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SEEING THE WOOD DESPITE THE TREES? ON THE SCOPE OF UNION CITIZENSHIP AND ITS CONSTITUTIONAL EFFECTS

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1. Introduction

The body of case law on Union citizenship has grown considerably in the past ten years, giving us a varied and complex picture of citizens' rights. Overall, Union citizens knocking at the Court's door have found a friendly welcome and, in most cases, they have also been granted what they asked for. However, the variety of factual situations which gave rise to the cases, together with the Court's reasoning, often complex and not always clear, has caused a certain degree of disorder: if the general picture has started to take shape, its details are still as blurred as those of an impressionist painting. This article attempts to take a step back and offer a more distanced vision of the case law, so as to provide a more systematic analysis of Union citizenship. In particular, it focuses on the effect that Union citizenship has had on the personal and material scope of the Treaty; and on its constitutional effects for domestic systems following the *ad hoc* proportionality assessment demanded by the *Baumbast* line of case law.

We will start by recalling the personal scope of the economic free movement provisions (section 2), and then turn to assess how the introduction of Union citizenship has affected the pre-existing situation. In this respect, the introduction of Union citizenship has not only challenged the economic paradigm that underpins the scope of the economic free movement provisions; it has also challenged the migrant paradigm, so that *any* Union citizen now falls within the scope of the Treaty, without having to establish cross-border credentials (section 3).

We will then analyse the material scope of the Union citizenship provisions, i.e. the rights that are granted by the Treaty to Union citizens. Here, the right to move and reside anywhere in the Community conferred upon Union

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citizens by Article 18(1) EC has considerably expanded the material scope of the Treaty; as a result, no national rule falls *a priori* outside the scope of the Treaty, since movement is enough to bring the situation within its scope. Thus, an increasing number of rules, especially – but not only – those containing a territorial element, need to be justified when they affect in any way the movement rights of Union citizens (Section 4). We will then turn to analyse the case law on the right to reside on the territory of another Member State, focusing in particular on the right to equal treatment (Section 5), to then proceed to assess whether the right to equal treatment can also be interpreted as a free-standing right (Section 6).

Finally, we will analyse the constitutional effects of Union citizenship, and especially its effects on domestic systems of judicial protection (Section 7).

2. The personal and material scope of the Treaty economic free movement provisions: The traditional approach

The personal scope of a piece of legislation, its *ratione personae*, identifies those to which such legislation applies, whilst the material scope, *ratione materiae*, relates to the situations to which the legislation applies. In order to fall within the scope of any legislation, including primary and secondary Community law, both conditions must be satisfied; the claimant must fall within the personal scope of the legislation, and the situation must fall within its material scope. Whilst the distinction between personal and material scope of Community law is not always clearly drawn out in the case law, such a distinction is crucial to understand the true scope of Community law. This is particularly the case when the piece of legislation at issue is capable of conferring rights on individuals: here the personal scope defines the class of potential right-holders, whilst the material scope defines the potential rights that such individuals might claim. To fully appreciate the significance of this distinction one might usefully recall the recent case of *Dell'Orto*,[1] in which the referring court enquired as to the personal scope of the framework decision on the victims of crime,[2] in order to ascertain whether that piece of

1. Case C-467/05, *Dell'Orto*, judgment of 28 June 2007, nyr. For another example of the relevance of defining the personal scope of legislation (this time Directive 92/85) see A.G. Kokott's Opinion in Case C-116/06, *Kiiski*, delivered on 15 March 2007, case still pending at the time of writing.

2. Framework Decision 2001/220/JHA of 15 March 2001, on the standing of victims in criminal proceedings, O.J. 2001, L 82/1.

legislation was capable of being (indirectly) invoked by a legal person.[3] The negative answer of the Court determined the legal irrelevance of that framework decision to the applicant.

In the case of the economic free movement provisions, the Court has tended not to be explicit in defining the personal *vis-à-vis* the material scope of the Treaty. However, it seems that in order to fall within the personal scope of the economic free movement provisions, two conditions must be satisfied. First of all, the claimant must establish an "economic" link, i.e. the individual must be providing or must intend to provide (or receive) services for remuneration, whether in an employed or self employed capacity. Secondly, the claimant must establish the existence of a cross-border link.[4] On the other hand, the material scope of the Treaty economic free movement provisions relates to the rights granted by those provisions, such as the right not to be discriminated against on grounds of nationality,[5] the right to accept offers of employment, the right to move within the territory of the host Member State,[6] the right to be accompanied by family members,[7] and so on.

