenship and Human Rights,* in J. Winter, D. Curtin, A. Kellermann, B. de Witte (eds.), *Reforming the Treaty on European Union – The Legal Debate -,* The Hague, Kluwer, 1995, p. 64. Confer further: D. Schnapper, *L'Europe des immigrés,* Paris, Editions Françoise Bourin, 1992, p.51.

process and increase the unsatisfactory participation in elections of the European Parliament. This understanding of Union citizenship would not be one determined by cultural or ethnic elements but based on a civic, rational construct, offering a sense of 'belonging' or being 'at home'.[93]

2.1.2 Political Integration through the Realisation of a Single Common Market

One of the leading reasons for the introduction of the right of resident EU citizens to vote in municipal elections was that no EU citizen should feel disadvantaged concerning political participation by of working in an EU-country different from his or her country of origin. It can be observed that the debate about electoral rights grew, in a way, out of the development of free movement rights under the Treaty and through the case law of the Court of Justice. Political demands for such "free movers" to be considered as "community citizens" date back to the 1970s.[94] The Commission as well as the European Parliament therefore emphasised the importance of the right to vote and contest in municipal elections for the achievement of the internal market. European citizenship, including the right of EU citizens resident in any Member State to participate in municipal elections, should solve the loss of access to democratic practice by exercising the right to free movement. Successful politics of economic integration on the one hand, and political exclusion on the other formed a gap that was supposed to be filled through the concept of European Citizenship including extended and "denationalised" political rights.[95] Interestingly as early as the 1970s the Commission had considered the question whether "[i]n a democratic society, does the fact that people are disenfranchised, even at local level, marginalize them still further when the aim should be to integrate them?"[96]

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[92] D..M. Smith, M. Blanc, *Some Comparative Aspects of Ethnicity and Citizenship in the European Union,* in M. Martiniello (ed.), *Migration, Citizenship and Ethno-National Identities in the European Union,* Aldershot, Ashgate, 1995, p. 70.
[93] J. Shaw, *European Citizenship: The IGC and Beyond,* European Integration online Papers, vol.1, no. 1, 1997, p. 6.
[94] Shaw, op. cite., note 27, p. 14.
[95] Confer: A. Wiener, *Assessing the Constructive Potential of Union Citizenship – A Socio-Historical Perspective,* in «European Integration online Papers», vol. 1, n° 17, 1997, p. 9.
[96] Bulletin of the EC, Supplement 7, 1986, p. 7.

I want to pose exactly the same question in regard to resident third country nationals who, according to the Tampere conclusions[97], are supposed to be integrated and enjoying equal rights as granted to Union citizens.

What are the reasons for the exclusion of third country nationals from the outlined process of political integration? The impact of economic integration on the right to political participation was only taken into account concerning the national population of the Member States, thus ignoring around 13 million resident third country nationals.[98] Why has this democratic deficit, which had developed alongside the growth of the single market, stemming from this unequal process of economic and political integration only been identified in regard to the exclusion of EU-nationals? The limited impact in improving this democratic lacuna at the level of the European Union, as well as on the municipality level, becomes evident by considering the fact that there are larger populations of third country nationals in each of the Member States than there are of second country nationals.[99] Antje Wiener precisely points out that the democratic deficit in the EU is a twofold one: "It compromises both a procedural aspect, that is, the problem of establishing appropriate channels for democratic participation within the Euro-polity, and a normative aspect, that is, a problem of equality among an increasingly visible and growing diversity of residents."[100]

It is interesting in this context to follow the process of how migrants progressively gained rights through their productive economic status concerning social security and taxes, which were normally granted only to formal EU citizens. Through active economic participation, their status became economically similar in many aspects to the preferable status of EU citizens residing in any other Member State. The European Court of Justice contributed greatly to this development through its progressive case law in which it laid down the principle that migrants are entitled to all advantages which, whether linked to a contract of employment or not, are generally granted to national workers primarily because of their objective economic status as workers or by virtue of the mere fact of their residence on the national territory.[101] This development of partial legal integration is due to the fact that labour mobility could only be viable if workers did not suffer any monetary disadvantages by crossing borders to pursue employment and then returning to their original receiving country

[97] Conclusions of the special European Council meeting in Tampere Finland, 19/ 20 October 1999, points 18, 20. According to point 18 "[t]he European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens."

[98] *Eurostat yearbook 2002. The statistical guide to Europe*, Office for Official Publications of the European Communities Luxembourg, 2002, pp. 82-84.

[99] Shaw, op. cite., note 27, p. 8.

[100] Confer: Wiener, op. cite., note 95, p. 13.

to retire.[102] The development of increased migrants rights was therefore especially promoted for the practical economic reasons of resolving the problem of worker shortages through increased mobility and the removal of legal obstacles. The evolution of political rights of these "denizens", however, lags behind the recognition of economic and social rights of resident immigrants stemming from third-countries.[103]

I think one of the factors facilitating and sustaining such exclusionary policies concerning political integration is that resident immigrants are often unaware of being disadvantaged in the same way as they would be through the exclusion from particular social welfare benefits. Although there are many initiatives in EU-Member States that advocate and campaign for voting rights of resident immigrants, the pressure has not been as convincing as in other cases where it reached a level creating an obstacle to labour mobility. Another reason, of course, is that the national population considers voting rights as something of a "sacred cow" forming a core issue of national sovereignty, even, with regard to municipal elections. Due to the lack of awareness in the national population of the receiving states and the immigrants themselves, who often remain passive concerning national political issues, the right to political participation on the municipal level often remains a postponed claim, like a political hot potato that is passed from one legislature period to another[104].

The present concept of Union citizenship based on the exclusionary notion of integration applying only to nationals of Member States seems especially ironic concerning the number of attempts and initiatives launched by the EU to combat racism and discrimination.[105] This "closure"-effect[106] of citizenship on people from outside seems to undermine those positive actions against exclusionary and discriminatory national legislation. In fact, presently no recognised general principle of non-discrimination on grounds of third-country nationality exists under Community law, although the Tampere Conclusions made important commitments in this direction.

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[101] ECJ case: Ministère public v Even C-207/78.
[102] L. Contant, *Contested Boundaries – Citizens, States, and Supranational Belonging in the European Union,* European Forum Series, RSC No.2001/27, Florence, European University Institute, 2001, p. 7.
[103] Confer: Proposal for a Council Regulation of the European Commission extending the provisions of Regulation No 1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality, 2002/0039 (CNS), dated 6 Feb. 2002.
[104] Confer: Coalition Agreement of the German Social Democratic Party SPD and the Greens, Chapter IX(7).
[105] Confer: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJEC L 180/22 of 19 July 2000. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJEC L 303/16 of 2 December 2000. Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination, OJEC L 303/23 of 2 December 2000.
[106] Expression taken from D. Kostakopoulou, *Is there an alternative for Schengenland?,* in Political Studies, no.46(4), 1998, p. 886.

Wiener argues for a more positive and optimistic approach to EU citizenship asserting that, the concept of citizenship, including "access" and "belonging" as well as rights, has never been static or uniform.[107] Markets and migration in her view promote the conceptual and practical precondition for triggering legal, political and social entitlements. Instead of looking at the legal aspects of European citizenship and identifying restrictions and limitations, Article 17 TEU encompasses a constructive potential of Union citizenship. The importance of the concept of EU citizenship hence lies not in its specific content but rather in the possibility of a further development of the extension of traditional citizen rights to non-citizens stemming from outside EU-boundaries.

I share this approach of an ongoing development of the concept of citizenship. Hence I perceive the present version of Article 17 of the Treaty of Maastricht as a preliminary and intermediate step towards a truly denationalised conception of citizenship. At the same time, I want to emphasise the importance of campaigns and public debates aimed at this inclusive concept in order to maintain the progressive development of citizen rights decoupled from nationality. Awareness raising actions and distribution of information concerning the importance of political integration of third country nationals should be targeted both towards the population already in favour of EU-citizenship, as well as towards those who are still kept outside. Human rights education and awareness-raising play a crucial and decisive role concerning the empowering aspect inherent in all human rights debates.

Although there exist a great number of organisations and associations representing migrant interests, their impact on EU policies is limited as they often tend to only represent single ethnic groups, and furthermore, because they lack a Europe-wide perspective and approach as they remain overwhelmingly nationalised. Yet the European Union Migrants' Forum, established in 1991 as an umbrella group for migrant organisations in each Member State, provides a forum for the expression of migrants' opinions. It was founded by and funded through the Commission, which leaves open the question of who in fact influences whom. The EUMF further faces problems in co-ordinating groups that operate in diverse national settings. National differences on immigrant integration paradigms are therefore reflected in tensions within the EUMF.[108] However, in representing 65 non-EU nationalities

[107] Wiener, op. cite., note 95, pp. 1-27. Confer also: D. O'Keeffe, *Union citizenship,* in D. O'Keeffe, P.M. Twomey (eds.), *Legal issues of the Maastricht Treaty,* London, Wiley Chancery Law, 1994, p. 106. "The importance of the TEU citizenship provisions lies not in their content but rather in the promise they hold out for the future. The concept is a dynamic one, capable of being added to or strengthened, but not diminished."

[108] A. Geddes, *Immigration and European integration. Towards fortress Europe?*, Manchester, Manchester University Press, 2000, p.145.

the Migrants' Forum provides a sound platform encompassing migrants irrespective of their ethnic background and it includes a network operating on the European level which co-ordinates different national lobbying strategies. One of the main policy demands of the forum includes the extension of European Citizenship to resident third-country nationals and advocates for a comprehensive approach to the fight against racism at the European level, seeing it as an essential component of any process designed to facilitate the integration and full participation of migrant communities.