Admittedly, the distinction between personal and material scope of the Treaty economic free movement provisions is less clear-cut than one might first think: whilst the existence of a cross-border link is a precondition that needs to be satisfied in order to bring oneself within the personal scope of those provisions, the right to move is a right conferred upon individuals directly by the Treaty, and in that way it is correctly defined as part of the material scope of the Treaty. However, this does not have any bearing on what was said above: indeed, if it were not necessary to establish a cross-border link in order to fall within the personal scope of the Treaty economic free movement provisions, then any "worker" or economic actor would be able to rely on the rights conferred by the Treaty and there would be no scope for the notion of the purely internal situation. However, this is not the way the Court

3. Framework decisions cannot have direct effect (Art. 34(b) TEU), but following the Court ruling in Case C-105/03, *Pupino*, [2005] ECR I-5285 they might give raise to a duty of consistent interpretation.

4. Cf. Case C-419/92, *Scholz* v. *Opera Universitaria di Cagliari*, [1994] ECR I-505, para 9. The two conditions do not need to be related; thus a person who moves her residence to another Member State but continues to exercise her economic activity in her Member State of origin falls, by sole virtue of having moved residence, within the personal scope of the Treaty; see e.g. Case C-470/04, *N* v. *Inspecteur van de Belastingdienst Oost/kantoor Almelo*, [2006] ECR I-7409; Case C-287/05, *Hendrix*, judgment of 11 Sept. 2007, nyr.

5. Cf. Art. 39(2) EC; Regulation 1612/68, O.J. sp. ed. 1968, L 257/2, p. 475; Arts. 43 and 49 EC.

6. E.g. Art. 39(3) EC.

7. See now Art. 2 Directive 2004/38, O.J. 2004, L 229/35, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

has construed the Treaty free movement provisions. For instance, early on, in *Saunders*,[8] the Court refused to apply the right to move within the territory of a Member State, a right expressly conferred by Article 39(3) EC, to a person who was in a purely internal situation, thus demonstrating that the establishment of a cross-border link is a precondition for the possibility to claim rights under the Treaty economic free movement provisions.[9] On the other hand, in *Carpenter*, the claimant fell within the personal scope of the Treaty by virtue of being an economic actor providing cross-border services, and for this reason he could rely on the rights conferred by Article 49 EC.[10]

Thus, it appears clear that in order to fall within the personal scope of the economic free movement provisions and therefore be able to claim the rights conferred by Community law an individual must establish both the cross-border and the economic link.[11] It is now time to analyse how this framework has been affected by the introduction of Union citizenship.

3. The personal scope of Union citizenship

The doctrinal reflection on citizenship has concentrated on composing a coherent picture from a fragmented jurisprudential analysis;[12] on more fundamental issues as to the true significance of supranational citizenship;[13] on the

8. Case 175/78, *R* v. *Saunders*, [1979] ECR 1129.

9. Consistent case law; see e.g. also Joined Cases 35 & 36/82, *Morson and Jhanjan* v. *Netherlands*, [1982] ECR 3273.

10. Case C-60/00, *Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279, esp. para 29.

11. Admittedly the requirement to establish a cross-border link has been relaxed to the point of becoming meaningless; see, for instance, Case C-405/98, *Gourmet International (GIP)*, [2001] ECR I-1795 where the Court accepted that the existence of a *potential* recipient of services in another Member State was enough to establish the cross-border link; and Case C-355/00, *Freskot*, [2003] ECR I-5263, where the Court accepted that the existence of a *potential* provider of services in another Member State was enough to trigger the Treaty.

12. E.g. O'Leary, "Putting flesh on the bones of European Union citizenhip", 24 EL Rev. (1999), 68; Shaw and Fries, "Citizenship of the Union: First Steps in the European Court of Justice", 4 EPL (1998), 533; Illiopoulou and Toner, "A new approach to discrimination against free movers? *D'Hoop v Office National de l'Emploi*", 28 EL Rev. (2003), 389; Dougan and Spaventa, "Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article18 EC", 28 EL Rev. (2003), 699; Barnard, Annotation of *Bidar*, 42 CML Rev. (2005), 1465.