"If Europe is to face up to the dangers that current nationalist and xenophobic movements present, it needs to come up with solutions which inspire solidarity and understanding at all levels, which ensure that fundamental rights are available to all. Political participation and citizenship are the key to progress in this context. With political and civic participation comes empowerment; perhaps we can begin to move towards a Europe of equality."[109]

2.1.3 Different Treatment of Third Country Nationals

Concerning the status of third-country nationals there exists no coherent set of rights in European Community law. Instead there are presently about twenty-four international agreements granting special rights to non-EU citizens[110]. Looking at the entire legal framework of the EU it can be observed that actually only two areas of Community law can be considered as excluding third country nationals: the free movement of persons and EU-citizenship.[111] Every other area of community law appears to apply without distinction on the basis of nationality.[112]

The Council Directive 96/30/EC[113] lies down detailed arrangements enabling citizens of the Union, residing in a Member State of which they are not nationals, to exercise the right to vote and to contest in municipal elections. The Directive aims to abolish the nationality requirement concerning local elections, but only in regard to EU-citizens. The principle of

[109] European Union Migrants' Forum, Paper presented within the framework of the European Conference *"all different – all equal: from principle to practice",* October 2000, in preparation for the World Conference Against Racism, p. 4.
[110] The most substantive agreements are those of the European Economic Area, the Maghreb Cooperation Agreements, the Euro-Mediterranean Agreements, the Europe Agreements with the Eastern European States and finally Partnership and Cooperation Agreements with six former Soviet republics.
[111] Groenendijk, Guild, Barzilay, op. cite. note 20, p. 7.
[112] Ibidem, p. 7.
[113] The Council Directive 96/30/EC of 13 May (concerning the exercise of the right to vote and to stand as a candidate in municipal election of citizens of the Union residing in a Member State of which they are not nationals)amended the previous Council Directive 94/80/EC of 19 December 1994.

equality and non-discrimination only applies in relation to domestic and Community voters and candidates. Concerning other foreigners the requirement of nationality criteria still excludes them from any formal political participation.

Non-discrimination on grounds of nationality laid down in Article 12 ECT is one of the central principles of EU law. Its scope, however, does not reach beyond its own citizens. Third-country nationals only indirectly enjoy the position of equal treatment in regard to EU citizens. By indirectly I mean that they have certain rights if they are qualified as service providers or employees of Union companies. In addition family members of third-country nationals that are legally resident in a Member State, enjoy certain rights only because of their relationship to Union migrants.[114] The Council Resolution of March 1996 sets out the minimum standards concerning the treatment of long-resident third-country nationals and can be seen as a starting point to approximate their legal status to the one of formal EU citizens.[115]

So far in the development of Community law, rights acquired by individuals have been based on the concept of reciprocity.[116] This is true concerning rights conferred by the status of formal EU citizenship as well as through special Third Country Agreements, specifically with Turkey[117], the Maghreb Countries[118] and the Central Eastern European countries. They therefore devolve on individuals because of their nationality. The European Commission and Council as well as the European Parliament have repeatedly expressed their concern for the importance of a vigorous integration policy for long-term third country nationals and to approximate the legal status of third country nationals to that of Member States' nationals.[119] Long-term third country nationals are by definition somehow not characterised by the

[114] For further information confer: J. Handoll, *The status of third-country nationals residing on a long-term basis,* paper presented to the First European Congress for Specialist Lawyers in the Area of Immigration and Asylum in Europe, December 2000, p. 9.
[115] Council Resolution on the status of third-country nationals residing on a long-term basis in the territory of the Member States, 4 March 1996, 96/C 80/02.
[116] E. Guild, *Immigration Law in the European Community,* in E. Guild, J Niessen (eds.) «Immigration and Asylum Law and Policy in Europe», vol. 2, The Hague, Kluwer, 2001, p. 327.
[117] The EEC-Turkey Association Agreement 1963 and its 1970 Protocol provides the most complete system of protection of third country nationals already resident in the Member States of the Union, protecting security of residence of workers and their family members and guaranteeing non-discrimination in working conditions and social security.
[118] Algeria, Marocco and Tunisia.
[119] Confer e.g.: Communication of the Commission on immigration and asylum policies COM(1994) 23 final. Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, OJ.199 C19/1. Scoreboard of the Commission, first issued in April 2000 COM (2000) 167 final, since then updated during each Presidency. Communication of the Commission on a Community integration policy, COM (2000) 757 final. Joint resolution of the European Parliament on migrant workers from third countries of 14 June 1990. EP Resolution on the situation as regards

attainment of any particular nationality but instead share the defining criteria of legal long-term residence within the European Union. The fundamental question now arises whether the criterion of reciprocity is necessary for the Community's legal framework concerning the treatment of individuals within the Community immigration sphere.

I think any human right conferred only on the basis of reciprocity, amounts to a form of discrimination.[120] The general characteristic of human rights lies in their universal scope and are to be granted to every individual irrespective of any formal conditions. I further think that reciprocity does not correspond with to the teleology of human rights treaties.[121] Their purpose is not to protect only the nationals of the contracting state but all human individuals.[122] Not nationality but human dignity is in the criteria that counts in this regard. Although human rights might only in rare cases be conferred in an entirely absolute way, the concept of reciprocity fails to establish any justifiable reason for a relative application. I have argued in the first part that the right to take part in municipal elections should be perceived as a human right to political participation. The national sovereignty argument fails to establish any valid justification for the exclusion of resident non-nationals that share the same circumstances as the national population inhabiting a particular municipality. Political rights on the municipal level should therefore be conferred to the whole resident population irrespective of nationality.

The process of the exclusion and differentiation of third country nationals can be also observed by the mounting evidence of growing racism and hostility to migrants, and through the success of right-wing political parties, using the fear of "Überfremdung[123]" through immigration as a measure to gain electoral support.[124] The proclaimed aim of the EU of getting closer to its citizens through the establishment of European Union Citizenship, demonstrates the narrow understanding of this concept. The idea of a static nation-state orientated citizenship again equates formal membership in the national polity as a requirement or condition for the status of citizen. Following this current concept of Union citizenship EU-institutions do not come closer but actually distance themselves from legally established third

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fundamental rights in the European Union, A5-0223/2001, section V. European citizenship. Conclusions of the special European Council meeting in Tampere Finland, 19/ 20 October 1999, points 18, 20.

[120] Confer para. 36 of the Explanatory Report to the Convention on the participation of foreigners in public life at local level of the CoE. Although it was originally envisaged that parties to the convention should grant political rights only on a basis of reciprocity it was finally concluded that all rights conferred by the convention should apply to all foreign residents without distinction on nationality.

[121] M. Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law,* in «European Journal of International Law», vol. 11, 2000, pp. 489-519.

[122] Confer: General comment 15 of the Human Rights Committee, para. 1 and 7.

[123] See footnote 73.

country nationals who are contributing to the economic health and wealth of the Union.[125] This sizable category of substantial citizens is, a priori, excluded from the benefits of that membership.

The objective of the new power of the Community, conferred through Title IV of the Treaty of Amsterdam, is the creation of an area of freedom, security and justice. It is apparent, and reinforced by the conclusions of the European Council Meeting in Tampere, that the freedom in this context is wider than freedom of movement alone. According to Elspeth Guild that freedom must include the guarantee of rights which can be enjoyed by third country nationals and Community nationals alike in this field.[126]

2.1.4 Alternative Approach to the present Concept of Union Citizenship

Union Citizenship was established with the aim of bringing the Union closer to its citizens. In fact it excluded around 13 million resident third country nationals by according them a form of second-class status compared to the primacy obtained by second country nationals. As Steve Peers states "[o]ne cannot hope to build an 'ever closer union among the peoples of Europe' while excluding over ten million of them."[127] This discriminatory situation undermines the Union's expressed commitment to the elimination of racial discrimination, racism and xenophobia, and the integration of settled migrants.[128] It is therefore extremely important to argue for a genuine anti-discrimination and integration policy while at the same time emphasising that discrimination against third-country migrants is inextricably linked to racism and xenophobia.

The best way to integrate and protect long-term third country residents from discrimination-measures would be to grant them access to Union citizenship, independent from nationality criteria.[129] As presently Member States' nationality laws are still far from harmonisation there exists no uniform standard for joining the circle of Union citizens.[130] Bruno Nascimbene refers to the concept of abode which he sees as "the most appropriate

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[124] Confer: Martinello, op. cite., note 53, p. 44.
[125] G. de Búrca, *The Quest for Legitimacy in the European Union,* in «Modern Law Review» vol. 59, 1996, pp. 356-361.
[126] Guild, op. cite., note 116, p. 334.
[127] S. Peers, *Towards equality: Actual and potential rights of third-country nationals in the European Union,* in Common Market Law Review», vol. 33, 1996, p. 50.
[128] See footnote 105.
[129] Confer: European Union Migrants' Forum, *Proposal for the Revision of the Treaty on European Union at the Intergovernmental Conference of 1996.*.
[130] U. Bernitz, H. Lokrantz Bernitz, *Human rights and European identity: the debate about European citizenship,* in P. Alston (ed.), *The EU and human rights,* Oxford, Oxford University Press, 1999, p. 524.

standard to establish the link or tie between an individual and a civil or social community."[131] The notion of abode, conditional on permanent legal residence or residence over a certain period of time, is based on objective criteria contrary to the subjective national concept of citizenship.[132] Adobe based criteria are, therefore, in line with the principle of non-discrimination, which is enshrined in both the EU and EC Treaties. Concerning the right of free movement and social protection, the EU should endeavour in the same way to grant the rights linked to European Citizenship to the entire long-term resident population without regard to nationality. This amendment to the present version of Article 17 TEU bypassing the nationality requirement would open a second avenue for the acquisition of Union citizenship. The proposal for a Directive of the European Commission concerning the status of third country nationals who are long-term residents defines their status in Chapter II Article 5. This could form a basis for a uniform application of Union citizenship, provided that there exists a uniform policy, concerning the acquisition of legal residence. According to Article 5 of the draft Directive third country nationals who have resided legally and continuously for five years in the territory of the Member State concerned would then only have to register with the municipal electoral list in order to be able to exercise their right to vote in European as well as municipality elections.[133] In comparison with other states that already regulate alien suffrage in municipal elections, 5 years of legal residence seems rather high. Denmark and Sweden require 3 years of legal residence prior to election day; Finland sets out 2 years; and the Netherlands generally ask for 5 years of legal residence in order to take part in municipal elections. However, the benchmark set out by the Draft Directive could serve as a common minimum requirement that would be compatible with the standard set out in Article 6 of the Convention on the Participation of Foreigners in Public Life at Local Level (which also set five years of lawful and habitual residence as a precondition to qualify for the right to vote and to stand for election in local authority elections).