13. E.g. Meehan, *Citizenship and the European Community* (Sage, 1993); O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International, 1996); O'Keeffe, "Union Citizenship" in O'Keeffe and Twomey, (Eds.) *Legal Issues of the Maastricht Treaty* (Chancery Law, 1994), ch 6; Preuß, "Problems of a Concept of European Citizenship", 1 ELJ (1995), 267; Shaw, "The Many Past and Futures of Citizenship in the European Union", 22 EL Rev.

way Union citizenship might be reshaping traditional models of solidarity and belonging which have characterized the post war nation States;[14] and on the constitutional issues arising from citizenship.[15] However, little, if any, attention has been devoted to analysing the extent to which the introduction of Union citizenship might have affected the personal scope of the Treaty. In particular, little attention has been devoted to analysing whether migration is a precondition to claim citizenship rights; or whether, instead, migratory rights are but one of the rights conferred upon Union citizens. To put it in other words, the question is whether in order to fall within the scope of Union citizenship an individual has to satisfy two conditions, migration and nationality; or, rather, whether nationality alone suffices to bring an individual within the personal scope of the Treaty, and movement, political rights, and non-discrimination are the rights enjoyed by those who fall within the personal scope of the Treaty, i.e. those who hold the nationality of a Member State.

Here, orthodox thinking led us to believe that, in order to fall within the scope of the Treaty, the migration paradigm had to be satisfied for Union citizens to acquire rights in Community law. The reasons for this approach are not difficult to trace: first of all, naturally, the focus has been on the extent to which Union citizenship affected, and maybe threatened, pre-existing notions of belonging to a given welfare community, and on the significance of a supranational notion of citizenship on delicate political and social compromises as to allocation of limited resources to non-economically active migrants. Secondly, almost all citizenship cases concerned situations with a cross-border link.[16] It is therefore not surprising that the distinction between personal and material scope of the citizenship provisions might have been overlooked.

(1997), 554; Guild, *The Legal Elements of EU Identity: EU Citizenship and Migration Law* (Kluwer Law International, 2004).

14. E.g. Barnard, "EU Citizenship and the Principle of Solidarity" and Dougan and Spaventa, "'Wish You Weren't Here…' New models of social solidarity in the European Union", both in Dougan and Spaventa (Eds.), *Social Welfare and EU Law* (Hart Publishing, Oxford, 2005), Chs. 8 and 9; Ferrera, "Towards an 'Open' social citizenship? The new boundaries of welfare in the European Union" in De Búrca (Ed.), *EU Law and the Welfare State* (OUP, 2005), Ch. 2; Davis, "Citizenship of the Union … Rights for All" 27 EL Rev. (2002), 121; Hailbronner, "Union citizenship and access to social benefits", 42 CML Rev. (2002), 1245.

15. E.g. Jacqueson, "Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship", 27 EL Rev. (2002), 260; Dougan, "The constitutional dimension to the case law on Union citizenship", 31 EL Rev. (2006), 613; Besselink, "Dynamics of European and national citizenship: inclusive or exclusive?" 3 EuConst (2007), 1.

16. See section 3.2. below for an analysis of those cases in which the cross-border element might have been weaker.

And yet, to draw such a distinction is essential in order to fully appreciate the legal consequences of the introduction of Union citizenship, and to understand the scope of Community law.[17] In this respect, one of the claims put forward in this article is that the introduction of Union citizenship challenges the existing migrant paradigm so that in order to fall within the personal scope of the Treaty it is no longer necessary to have exercised the right to move. This claim is supported both by the wording of Article 17(1) EC, which establishes Union citizenship making it conditional only upon nationality of one of the Member States;[18] and by the case law of the Court. In relation to the latter, we can distinguish two stages in the case law: the earlier case law, in which the Court implicitly afforded legal effects to Article 17 EC; and the more recent case law, in which the Court explicitly refers to Article 17 EC, albeit admittedly falling short of openly declaring its legal consequences.

3.1. *The implicit legal effect of Article 17 EC*

As said above, Article 17(1) EC establishes Union citizenship, and there is no mention in that Article of the need to satisfy any other requirement but that of nationality of a Member State before being able to claim citizenship rights under the Treaty or secondary legislation. And, indeed, the right to vote for the European Parliament,[19] the right to petition the European Parliament and the right to apply to the ombudsman are not conditional upon migration.[20] This said, as mentioned above, the attention of both Court and scholarship has focused on the legal effects of the rights to move and reside conferred by Article 18(1) EC rather than on the legal consequences of Article 17 EC. And yet, a careful reading of the earlier case law demonstrates that Article 17 EC is capable of having some legal effects. Take for instance the case of

17. Not least, since the general principles of Community law only apply to determine the lawfulness of limitations to the rights granted by the Treaty (material scope) and not to the interpretation of its personal scope.

18. And it is not open to the Member States to question the rules of other Member States concerning the grant of nationality, e.g. Case C-369/90, *Micheletti*, [1992] ECR I-4239; Case C-200/02, *Chen*, [2004] ECR I-9925.

19. See Case C-300/04, *Eman and Sevinger*, [2006] ECR I-8055, and A.G. Tizzano's Opinion para 146: "… persons possessing the nationality of a Member State are citizens of the Union and therefore, in principle *and regardless of where they live*, enjoy all rights available to such citizens under Community law, including naturally those provided for in the second part of the Treaty" (emphasis added).

20. Cf. Art. 21 EC; such rights are not exclusive to Union citizens, see Arts. 194 and 195 EC.

Martínez Sala.[21] There the Court explicitly held that since Mrs Martínez Sala was a Union citizen, it was not necessary to investigate whether she derived a right to reside from Article 18(1) EC in order to assess the compatibility with Community law of a discriminatory requirement in relation to a non-contributory benefit falling within the material scope of the Treaty.[22] Since Article 18(1) EC was not relevant, then the trigger for the application of the principle of equal treatment must have been Article 17 EC, i.e. the fact that Mrs Martínez Sala was a Union citizen. In this respect, the fact that Mrs Martínez Sala was a lawfully resident migrant citizen does not have any bearing on the conclusion that it was by virtue of Article 17 EC, not 18 EC, that she could claim rights in Community law.

In *D'Hoop*,[23] the Court pointed at a clear distinction between the personal and the material scope of the Treaty: the former concerns "every person holding the nationality of a Member State".[24] The material scope, which allows those who find themselves in similar circumstances to enjoy a right to equal treatment, "*include* those [situations] involving the exercise of the fundamental freedoms guaranteed by the Treaty, *in particular* those involving the freedom to move and reside within the territory of the Member States, *as conferred by Article 8a* [now 18] of the EC Treaty".[25] Thus, Union citizens by definition fall within the personal scope of the Treaty, and the migratory rights conferred therein (part of the material scope) are only *some* of the rights conferred upon Union citizens by the Treaty.

In *Baumbast*,[26] the Court first stated that Mr Baumbast was covered by Article 17 EC as a Union citizen (personal scope), clarifying that that status is not conditional upon pursuing an economic activity, to then analyse the rights that Mr Baumbast derived from his status, i.e. the right to reside (material scope).[27] In *Trojani*, the Court held that Mr Trojani had a right to rely on Article 18(1) EC (material scope) simply by virtue of being a citizen of the Union (personal scope).[28] In *Collins* the Court held that a lawfully resident

21. Case C-85/96, *M M Martínez Sala* v. *Freistaat Bayern*, [1998] ECR I-2691.
22. Ibid., esp. paras 59 and 60.
23. Case C-224/98, *M N D'Hoop* v. *Office national d'emploi*, [2002] ECR I-6191.
24. Ibid., para 27. This section of the ruling is entitled "The scope *ratione personae* and *ratione materiae* of the Treaty provisions on citizenship of the Union"
25. *D'Hoop*, *supra* note 23, para 29, our emphasis. See also Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 33.
26. Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*, [2002] ECR I-7091.
27. Ibid., paras 82 and 83.
28. Case C-456/02, *Trojani*, [2004] ECR I-7573, para 31. "It must be recalled that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union

citizen in the territory of a host State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law.[29]

Thus, it is clear from the earlier case law that a Union citizen is taken within the personal scope of the Treaty by sole virtue of Article 17(1) EC. However, it should be noted that in all the above mentioned cases there was a strong element of migration, in that the claimant was either a non-national (*Martínez Sala*, *Baumbast*, *Trojani*, *Collins*), or was being discriminated against on grounds of movement (*D'Hoop*).