Unfortunately, not even the European Parliament, as the main advocate for the integration of resident non-EU citizens, proposes the extension of EU citizenship to this substantial part of the resident population within the Union. Only the Economic and Social Committee in its opinion on the Draft Directive concerning the status of third country nationals recognises the importance of the integration of voting rights and access to formal nationality and proposes

[131] B. Nascimbene, *Nationality Laws in the European Union,* London, Butterworths, 1996, p. 10.
[132] Bernitz, Lokrantz Bernitz, op. cite., note 130, p. 527.
[133] This same condition of subscribing to the respective electoral list also applies to any other EU citizen stemming from a Member State.

that these aspects should be dealt with separately due to the limited competence of European legislature. According to the Committee the right to vote in municipal and European elections could be dealt with by European legislation. This issue therefore must be addressed at the next Intergovernmental Conference in 2004.[134] The extension of Union citizenship to resident third country nationals faces limited support from state governments as it would change the present feature of Union citizenship from Article 17 (2), namely the additional character that leaves the status of national citizenship untouched.[135] The inclusion of long-term resident third country nationals would change this state of affairs by establishing a direct relationship between the Union and the individuals who stem from a third country.[136]

It is important at this point to mention the Resolution of the European Parliament on the situation of fundamental rights in the EU, where it recommends Member States to "take all possible measures to improve participation in political life by third country nationals legally resident in EU territory" and to ratify the European Convention on the Participation of Foreigners in Public Life at Local Level as well as the Convention on Nationality.[137] This recommendation could be seen as another approach to tackle the democratic deficit at the municipal level although it would not include electoral rights with regard to the European Parliament.

Several other proposals have been put forward to resolve this unsatisfactory situation.[138] One alternative proposal to the various entrance criteria (currently 15 different policies) would be to harmonise nationality legislation throughout the Union.

I consider both the harmonisation as well as the liberalisation concerning acquisition of formal citizenship as crucial in order to promote the political integration of resident foreigners that should go in line with the aforementioned culturally neutral principles.[139] The acquisition of formal national citizenship would guarantee the best defence against any form of discrimination and would lead to the full possession of electoral rights including those at

[134] Opinion of the Economic and Social Committee on the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, OJEC C 36/59 of 8 February 2002.
[135] A.C. Oliveira, *The Position of Resident Third-Country Nationals,* in M. La Torre (ed.), *European Citizenship: An Institutional Challenge,* The Hague, Kluwer, 1998, pp.196, 197.
[136] Ibidem, pp.196, 197.
[137] European Parliament resolution on the situation as regards fundamental rights in the European Union (2000/2231 (INI)), A5-0223/2001, section V, para. 117, 120.
[138] See: Bauböck, op. cite., note 82, chapter 3. Confer further: TSER EURCIT Project Final Report, *European Citizenship and the Social and Political Integration of the European Union,* R. Bellamy (project co-ordinator), 2001, p.70.
[139] Note the importance of the acceptance of multiple nationality in relation to the pertinence of resident foreigners to naturalise, which is very low in countries that pursue a restrictive policy in this regard. Austria, Denmark and Germany are the Member States with the most rigid policy concerning dual nationality.

the national level. Although in 1996 Bruno Nascimbene stated that a harmonisation of laws on citizenship would be, despite common traditions and institutions and despite the independence of the system, politically impossible,[140] I think that the introduction of title IV through the Amsterdam Treaty and the resulting harmonisation processes concerning immigration policies changed the situation considerably. In addition to the fact that the EC is increasingly gathering competences concerning criteria and preconditions for naturalisation such as legal residence, it is further important to consider the impact of harmonised immigration policies on the national regulation of naturalisation.[141] The increasing acceptance of the right to become a national citizen after a certain period of residence further points out the close interrelation between immigration and naturalisation policies. Also the report on the legal status of long-term resident third country nationals in the Member States of the EU concludes that there are "clear indications that the systems are beginning to approach one another in Europe".[142] I therefore pursue a more positive view concerning the process of harmonised criteria for the acquisition of Union citizenship.

Opponents of a wider concept propagate that EU citizenship needs to develop an interactive bond with EU citizens, otherwise citizens will regard EU citizenship as a vague, intangible concept meaning very little in reality.[143] This however would mean that the notion of identity and collectivity that EU citizenship should include, is actually based on exclusion of the so-called "others". This argument is hard to either empirically prove or refute as it deals with the psychological and irrational aspects of membership. I believe, however, that the way in which citizens perceive a political community depends less on the entrance criteria than on the rights that are actually conferred by their status. Therefore Union citizenship is in some danger of being perceived as an abstract and loose concept due to the limited scope of rights that it grants rather than as a more inclusive concept aimed to enhance the representativeness of political bodies.

The current version of Article 17 TEU represents a case of partial alien suffrage, albeit restricted to certain categories of beneficiaries and conferred only to municipal and European elections, that has contributed to a better understanding and recognition of the importance of

[140] Nascimbene, op. cite., note, 131, p. 11.
It is interesting to note at this point that the *European Convention on Nationality* of the CoE has only been ratified by 5 Member States, namely by Austria, Netherlands, Sweden, Portugal and recently by Germany.
[141] At this point I want to draw attention to the impact of immigration policy on the national policy concerning the acquisition of formal citizenship. Confer: Hammar, op cite., note 5, p. 216.
[142] Groenendijk, Guild, Barzilay, op. cite., note 20, p.110.
[143] Confer: Second report of the European Commission on Citizenship of the Union, p. 3. See: http://europa.eu.int/comm/internal_market/en/update/report/citen.pdf (as of 15.07.2002).

political integration through extending voting rights.[144] European citizenship however, can only be understood as a liberal concept as long as it is perceived as a temporary and intermediate step towards the democratic aim of finally enfranchising the entire resident population on the local level and not only those stemming from EU-member countries. I think that the present situation of a uniform concept of a transnational citizenship based on 15 different nationality laws can only be seen as a preliminary stage that must be addressed at the next IGC. I prefer the solution of a denationalised concept of Union citizenship as it would be a crucial political sign that the sizeable number of third country nationals, resident on a long-term basis, are fully accepted as "belonging" in Europe and are therefore entitled to full equality. Nevertheless, I am aware of the political obstacles which might impede any progress in that direction due to the adherence of the gatekeeper function of Member States through their nationality laws. Restrictive immigration policies that stimulate a climate of exclusion rather than inclusion through naturalisation might generally pose the biggest obstacle to an acceptable resolution of this "un-unified" Union citizenship.[145] It is therefore crucial to argue for the elimination of discrimination between foreigners, thus enhancing both the political integration and the quality of inclusive democracy within the territory of the EU.

2.1.5 Current EU-Policy on the Political Integration of Third Country Nationals

Looking at daily news broadcasts it can be easily observed that the issue of alien suffrage remains a highly political topic. It is an especially sensitive issue as it is very closely related to the debate on immigration policies. However, other issues such as national sovereignty, self-determination, cultural tradition and even national identity are related to the extension of suffrage to non-citizens. It even seems to touch a nerve of public opinion easy to agitate with apocalyptic prognoses and predictions. Extremist and populist language is used predominantly by social-nationalist parties concerning cultural and social issues based on a collective identity constructed though exclusion of the "other". A very positive step was taken in this context by the creation of a "Charter of European political parties for a non-racist society"

[144]Confer: S. Day, *Dealing with Alien Suffrage: Examples from the EU and Germany,* Paper presented to the Ionian Conference, May 2000, p. 2. "The fact that the 5.5 million EU citizens living in other EU Member States have been granted limited political rights is obviously a step forward but the fact that resident aliens and third-country nationals lack equivalent rights and, hence, remain excluded from both the national and, local and supranational arena, represents a major challenge to the normative-based idea of good-governance."
[145] See footnote 141.

which contains principles of responsible political campaigning and discourse.[146] Political Parties which generally support electoral rights for non-nationals, whether in the name of democracy, human rights or better integration of immigrants refrain from public debate concerning this issue as they fear losing popularity and, as a result, political capital. It can even be observed that some European socialist parties, in reaction to social-nationalist and populist mobilisation, have begun to accommodate certain elements of their erstwhile opponents.[147] Consideration of the present political scenario in EU Member States and the precipitous rise of far right wing populist parties reflects a current climate inimical to a more liberal construction of the boundaries of suffrage. Stephen Day states that the issue of alien suffrage, in whatever form, lacks political capital, measured in prospective votes, thus meaning that it is unlikely to be addressed at the national level as anything other than banal rhetoric.[148]

Currently there are no initiatives in sight at the EU level to adopt measures that would require Member States to confer electoral rights to residents originating from third countries. The Amsterdam Treaty introduced Title IV into Part Three of the EC Treaty which replaced the inter-governmental approach to migration policy by a "communitarised" approach which, however, requires unanimity decisions concerning most areas including the conditions of entry and residence of third country nationals. Member States finally recognised the need for harmonised immigration policies in order to manage migration flows within the common market in which internal border controls are mainly abolished. The extraordinary European Council in Tampere in October 1999 dwelt at length on the need to encourage a common approach to ensure the integration by means of "fair treatment" of lawfully resident third country nationals. The proposal for a Directive governing the status of long-term resident third country nationals amended by the European Commission in March 2001 is seen as a flagship measure of this evolving process.[149] The proposal sets out the conditions for delivery of long-term resident status and further determines the rights attached to this status. Although the draft Directive is based on the principle of equal treatment concerning, for example, access to employment and self-employment activities, social protection and assistance, its impact however, is limited as it excludes electoral rights from the scope of the rights which it