3.2. *The more recent case law: exploring the legal effects of Article 17 EC*

Whilst, as said above, the earlier case law concerned cases with a strong migratory element, and might therefore seem inconclusive, more recent cases suggest that Article 17 EC might be read independently from Article 18(1) EC. For instance, in *Gaumain-Cerri and Barth*,[30] the issue related to the compatibility with Community law of rules which made the receipt of some benefits conditional upon residence within the Member State's territory. After having found that the benefits in question were covered by Regulation 1408/71,[31] thereby falling within the material scope of Community law, the Court decided that it was not necessary to investigate whether one of the claimants concerned was to be qualified as a "worker" falling within the personal scope of either the Regulation, or Article 39 EC. Instead the Court found that the claimants were Union citizens according to Article 17 EC (personal scope), and that that status enabled those "who find themselves in the same situation to enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for" (material scope).[32] Accordingly, the residence criterion was found to be incompatible with Community law.

by Article 18(1) EC …. Mr Trojani therefore has the right to rely on that provision of the Treaty *simply* as a citizen of the Union" (emphasis added).

29. Case C-138/02, *Collins*, [2004] ECR I-2703, para 61. In Case C-148/02, *Garcia Avello*, [2003] ECR I-11613, the Court held that the effect of the citizenship provisions was not to broaden the material scope of the Treaty; it did not comment upon the effect of such provisions on its personal scope.

30. Joined Cases C-502/01 & C-31/02, *Gaumain Cerri and Barth*, [2004] ECR I-6483.

31. Council Regulation (EEC) 1408/71, consolidated version O.J. 1997, L 28/1, and <www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf>, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; soon to be replaced by Regulation 883/2004, O.J. 2004, L 166/1, on the coordination of social security systems.

32. *Gaumain Cerri and Barth*, *supra* note 30, para 34.

In *Schempp*, the Court again relied on Article 17 EC and held that "… Article 17(2) EC attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right to rely on Article 12 EC in all situations falling within the material scope of Community law".[33] In this case, the issue concerned tax rules imposed on a German citizen residing in Germany: as a result of the fact that his former wife moved to Austria, Mr Schempp found himself in a less favourable situation in relation to the tax treatment of the alimony he paid her. The German Government argued that since Mr Schempp had not taken advantage of his right to move, the situation fell outside the scope of the Treaty and it was purely internal. The Court rejected this argument and found that since Mr Schempp's former wife had exercised her right to move, the situation could not be seen as purely internal, and Article 12 EC was therefore applicable. The Court then based its reasoning on a combined application of Article 18(1) EC and Article 12 EC.[34] In any event, the exercise of Article 18(1) EC rights was relevant in establishing the material scope of the Treaty, not its personal scope (or else the nationality of Mr Schempp would have been irrelevant, the only relevant link being the nationality of his former wife).

Finally, in *Tas-Hagen and Tas*,[35] the Court accepted that the scope *ratione personae* of the Treaty had been affected by the introduction of Union citizenship. Thus, in analysing a residence condition imposed on those in receipt of a pension for civilian war victims, the Court held that Union citizens fell within the personal scope of the Treaty by virtue of Article 17 EC, and that therefore they were entitled to the rights conferred upon them by the Treaty,

33. Case C-403/03, *Schempp*, [2005] ECR I-6421, para 17.

34. The Court's interpretation seems rather artificial for two reasons. First, there is a certain discordance in the finding that the exercise of a right to move by a person other than the claimant brings, for that reason alone, the matter within the material scope of Community law. In this respect, *Schempp* can be distinguished from Case C-76/05, *Schwarz and Gootjes-Schwarz*, judgment of 11 Sept. 2007, nyr, because of the inherent difference in the type of link existing between ex-spouses on the one hand, and children who are dependent on their parents on the other. Secondly, the reasoning of the Court seems to suggest that had Mr Schempp's former wife been a third country national, and all other things being equal, the situation would have fallen outside the scope of the Treaty, a result which seems rather arbitrary.