[146] *Charter of European political parties for a non-racist society* See: http://eumc.eu.int/projects/charter/ (as of: 15.07.2002)
The Charter encourages political parties to work towards fair representation of racial, ethnic, national and religious minorities within and at all levels of their party system.
[147] Day, op. cite., note 144, pp. 16-17.
[148] Day, op. cite., note 144, pp. 3-4.

proposes to ascribe to this group. Reasons for this separation of socio-economic and political equality are based on the argument that there exists no explicit competence within the Treaty to enact such rights. Norbert Reich criticises this narrow interpretation of Article 63(3) and (4) and argues that Article 63 could in fact form the legal basis for developing a "quasi-citizenship" for third country nationals by understanding the concept of "legal residence" in a broader sense.[150] It seems especially surprising in this context that the Report of the European Parliament's Committee on Citizens' Freedom and Rights, Justice and Home Affairs not only agrees with the limited scope of article 63 ECT but also suggests that Recital 3 should be amended to the effect that rights should only be "similar" to those of EU citizens, rather that "as near as possible".[151] As justification for the proposal of this less generous term, the Committee puts forward that harmonisation in the form of equal status would do away with any incentive to seek citizenship of the host Member State, a step according to the Committee which third-country nationals should be encouraged to take with a view to fostering integration.[152]

The logic of this argument seems flawed as transformation of the status of resident third country nationals to that of present EU citizens would only confer political rights at the municipal and European levels, a mere fraction of the political rights of national citizens. It is precisely this gap between political rights of nationals and aliens in which the incentive to naturalise is found.

The Committee's position on political rights of third-country citizens remains weak and rather disappointing in regard to the role of the European Parliament as general forerunner concerning the representation of interests of third country nationals.[153] The principle of fair and equal treatment of immigrants who wish to settle in the Union on a long-term basis is still only understood in social and economic terms, and the differentiation between foreigners

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[149] Shaw, op. cite., note 27, p. 27.

[150] N. Reich, *Union Citizenship – Metaphor or Source of Rights,* in «European Law Journal», vol. 4, 2001, pp. 18-19. Confer: Opinion of the Economic and Social Committee, in «Official Journal of the European Communities», 2002/ C 36/ 13, p. 60. According to the Committee the right to vote in municipal and European elections could be dealt with by European legislation and suggests/ urges that the next IGC on the reform of the Treaties should address this issue.

[151] Report on the proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, A5-0436/2001, pp. 5 ,32-33.

[152] Ibidem, p. 5.

[153] Confer: ibidem, amendment 34 and 35 on pp. 20-21. According to this amendments it is left to the voluntarism on the part of the Member States to grant long-term resident third country nationals the right to vote in municipal and European elections which leaves the reference to political rights as a mere symbolic statement, which is unlikely to be taken into serious consideration by national member governments. Confer: Shaw, op. cite., note 27, p. 29.

concerning political rights continues. According to T.H. Marshall,[154] citizenship is only fully realized through an interlocking triad of civil, political and social rights, further demonstrating the incomplete integration policy pursued on the political level of the EU. Although the EU has often emphasised the universality and indivisibility of human rights, especially in its external relations to third countries, it seems inconsistent not to follow this fundamental principle concerning the treatment of the population legally resident on the territory of the EU.

The "communitarisation" of immigration policies through the introduction of Title IV into the EC Treaty as well as the commitments expressed at the Tampere Council led to the development of an "open method of co-ordination for the Community Immigration Policy"[155]. Given the multi-dimensional nature of integration policies it is essential that Member States together with different European institutions can come together in order to work on appropriate integration policies. Considering that the success of such a policy depends on the effective coordination by all those concerned and on the adoption and implementation of new measures, as appropriate as at both Community and Member State levels it is crucial that also civil society organisations and third countries are included in this process. The Directorate General of Justice and Home Affairs provides a sound forum for states to discuss immigration issues shielded of national public opinion pressure. The elaboration on harmonisation process includes an exchange of different experiences and might accelerate the process of acceptance of an undifferentiated alien suffrage on the municipal level.

2.2 Commonwealth and CPLP

The British Commonwealth and the Community of Portuguese Speaking Countries[156] (further: CPLP) and the so-called Francophonie, are the three official multicontinental entities based on cultural ties. Of the three, only the first two deal with political rights concerning municipal or national elections.

Although the British Commonwealth that evolved out of United Kingdom's imperial past is very different in comparison to the young international organisation of the CPLP (founded in 1996), I think that both concepts can be dealt with together in this chapter as a counterpoint to

[154] See in general: T.H. Marshall, *Citizenship and Social Class,*/ London, Pluto Press, 1992.
[155] Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy, COM(2001)387 final, 11 July 2001.
[156] The seven founders and presently also all members are: Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Portugal and São Tomé and Príncipe.

the EU. Whereas the EU is based on the common interest of the Member States towards the realisation of the internal market, the countries forming the Commonwealth and the CPLP[157] are related to each other through history and language and therefore desire to sustain their common cultural ties. Another major difference between the aforementioned communities and the EU is determined by the geographical concentration of the European states as opposed to the widespread diffusion of Commonwealth and CPLP Member States.

In the following section I want to take a closer look what role political rights play in the context of the two communities based on solidarity and complicity, rather than on purely rational and economic calculations.[158] Although I do not want to go into deep concerning the structure and organisation of the communities, simply because of the limited scope of the present work, I want to start by giving a brief overview about the progressing development and the underlying reasons and objectives of both institutions.

2.2.1 Historical Development

The Commonwealth's structure is based largely on unwritten and traditional procedures instead of a formal charter or constitution. It is guided, however, by a series of agreements[159] on its principles and aims.

Contrary to the direct colonial derivation of the British Commonwealth, which might even have prolonged the process of decolonisation, the CPLP can be said to be "a product of the mature will of States"[160], most of whom have been independent for over 20 years. This distinct historical development is reflected in the organisational structure. The CPLP, established in July 1996 through the Constituent Declaration and Statutes of the Community of Portuguese Speaking Countries, meets the requirements of an International Organisation[161] and therefore obtains a legal personality in international law. The organisation was originally

[157] Mozambique even forms part of both communities.

[158] I certainly do not want to downplay the importance and influence of economic interests in both the Commonwealth and the CPLP, however the idea behind both communities is not solely based on economic reasons, like it is the case in the founding treaty of the EC, but includes aspects of a shared identity.

[159] The most important text adopted by the Member States are the Singapore Declaration of Commonwealth Principles from 1971 and the Harare Commonwealth Declaration issued in 1991. Both clearly set out the Commonwealth's commitment to democracy, the respect oh human rights and the rule of law and good governance as well as racial and gender equality and sustainable economic and social development.

[160] P. Canelas de Castro, *The Community of the Portuguese Speaking Countries (1),* in «Verfassung und Recht in Übersee, Law and Politics in Africa, Asia and Latin America», 31st year, 2nd quarter 1998, p.143.

founded to achieve a political and diplomatic concert between its Members in the dominions of international relations, and it is further intended to seek cooperation in economic, social, cultural, legal and scientific-technical dominions. Finally, as a third objective, the CPLP is dedicated to the promotion and diffusion of the Portuguese language.

2.2.2 Common Identity - Diffused Citizenship

Compared to the European Union's aims towards the realisation of the internal market, the British Commonwealth and the CPLP are founded on a special sense of "togetherness", resulting from shared histories and a common languages. The notion of common identity might therefore play an even more important role than that outlined in the previous chapter concerning the European Union. Considering the fact that citizenship, understood in a broader sense decoupled from the national context, forms a crucial part concerning self-consciousness it seems especially interesting how this is true concerning organisations linking former colonies with their colonisers. As a result of the different historic starting points the CPLP was established with the premise of the full equality of each members whereas the British Commonwealth still involves various features of British paternalism and hegemony.

Traditionally British identity and sense of belonging was founded on "subjecthood" rather than citizenship. Every British subject therefore individually owed allegiance to the monarch. The fact that allegiance was not linked with birth or residence in the United Kingdom proper made the notion of British citizenship an instrument for binding together the disparate territories and nations of the Commonwealth. Only in 1948 was this formal status finally defined by the British Nationality Act. In the early postwar period the UK applied a definition of nationality which included all inhabitants of what was then considered as the British Empire. As a result the majority of immigrants to the UK in the 1950s and 1960s were considered formal citizens enjoying the full set of rights encompassed therein. One has to keep in mind that a nation of 50.000.000 actually opened up its doors to 600.000.000 individuals primarily from economically less developed countries.[162] Pressure emanating from public opinion that increasingly opposed the entry of large numbers of non-white British

[161] An International Organisation is commonly defined as an association of States, created by a treaty, with its own permanent organs, that pursues common ends and affirms a diverse legal personality from that of the member States. The autonomous legal personality is furthermore expressly affirmed in article 2 of the Statutes.
[162] R. Hansen, *From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU, New York, Palgrave, 2001, p. 76.*

subjects, led to a gradual decrease of rights conferred to the population stemming from the new Commonwealth countries.[163] The Commonwealth Immigrants Act from 1962 basically broke the link between nationality and citizen rights. This intermediary stage, moving towards the abolition of the preferential status of people stemming from former colonies, can be seen as a very different, albeit hardly exemplary, notion of denationalised citizenship. The consequence of this change of legislation was that simple possession of formal nationality did not provide the full set of citizen rights. Millions of mostly non-white British subjects consequently continued to retain British nationality without enjoying its otherwise accompanying rights. "[T]hey were British citizens in passport but not in right."[164] Rights were not conferred by citizenship but were based rather, on further conditions such as the possession of a labour voucher, or birth within the UK. With this differentiated approach the UK singled itself out concerning policies of nationality and citizenship; the rest of Europe followed a very different approach in this regard. It led not only to a diffuse and highly complicated system of differentiation but also left many individuals in the "juridical dessert" of statelessness. The Immigration Act of 1971 can be seen as a further response to unpopular Commonwealth immigration as it placed Commonwealth citizens on the same legal footing as aliens concerning the right to enter a country and remain there.[165] This process restricted the rights of immigrants from the poor "new Commonwealth" countries. The British Nationality Act of 1981, initiated by Margaret Thatcher's conservative government, differentiated between three categories of citizenship each with different citizen rights: British citizenship, British overseas citizenship and British dependent territories citizenship.[166] The Act laid out naturalisation requirements that, for the most part, still apply today. Generally speaking the requirements for full British citizenship are based on five years residence, good character and

[163] Since the Second World War, British subjects have been distinguished by their country of origin: Canada, Australia, New Zealand and usually also South Africa count to the so-called „old Commonwealth" not to say cynically "white Commonwealth". The West indies, the Indian subcontinent and East Africa at the other side became considered as the "new Commonwealth". Usually the discussion on immigration only deals with people stemming from the latter category of Commonwealth Member States. Confer: R. Hansen, *From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU, New York, Palgrave, 2001, pp. 69, 70.*

[164] R. Hansen, *From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU, New York, Palgrave, 2001, pp.77.*

[165] R. Hansen, *From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU, New York, Palgrave, 2001, pp.77, 78.*

[166] The people from Hong Kong, Bermuda, the British Virgin Islands and Gibraltar succeeded in acquiring a privileged status whereas the population of the remaining British dependent territories were categorized by the status of British overseas citizenship (BOC). The difference mainly lies in the fact that the former category of citizens had a right to register after 5 years of residence in the UK while the others only could apply but were granted citizenship only on a discretionary basis.

sufficient language knowledge in English, Scottish or Gaelic. One could say that although Commonwealth citizens lost their privileged status concerning entry into the UK, once they managed to become a legal residents their status becomes somehow privileged again in terms of electoral rights in local and national elections.

It can be said that the concept of CPLP-citizenship is evolving or at least under serious consideration. The concept of a special form of citizenship is aspired to facilitate the participation in the polis. The recognition of a special set of rights to nationals of CPLP Member States, resident in the any other Member States of the organisation, is supposed to form the formation for the implementation of a common notion of citizenship.[167] Electoral rights besides residence and economic rights play a crucial role in this regard. Cape Verde had made a courageous step towards this project of political integration by defining the status of the Portuguese speaking citizen in Article 1 of its constitution. This unilaterally defined status exists independently of any reciprocity criteria, which seems especially surprising considering the commonly highly guarded issue of sovereignty. The status of a so-called "Portuguese speaking citizen" is conferred to a "national of any of the other Member States of the Community of Portuguese Speaking Countries"[168]. Cape Verde introduced through this amendment of its Constitution a form of partial alien suffrage that applies only to a select group of foreigners. It is further interesting to note that according to Article 5 of the Constitution Portuguese speaking citizens who want to acquire formal nationality are not obliged to renounce their previous nationality. That further means that the respective country of origin determines the acceptance of the Capeverdian state concerning dual citizenship. According to Paulo Canelas de Castro the project of CPLP-citizenship is still in an embryonic stage, as it is either only introduced by a single national constitution or based on a bilateral and reciprocal level.[169] The process towards a true internationalisation of the process of CPLP-citizenship could be achieved through a treaty between all Member States generalising its concession to their diverse spaces of sovereignty or through defining a special CPLP status.[170]

I would like to draw attention to the relationship between Brazil and Portugal which has a long tradition and can be considered as the most elaborate one between CPLP Member States. This is especially true concerning political rights which are based not on a concept of

[167] Ibidem, op. cit. p. 274.
[168] Article 2 of the Constitution of Cape Verde.
[169] P. Canelas de Castro, *The Community of the Portuguese Speaking Countries (2),* in «Verfassung und Recht in Übersee, Law and Politics in Africa, Asia and Latin America», 31st year, 3rd quarter 1998, p. 275.
[170] Ibidem, pp. 275-276.

general citizenship but rather on the notion of reciprocity. The Convention of Brasilia of 1971 extends nearly the full set of citizen rights to all Portuguese and Brazilian nationals who are legally resident for more than 5 years in the respectively corresponding country.[171] Citizen rights are in this sense conferred decoupled from the condition of nationality but most importantly also stripped of the right to enter or stay in the respective host country.

In contest with the outlined approach of the British Commonwealth which conferred nationality without rights Portugal's relationship with Brazil conferred rights without nationality. However, in a way both approaches achieve the same outcome of conferring political rights to legally resident immigrants stemming from former colonies without conferring the rights to enter or stay in the respective host country. Therefore in both cases, political rights depend not on naturalisation, which is the case for any other alien, but on immigration regulation.

2.3 Cultural Ties and Economic Interests as Transmitter of Special Political Rights

The problem that can be observed by describing different concepts of transnational citizenship becomes apparent by looking at the different and overlapping bounds in which states find themselves. Dietrich Thränhardt and Robert Miles point out that there are worldwide parallel integration processes evolving and that these processes lead on the one hand to integration and inclusion and to exclusion and discrimination on the other.[172]

In the case of Portugal the EU overlaps with the CPLP. Brazil, on the other hand, is member of the CPLP and at the same time part of the MERCOSUR[173], which is in a process of accelerated integration. Mozambique is covered by three transnational organisations: the CPLP, the British Commonwealth and the SADC[174]. This enumeration could be continued,

[171] R.M. Moura Ramos, *Migratory Movements and Nationality Law in Portugal,* in R. Hansen, P. Weil (eds.), *Towards a European nationality: citizenship, immigration, and nationality law in the EU,* New York, Palgrave, 2001, p. 225.
[172] D. Thränhardt, R. Miles, *Introduction*, in R. Miles, *Migration and European integration: the dynamics of inclusion and exclusion*, London, Printer Publishers, 1995, p. 9.
[173] Mercado Común del Sur was established in 1991 between Argentina, Brazil, Paraguay, and Uruguay. The founding reason is based on economic reasons including the creation of a common market, a customs union and generally the decrease of trade barriers. In 1996 after the democratic crisis in Paraguay, it was decided to introduce a Democracy-clause which foresees a democratic governmental system as a conditio sine qua non for membership. Confer: D. Nohlen (ed.), *Lexikon Dritte Welt,* Reinbek b. Hamburg, Rowohlt, 2000, pp. 512-514.
[174] The Southern African Development Community , founded in 1992, is a regional organisation aimed towards economic and political co-operation. It is composed by Angola, Botswana, Lesotho, Malawi, Mauritius,

however, these few examples give an idea of the complexity and diversity of the links that connect states all across the world. This process of increased interconnection resulting from economic, political or cultural reasons can be seen as a consequence of increased mobility of persons and goods and enhanced communication technologies and media; a consequence of a "globalising" village.

The different concepts of citizenship limited through the membership criteria of the respective nationality leads to political systems of discrimination of a certain category of foreigners that stem from non-affiliated states. This is not only true concerning political rights but also includes other human rights such as family reunification or the right not to be extradited to another state.

Both the UK as well as Portugal had based their nationality laws on the principle of jus soli and therefore adopted a very liberal point of view concerning the acquisition of political rights through citizenship. Granting citizenship to those born abroad was perceived as an instrument to maintain and encourage an expatriate's ties with the mother country.[175]

In the UK negative public opinion concerning non-white Commonwealth immigration led to immigration restrictions, mainly introduced through naturalisation legislation, and to the partial abolition of the preferential status of Commonwealth citizens. Restrictions to enter the UK which consequently applied in the same way to Commonwealth citizens as well as to any other aliens. However, there was no public pressure to further delimit their preferential status concerning political rights. This leads us to the present situation in the UK in which only aliens from former colonies are allowed to participate in national and local elections, after they have registered on the electoral roll. All other third country nationals are excluded form both active and passive voting rights until they acquire formal British citizenship. The notion of a citizenship referring to a common link and a special feeling of "togetherness" shared between all Commonwealth citizens, in this sense somehow is revived again concerning political rights.

Looking at the case of Portugal I want to draw attention to the fact that Portugal, as a Member State of the EU, has maintained its power of determination of national citizenship, and with

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Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC follows a pattern of increased integration that could lead to a parallel development compared to EU including an internal market and a common Parliament. Confer: D. Nohlen (ed.), *Lexikon Dritte Welt,* Reinbek b. Hamburg, Rowohlt, 2000, p. 655.

[175] Moura Ramos, op. cite., note 171, p. 214.

this of the Community citizenship, and is therefore able to favour nationals from Portuguese Speaking countries in the acquisition of citizenship. Although I acknowledge the special link of Portugal to the other members of the CPLP, I state that this is not in alignment with the idea of a uniform status of Union Citizenship. Portugal is, of course, only one example besides the German "Aussiedler"[176] or the citizens stemming from British Commonwealth states. These special historical and cultural ties of European countries to former colonies or territories that used to form part of the ancient nation, give another convincing reason for the importance of the creation of an independent Union citizenship status, as a harmonisation of nationality legislation of all Union Member States could only be reached through the extension of these preferential statii to all other aliens.

What reason or justification might defeat the argument of this differentiation between foreigners, which leads above all to a different status concerning political rights? I would like to refer at this point to the arguments I have brought forward in the chapter 1.3 concerning the tension between demos and ethos, which are based on the importance of a ethnically and culturally unbiased way of drawing the boundaries of suffrage. In my opinion historical, cultural or even ethnic reasons are not valid considering the general principle of non-discrimination. I will further outline this argument in the next chapter referring to international human rights documents.

Part III:
The Right to Non-Discrimination Regarding Political Rights

3.1 Two different approaches to argue for political rights of aliens

3.1.1 The Right to Democracy

The right to political participation of non-nationals can be approached from two different angles. The first starting point in arguing for the extension of electoral rights to resident foreigners is based on the principle of democracy, which is commonly perceived as an

[176] „Aussiedler" are people of German extraction who have moved back to Germany from East and South-East Europe, where their families have sometimes been living for generations. Aussiedler generally enjoy a preferential status concerning naturalisation and immigration requirements.

indispensable condition for the protection and promotion of human rights. However the universal right to political participation, expressed as the right to "take part in the government of his [or her] county, directly or through freely chosen representatives"[177] is limited through the authority of the sovereign state. According to international law[178] states are sovereign in determining who is considered to be a national citizen and with this commonly entitled to electoral rights. The political right concerning the participation in elections whether at the national, local or municipal level is laid down in Article 21 UDHR, Article 25 CCPR, Article 5 lit. c) CERD[179], Article 7,8 CEDAW (Convention on the Elimination of Discrimination against Women), Article 3 of Protocol No. 1 to the ECHR, Article 23 of the Convention of Human Rights of the OAS and Article 13 of the African Charter of Human and Peoples' Rights. However, each of these Articles either refers only to "citizens" as being entitled to participate in elections, or they must be read in conjunction with other Articles in the same document, which reserve the right of the contracting states to distinguish between citizens and aliens. Only Article 21 of the UDHR mentions the right to participate in the government of "his [or her] country". This choice of words does not necessarily refer to national citizens, and as such is open to an interpretation including long-term residents and those with an habitual centre of life and interest.[180] This interpretation however, is far from being recognised, which further means that the right to political participation enshrined in international treaties and declarations is still delimited by the states' sovereignty in determining who qualifies as a member of the polity and who remains outside. [181] It can somewhat cynically be said that the right to political participation in this respect is not actually inherent as it only becomes effective if a person shares the nationality, and with it the full range of political rights of the country they have chosen as the centre of their life. The right to political participation in elections also lacks the fundamental universality of a human right, as it generally depends upon the issue of nationality, again a domain under the discretion of the concerning state. Furthermore the crucial claim of the indivisibility of human rights[182], first officially proclaimed at the UN World Conference on Human Rights in Vienna in 1993, is weakened regarding electoral rights through their general restriction to formal national citizens in contrast to civil, economic, social and cultural rights increasingly granted to legal residents irrespective of nationality. Generally it can be said that the right to political participation, or

[177] Article 21 UDHR.
[178] See supra note 14 and 15.
[179] Confer Article 6 of the UN Declaration on the Elimination of All Forms of Racial Discrimination.
[180] Confer L. Henkin *Protecting the World's Exiles: The human Rights of Non-Citizens,* in «Human Rights Quarterly» vol. 22, 2000, p.282.
[181] Confer Article 16 ECHR, Article 1 para. 2 ICERD.

the right to democracy, is one on which the highest emphasis is commonly put concerning the realisation and promotion of human rights. At the same time, assurance of the single individual's right to participate in their local political system is far from a practical reality in terms of enforceability.

3.1.2 The Right to Non-Discrimination

The second approach which I chose to argue for the inclusion of non-nationals into the political system is another fundamental principle of international human rights law. The right to non-discrimination appears in virtually every major human rights instrument as well as the UN Charter. The right of states to distinguish between nationals and aliens[183] and to confer a more preferential status to the former is continuously limited through the emerging recognition of social, economic and civil rights. Social security, freedom of movement within the national boundaries, and public education for example, can no longer be considered the exclusive privilege of national citizens but reached a level of universality which is above the differentiation between insiders and outsiders. As outlined above the right to political participation has not yet reached this critical stage of international recognition.

In the previous chapters I described an evolving development towards this recognition by pointing out the increasing separation of the notion of citizenship from nation-state. I further described three transnational entities that implement a form of partial alien suffrage. In the following I will try to establish a legal argument that is stronger than the vague principle of the right to democracy. Although, I acknowledge that this approach might be limited as the principle of non-discrimination does not include any substantial guarantee of a specific right, as in this case the right to vote or to stand for elections. It exclusively refers to the need of a valid justification for the different treatment of two similar and comparable situations. Keeping this limited scope in mind I nevertheless think that in the case of Europe, where different forms of alien suffrage can be observed, the claim of non-discrimination between foreigners has a stronger and probably more convincing clout than the right to democracy and political participation.

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[182] Confer: Resolution of the Commission on Human Rights 1999/57.
[183] Article 16 ECHR, Article 1 lit. a) ICERD, Article 1 Convention Concerning Certain Questions Relating to the Conflict of Nationality, Article 3 of the European Convention on Nationality. See supra note 14.

3.2 Non-Discrimination between Foreigners

International law gives no clear answer regarding the legitimacy of differentiation between nationals of countries party to certain international agreements, such as the TEU, and other aliens, in the granting of voting rights.[184] In the present chapter I will try to argue that any distinction between foreigners on the basis of nationality regarding political participation at the municipal level amounts to a form of discrimination due to the lack of any valid justification.

In fact there is no clear provision in international law that deals with the issue of different treatment of aliens. International law only considers two categories of individuals with relation to states: national citizens and aliens. What can be observed looking at the ongoing development of international integration processes is that conferring a preferential status to nationals of a specific group of states blurs the original distinction. In the case of the EU we can distinguish between formal national citizens, second country citizens and the 13 million third country nationals who qualify as long-term residents in one of the Member States. This blurry differentiation increases the risk of potential discrimination as these different categories are not regulated by international law and could therefore lead to multiple categories of aliens distinguishable by the differing levels of rights they are granted in a respective country of residence. Concerning Article 52 of the European Charter of Fundamental Rights, it was proposed to disallow the application of Article 16 ECHR.[185] This would mean that any discrimination on the grounds of nationality would be invalid as citizens of the Union cannot be considered foreigners within the scope of Community law in the sense of Article 16 ECHR. Whereas under international law Union citizens would be considered aliens in respect to any other Member State, within the Union they are regarded as "quasi-nationals". This further means that Article 16 ECHR, which allows restrictions on political activities of aliens, would not be applicable among Member States. In this context the diffusion of the categories of aliens and formal nationals becomes even more evident as an individual can be considered a quasi-national in respect to some countries and an ordinary alien in respect to others. I do not argue against the extension of certain citizen rights to non-nationals but rather for the equal distribution of electoral rights to the entire category of resident non-nationals. Therefore my starting point is based on the right to non-discrimination.

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[184] H.U. Jessurun d'Oliveira, *European Citizenship: Its Meaning, Its Potential, Its Potential,* in R. Dehousse (ed.), *Europe after Maastricht: an ever closer Union?,* Munich, Law Books in Europe, 1994, p. 142.
[185] Confer: http://www.europarl.eu.int/comparl/libe/elsj/charter/art52/default_en.htm (as of 15.07.2002).

Arguing on the basis of equal treatment carries the danger that equality might technically be reached through a constriction of the rights currently enjoyed by the favoured class, thus resulting in an unsatisfactory equality of the lowest common denominator. However, it seems very unlikely that this could be the case, at least concerning the EU and the concept of Union citizenship. I therefore believe that my argument withstands the indifferent character of the principle of non-discrimination regarding the quality and extension of rights that are conferred in an inconsistent way.

The European Court of Human Rights has concluded in several cases within the context of Article 14 ECHR that "[…]the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies."[186] Discrimination, simply put, is differing treatment in analogous situations.[187] A non-discriminatory distinction must therefore have an objective and reasonable justification. It must pursue a legitimate aim and there must be a reasonable relationship of proportionality between that aim and the means employed to attain it.

The different treatment of foreigners with respect to the entitlement to participate in municipal elections begs the question of why nationality matters in this respect. This question is in fact the starting point of my work and I have tried to present a consistent path towards a possible answer throughout the previous chapters. In the first part of the present work I tried to elaborate a theoretical framework for the foundation of a right to participate in municipal elections. As legislative and jurisdictional powers are not impacted at the local level the common sovereignty-argument loses its persuasive power. The reasons put forward concerning the outlined concepts of transnational political communities conferring certain political rights exclusively to nationals from Member States are founded on either common cultural ties or on the basis of economical and political integration. I think both lines of arguments fail to withstand the claim to political participation in its quality as a universal human right.

[186] Case: *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,* Merits, 23 July 1968, vol. 6, series A, European Court of Human Rights, para.8.
[187] A. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law,* in «Human Rights Journal», vol. 11, No. 1-2, 1990, p.12.

Coming back to the case of partial alien suffrage, citizens from respective Member States and ordinary aliens living in a country different than their country of origin share an analogous situation and are both, according to international law, considered foreigners. Both are equally obliged to comply with the laws and regulations of the host country. Why then are only the first type of aliens entitled to participate in municipal elections when both have such comparable circumstances? Jessurun d'Oliveira asks a very similar question concerning this inconsistency in regard to the European Union. He critically analyses whether the principle of democracy on which all Member States claim to be founded, can be reconciled with the inclusion of Member States nationals in local elections and the concurrent exclusion of all other residents, for this entails distinguishing between a select group of nationalities and all others.[188] However it must be acknowledged that some countries such as Denmark have resolved this inconsistency regarding the once preferential status of Scandinavian nationals and have extended electoral rights concerning municipal elections to all legally resident foreigners.[189]

Looking at human rights treaties designed within the framework of the Council of Europe it can be observed that a clear development towards an equal treatment of all non-nationals irrespectively of their nationality takes place. During the years 1955-1980 conventions touching immigrants issues were based on the idea of a limited group of states that granted residents of other Member States privileged treatment or nationality on the basis of reciprocity.[190] The European Convention on Establishment, signed in Paris in 1955, explicitly states in the Preamble that "the rights and privileges which they grant to each other's nationals are conceded solely by virtue of the close association uniting the member countries of the Council of Europe by means of its Statute […]."[191] In 1988 the Parliamentary Assembly of the CoE adopted a Recommendation which launched a new direction inviting Member States to recognise the rights of migrants, irrespective of their country of origin or nationality.[192] Hence legal resident migrants who have lived in the host country for at least five years should be afforded the same rights as nationals of the country. Most importantly the recommendation mentions in addition to social and economical rights, the right to electoral

[188] Jessurun d'Oliveira, op. cite., note 184, p. 142.
[189] Confer: Municipal Election Act 1981 which extended voting rights to foreigners on the condition of residence in the realm for three years prior to election day.
[190] K. Groenendijk, *Long-term immigrants and the Council of Europe,* in «The European Journal of Migration and Law», vol. 1, no. 3, 1999. See: http://www.jur.kun.nl/cmr/articles/longterm.pdf (as of: 15.07.2002), p. 10.
[191] Para.3 of the Preamble of the European Convention on Establishment.
[192] Recommendation 1082 (1988) adopted on 30 June 1988, para.9(b).

rights at the municipal level.[193] This notion of the equal treatment of foreigners without regard to the region of the world, rich or poor, from whence they came was further enumerated in the Convention on the Participation of Foreigners in Public Life at Local Level. This legally binding document is aimed at granting equal treatment to resident aliens on the basis of long lawful residence, irrespective of their nationality.

Moreover the case law of the European Court of Human Rights reflects this developments. In the case Gaygusuz v. Austria the Court held that "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."[194] For the first time the Court very clearly expressed its opinion on discrimination solely based on nationality.[195] Generally therefore, it can be said that there is a clear tendency to acknowledge the political rights of aliens as genuine human rights that leaves neither space for any privileged treatment on the basis of a certain nationality nor recognises the conditionality of reciprocity. If a right recognised in its importance at the status of being a human right is based on the notion of human dignity, it must be granted to every human being independently of any objective or subjective criteria.[196] It can therefore no longer be reserved to a special category of nationals distinguishing themselves through formal criteria. The alternative of reciprocity could allow a state to justify the torture of nationals from another country if its own nationals were suffering torture there.[197] In this context Arthur C. Helton very appropriately declares that "[h]uman dignity is not synonymous with citizenship."[198]

I think the main problem concerning the right to political participation lies exactly in the fact that, contrary to other human rights such as the principle of equality between men and women, its universality is not yet generally accepted. As such, it goes beyond the concept of the sovereign nation-state. Jessurun d'Oliveira, however, draws out the positive prospect that wherever partial alien suffrage is introduced, sooner or later these voting rights will be granted to all foreigners, regardless of nationality, who otherwise comply with residence

[193] Ibidem, para.9(b).
[194] Gaygusuz v Austria 16.9.1996, Reports of Judgments and Decisions, 1996-IV, no. 14, para. 42. See further: Groenendijk, op. cite., note 190, p. 10.
[195] P. Lemmens, *The decision of 16 September 1996 in the Gaygusuz case situated in the case law of the European Court of Human Rights,* in S. Bogaert (ed.), *Social Security, non-discrimination and property,* Antwerpen, Maklu, 1997, p. 32.
[196] L. Henkin, *Protecting the World's Exiles: The human Rights of Non-Citizens,* in «Human Rights Quarterly» vol. 22, 2000, p.282.
[197] This example is not unthinkable as it is currently being debated in the United States amongst scholars such as Alan Dershowitz in the context of the "War against Terrorism".
[198] A.C. Helton, *Protecting the World's Exiles: The human Rights of Non-Citizens,* in «Human Rights Quarterly» vol. 22, 2000, p.297.

conditions.[199] I wish to believe that he is right and that I can contribute through this present work to this process of making partial alien suffrage universal.

3.3 Different Concepts of Citizenship asking for Different Criteria

In the present chapter I want to briefly elaborate upon the difference between the national, supranational and sub-national levels. With regard to the sub-national level, I further want to analyse whether differentiation between foreigners as such and between nationals and foreigners is justified according to the principles I have outlined above.

In chapter 2.1.1, I explained the concept of concentric circles that aims to describe the different overlapping polities that exist on various strata (the national, sub-national, and supranational). The political community on the national level presently bases the starting point and premise for the concept of citizenship on the two other spheres. Although national states cope with many interrelated pressures stemming from increased integration and internationalisation processes, they are the principle actors in international law and therefore must draw clear distinctions between each other not only through territorial boundaries but also in regard to membership criteria in their respective national polity. Due to these normative circumstances the argument of state sovereignty is still valid in the general restriction of political rights concerning national elections of formal citizens. Although international law, as well as related concepts like citizenship or nation-state, is in a continuous developing process, I think that presently the instrument of national citizenship is justified.

For the same reasons, however, I think that the sovereignty argument is unconvincing as far as sub-national and supranational citizenship are concerned. The difference at the national level lies mainly in the fact that the latter two are not within the power of legislative competences, which forms the main argument undermining the sovereignty claim. The other reason is that neither the supranational nor the sub-national forms of citizenship are necessary to maintain international order as they can exist in parallel with to national citizenship.

What I want to attribute in the context of non-discrimination is the further development of the notion of concentric circles. Whereas I think it is legitimate for states to clearly distinguish between members and others using the criteria of formal nationality with regard to national elections, this is not the case concerning the other two layers of citizenship. Concerning the polity at the municipal and supranational level the general criteria of residency and abode is

[199] Jessurun d'Oliveira, op. cite., note 184, p. 143.

much more compatible with the principle of democracy than with the unilaterally defined criteria of nationality. Different levels of citizenship confer different rights and address different concerns. It is therefore arguable and coherent that each form of political community requests different entrance-criteria to confer membership rights.

I will try to clarify my line of thought by using the concept of Union citizenship as an example. I have pointed out in chapter 2.1 that the equal treatment of foreigners concerning political rights has not yet been achieved. This is mainly the case because the acquisition of EU citizenship, being a derivative of national citizenship, still depends on the highly differentiated naturalisation requirements of the current 15 Member States. The chance of a third country national becoming a Union citizen therefore depends in which Member State he or she applies for formal citizenship. In this case the different treatment of foreigners does not depend on their country of origin but on the country in which they begin to run the gauntlet towards legal citizenship. This could be understood as an indirect form of discrimination as there is no unified requirement for attaining Union citizenship. Instead of requiring the same preconditions for the national and supranational levels of citizenship there should be an independent status of Union citizenship lying down a general and non-discriminatory set of membership criteria. Concerning the problems and potential obstacles of this denationalised concept of Union citizenship I refer back to chapter 2.1.3.

3.4 Why human rights are essential in drawing the boundaries of suffrage

The process of increased interconnection between states, resulting from shared economic and political interests and reinforced through common cultural roots, can be seen as a consequence of the increased mobility of persons and goods, and enhanced communication technologies and media; a consequence of the "globalised" village. Presently the European Union probably forms the most elaborate supranational organisation and increasingly includes non-trade issues, which may only indirectly lead to the original goal of the creation of an internal market. This might show that transnational organisations tend to extend the preliminary aims set out at their founding. "Economics, foreign policy, common identity, equal rights, human rights," these interrelated catch-words could describe a possible positive development promoted by an increased and intensified relationship between states.

Different concepts of citizenship based on formal nationality criteria seem inadequate in balancing this interrelated environment. Mozambique for example, if integration processes were to follow the pattern of the EU, would consequently have to deal with four different concepts of citizenship, three transnational and one national. Although this would be an extreme case, I use this incongruous example to point out the irrational and paradoxical relationship between transnational and national concepts of citizenship. In this context the need for a definition of citizenry decoupled from formal nationality becomes even clearer.

The concept of human rights provides a universal standard to confer rights related to any form of citizenship in a non-discriminatory way. This would avoid the emergence of different unequal and uncoordinated concepts of membership segmenting nationals and foreigners into various categories of overlapping and exclusive groups. Only membership criteria defined on an equal basis, such as abode, legal residence, or centre of life might unify these increasingly overlapping spheres. Furthermore only the separation of the exclusionary and unilaterally delimited nationality criteria lives up to the principle of non-discrimination between foreigners stemming from different countries of origin.

I want to clarify at this point that I certainly acknowledge the importance of the ties and bonds that link countries. Not only do they promote mutual friendship between Member States, which has a crucial impact on the maintenance of state relationships of peace and security, but also in economic terms, countries in the North and South profit from the outlined integration processes. Member States sharing a common colonial history are furthermore often in favour of a common working language and similar systems of law and public administration, which facilitates any process of integration and harmonisation. The British Commonwealth has posed an additional example in its efforts made to promote democratic consolidation and the protection of human rights within its Member States.

However human rights, and in this case especially, political rights should not be at stake when it comes to regional economic and political approximations that only confer rights to individuals with the “right” nationality. Comparing the human right of political participation, generally only granted to formal national citizens, with the human right of non-discrimination between men and women, the disparate status of both rights can be observed very clearly.

I will try to elaborate this argument by using again the EU as an example. Article 12 ECT includes a general non-discrimination clause whose wording does not restrict the application

of the clause only to EU citizens. In practice however, Member States have continuously drawn a clear distinction between third-country nationals and EU citizens.[200] This different treatment of third country nationals on the grounds of nationality has always been considered as being in accordance with Community Law.[201] In contrast to the general discrimination prohibition on grounds of nationality, equal treatment for male and female workers for equal work, as laid down in Article 141 (1) ECT, has always been seen as a human right valid for all workers regardless of their nationality.[202] The legal framework of the EU in Article 13 ECT also includes a general principle of non-discrimination based on sex, religion or belief, disability, age, sexual orientation or racial or ethnic origin as a part of Community law. This general principle is reiterated in all 15 constitutions and as such constitutes an integral part of Community law. Kay Hailbronner points out that there is presently no consensus as to what extent Article 13 ECT can and should be used for anti-discrimination legislation within the framework of a European Policy to integrate foreigners and to abolish discriminatory treatment at all levels of society and economy.[203]

This limited notion of non-discrimination on the grounds of nationality in regard to political rights again shows that the right to political participation is not yet truly accepted as a universal human right.

Conclusion and Recommendations

Concentric Circles at the Centre of Citizenship

In order to write about political rights in local elections I had to start by describing the different concepts and theories of citizenship that exist independently from the state level. The creation of transnational political communities sharing common concerns and economic integration in general has led to a denationalised understanding of citizenship and its corresponding rights. I pointed out that denationalisation analogously takes place at the sub-national level with regard to municipal polities. By highlighting the equal situation of resident nationals and foreigners living in the same local community, I argued that the polity on the local level includes members different in comparison to the national electorate. I therefore perceive the different levels of citizenship, which exist parallely, as forming concentric

[200] K. Hailbronner, *Immigration and asylum law and policy of the European Union,* The Hague, Kluwer, 2000, p. 300.
[201] Von Bogdandy, in Grabitz, Hilf (eds.), *Kommentar zur Europäischen Union*, Artikel 6 EGV, para. 33
[202] Hailbronner, op. cite., note 200, p. 300.
[203] Hailbronner, op. cite., note 200, p. 301.

circles, each including a different, although overlapping, electorate distinguished through different criteria.

I acknowledge that presently the legal institution of formal national citizenship bears an essential regulative role in the area of international law as well as in regard to national constitutional law justifying the general differentiation between nationals and aliens. However, the normative function of national citizenship does not necessarily justify the application of nationality criteria in regard to any other form of political community. Instead of taking nationality criteria for granted, I argue that any differentiation between members and the so-called "others" must be justified by valid reasons.

Electoral Rights on the basis of Residency instead of Nationality or Reciprocity

To determine whether any distinction between nationals and non-nationals is justified with regard to local elections I compared both concerning their function and issues.

In general, legally resident foreigners are free to move within the boundaries of the host country and to change residence from one municipality to another. However only in the case of national citizens does formal membership which enables them to participate in local elections, automatically transfer corresponding with any change of residence. Whereas residency is a precondition for nationals in order to become members in a local community, this is not the case for aliens in the majority of European states. I see no valid justification for differentiating between nationals and aliens who have been resident in the host country for a certain predetermined period. Municipal politics involves neither legislative nor jurisdictional powers but deal instead with issues of immediate concern for the resident population including schooling, housing or social institutions such as child care facilities. I therefore claim that the sovereignty argument, and with it the regulative feature of national citizenship, does not apply and therefore fails to justify any distinction between resident nationals and non-nationals in regard to political rights on the local level.

Political Exclusion as a response to Fears of "Überfremdung" is undemocratic.[204]

Another arguable objection to the equitation of resident national citizens and resident aliens is based on the assumption of the necessity of homogenous cultural ties between the national

[204] Jessurun d'Oliveira, op. cite., note 184, p. 145.

population in order to confer a certain feeling of togetherness and loyalty. Political exclusion therefore is supposed to protect the cultural base of the nation-state from outside influences.
Not only do I think that loyalty within the population can be gained through the adherence of common values enshrined in the constitutional framework, I further believe that transnational migration is a reality of our present time that cannot be ignored through politics of closure. With respect to the increasing immigrant population, who fill critical labour shortage gaps and provide a counterbalance to the increasingly aging population in many host states, only integrative measures that lead to inclusive democracy can contribute to social and economic coherence and stability.
Fears of "Überfremdung" further originate from worries about undemocratic and fundamentalist influences potentially brought by immigrants coming from very different cultures. However, extremist tendencies detrimental to the political discourse are not linked to any particular nationality and can stem equally from national citizens or foreigners alike. It is essential to take these fears seriously and address them with awareness-raising and information programmes in order to explain the importance of political participation for the whole resident population and by arguing that it constitutes a human right to participate in local politics which is an crucial component of a peaceful and democratic society. Political exclusion is in any case the wrong approach to tackle these fears.

The Relativity of Political Rights

The increasing international acceptance of human rights principles and standards not only influences, and where necessary confronts, states in how they treat their citizens in relation to foreigners but also in determining who can enter, reside and finally become a citizen. I have shown the evolving process of reducing the exclusionary scope of citizens rights through the increasing acceptance of human rights. Human rights standards furthermore limit the state's sovereignty in drawing the line between insiders and outsiders and which rights the respective status confers. I consider the right to political participation as a human right situated at the very centre of the concept of democracy. All human rights treaties including this right either legitimise state discretion regarding who is considered to be a beneficiary of the rights or generally refer only to "citizens" as holders of the right. However, I think one must distinguish between the local and the national level. In my view the right to political participation is relative concerning national elections which are at the root of state sovereignty and which constitute a legitimate interest of states to clearly distinguish between nationals and

aliens and to exclude the latter from national electoral rights. However, concerning the local level, I perceive political participation only relative to a certain time of residence, which provides a necessary degree of integration in order to participate actively in local politics. Political participation in local elections therefore, after a certain time of residence becomes a right that should be conferred unconditional on any other criteria such as nationality or reciprocity. It amounts to the quality of a human right.

Political Rights of Aliens depending on their Country of Origin - Human Rights trump Reciprocity

In part III I elaborated on three different political organisations that confer political rights at the municipal level to foreigners on condition of Member States nationality. As a consequence of the different motivations surrounding the creation of these three entities, different grounds are put forward to confer a preferential status to the population of the contracting states. I challenge these grounds by confronting them with the principle of non-discrimination requiring objective and reasonable justification that pursues a legitimate aim and provides a reasonable relationship of proportionality between the means employed and the aim sought to be realised. I argue that in all three examples reasons of economic integration and common cultural ties fail to limit alien suffrage in local elections to a certain group of foreigners. I think any human right that is conferred on the basis of reciprocity, in fact must amount to a form of discrimination.[205] The general characteristic of human rights lies in its universality, it is granted to every individual irrespective of any formal conditions. I further think that reciprocity does not correspond with to the teleology of human rights treaties.[206] Their purpose is not to protect only the nationals of the contracting state but all human individuals. Not nationality but human dignity is in the criteria that counts in this regard. Human Dignity is not synonymous with citizenship.[207]

Legal Discrimination prevents True Integration

The right to enjoy human rights without discrimination is one of the most fundamental principles underlying international human rights law. All Member States of the European

[205] Confer para.36 of the Explanatory Report to the Convention on the participation of foreigners in public life at local level of the CoE. Although it was originally envisaged that parties to the convention should grant political rights only on a basis of reciprocity it was finally concluded that all rights conferred by the convention should apply to all foreign residents without distinction on nationality.
[206] Craven, op. cite., note 121, pp. 489-519.
[207] A.C. Helton, *Protecting the World's Exiles: The human Rights of Non-Citizens,* in «Human Rights Quarterly» vol. 22, 2000, p.297.

Union repeatedly express their commitment to combat legal discrimination on the basis of racial or ethnic origin as well as on sex, religion or belief, disability, age or sexual orientation. Whereas this prohibition of discrimination applies to third country nationals it does not cover differences of treatment based on nationality[208]. I think the principle of non-discrimination also affects states' discretion in regard to different treatment of citizens, quasi-citizens and others that is based solely on grounds of nationality. The European Court of Human Rights recently expressed in this regard that "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."[209]

Unfortunately equality of legal status and individual rights and entitlements do not overcome the effects of social exclusion, or confer "full membership" of a community and cannot guarantee the diffusion of anti-democratic and xenophobic tendencies. On the other hand, legally institutionalised differentiations lacking valid justification stipulate and sustain discriminatory attitudes within societies. It took many centuries and more wars for different classes enjoying a different set of rights to be abolished. One has to be cautious not to introduce a new form of second class citizenship which enjoys the same rights as the rest of the national population except for the right to take part in the process of political decision making. Political equality is essential, meaning that everyone's interests are to be accorded the same intrinsic value.

Union Citizenship – Still in the Stage of Creation

The present concept of citizenship depending upon fifteen different nationality laws conferring a common status, can only be perceived as preliminary. It is essential to address this issue of a harmonised set of conditions for obtaining Union citizen status at the next IGC in 2004. Furthermore it should be taken into account that truly equalising the status of long-term immigrants from third country nationals to Union citizen status requires decoupling it from the condition of nationality of one of the Member States. This would surely be the best way to combat legal discrimination against immigrants who have decided to shift the centre of their lives to the Union.

The proposal of the Commission to introduce a "method of open measures" might provide an appropriate platform for Member States to discuss and elaborate on migration issues still

[208] Confer e.g.: Council Directive 2000/43/EC of 29 June 2000, para.13 , OJ L 180/22.
[209] Gaygusuz v Austria 16.9.1996, Reports of Judgments and Decisions, 1996-IV, no. 14, para. 42. See further: Groenendijk, op. cite., note 190, p. 15.

under their exclusive competence. Such communication mechanisms are essential for a harmonised concept of Union citizenship considering the fact that the naturalisation legislation of one Member State actually affects all other Members. A truly unified status of Union citizenship could therefore be reached through the progressing adaptation of equal naturalisation criteria. Considering the close interrelation between immigration policy, which became "communitarised" through the Treaty of Amsterdam, and naturalisation laws this method of opinion and information exchange becomes even more important.

The logic of inclusion in the process of European integration is grounded in a set of common interests arising from joint participation at a similar level of economic development within the world economy.[210] There exists an awkward contradiction between the necessity of international migration and the existence of widespread political opposition to it which is in large part motivated by and expressive of racism.[211] It is a well known fact that EU Member States suffer a decreasing birth rate that faces the growing aging process of its population.

Need to draw Awareness of the Importance of Political Integration and Equal Treatment

Even the UN Special Rapporteur Rights of Migrants fails to mention this discriminatory distribution of voting rights on the municipal level. One might argue that this issue is a minor one, as the electoral participation of resident immigrants has proven to be low and as the municipal level does not play a big role regarding the other political institutions in which the real decisions are made. However I consider the municipal level as a crucial source of identification and participation in the community and hence the nation, and as such is the starting point for true integration policies. The different distribution of electoral rights according to nationality of certain Member States constitutes, in my opinion, a legally based form of discrimination.

"As the world grows closer in terms of population mobility, capital, investment, labour markets, cultural production, and high technology, it is imperative that we create political norms to make the most of these processes of integration consistent with democratic values. The possibilities for exploiting displaced persons are too great if we make capital and labour

[210] Thränhardt, Miles, op. cite., note 172, p. 6.
[211] Ibidem, pp. 1-2.

mobile but political rights immobile. We cannot read the world as a global economic village but define it as a collection of remote islands for the purposes of political participation.."[212]

[212] J. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage,* in «University of Pennsylvania Law Review», vol. 141, 1993, p.1460.

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[213] In chronological order.

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