35. Case C-192/05, *Tas-Hagen and Tas*, [2006] ECR I-10451, paras. 18 and 19; "18. Regarding the scope *ratione personae* of that provision, suffice it to state that, under Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. Furthermore, Article 17(2) EC attributes to citizens of the Union the rights conferred and duties imposed by the Treaty, including those mentioned in Article 18(1) EC. [19] As Netherlands nationals, Mrs Tas-Hagen and Mr Tas enjoy the status of citizens of the Union under Article 17(1) EC and may therefore benefit from the rights conferred on those having that status, such as, inter alia the right to move and to reside freely within the territory of the Member States conferred by Article 18(1) EC".

including the rights provided for in Article 18(1) EC. As a result, and as we shall see in more detail below, a residence requirement in relation to benefits previously excluded from the material scope of the Treaty, now falls within the scope of Community law (as a limitation of the right to movement). The same reasoning can be found in *Morgan*,[36] where the Court held that since the claimants were Union citizens they could rely on the rights conferred on "those having that status", also against their Member State of origin.[37]

From the case law referred to above, it seems clear that in order to fall within the personal scope of the Treaty, nationality alone is sufficient. Whilst this might seem uncontroversial, if not altogether banal, its consequences are less so. If Union citizens fall within the personal scope of the Treaty by virtue of Article 17 EC, and since that Article does not mention migration, then *any* citizen, and not only the migrant, now falls within the personal scope of the Treaty and is therefore able to rely on it whenever the situation falls within its material scope. The effect of the citizenship provisions is then to broaden considerably the personal scope of the Treaty in that for the first time static citizens acquire general Community law credentials.[38] The extent to which this has practical implications will then depend upon the material scope of the Treaty, i.e. upon the rights that the Union citizen is able to claim. We shall start by analysing the right to move and the right to reside, and then turn to investigate the extent to which Union citizens can claim the right to equal treatment granted by Article 12 EC.

4. The material scope of the Treaty – The right to move and reside within the European Community

Article 18(1) EC grants a directly effective right to move around the Community,[39] as well as the right to reside in any of the Member States.[40] Both rights

36. Case C-11/06, *Morgan*, judgment of 23 Oct. 2007, nyr; see also *Schwarz and Gootjes-Schwarz*, *supra* note 34.

37. Daniele has noted how almost half of the Union citizenship cases have involved claims of Union citizens against their Member State of nationality; "Free movement of Union citizens and free movement of economically active persons: What's the difference?", Durham European Law Institute seminar, 5 Nov. 2007, not published.

38. Of course, in relation to specified fields, static citizens have always enjoyed Community law rights, e.g. in relation to equal treatment on grounds of sex under Art. 141 EC.

39. *Baumbast*, *supra* note 26.

40. We are not concerned here with the "core" citizenship rights, i.e. right to stand and vote for the European Parliament; the right to petition the European Parliament; the right to apply to the Ombudsman; and the right to consular protection from other Member States when outside the territory of the Union. Those rights are not always confined to Union citizens; e.g. in Case

are subject to the limitations and conditions contained in the Treaty and in secondary legislation.

The right to move is unconditional, i.e. it is not subject to any requirement as to resources or health insurance, and is broadly construed. It encompasses the right to exit from, and enter into, the territory of any of the Member States, which can be restricted only for reasons of public policy, security and health,[41] interpreted narrowly and subject to the general principles of Community law.[42] Consistently with its case law on the economic free movement provisions,[43] the Court has construed the right to movement as also encompassing a right not to be discriminated against on grounds of movement.[44] However, the reach of Article 18(1) EC is much greater than the reach of the economic free movement provisions, since it is no longer necessary to establish a connection between an economic element and right to move. From a practical viewpoint this entails two developments: first, Union citizens have an enhanced right to challenge the rules imposed by their Member State of nationality; secondly, no rule, as such, can be excluded from the scope of the Treaty. Both developments are clearly visible in the case law of the Court.

Thus, in *D'Hoop*, the Court made clear that Member States cannot impose rules which have the effect of placing at a disadvantage their own citizens who have exercised the right to move.[45] And the more recent case law highlights the extent to which the principle of non-discrimination on grounds of movement impacts on national rules and especially on those rules which are more likely to contain a territorial element, such as tax and welfare benefit rules. For instance, in the above mentioned case of *Schempp*,[46] the Court accepted that German tax rules which had the effect of placing at a disadvantage the tax-payer only because his former wife had moved place of resi-

C-145/04, *Spain* v. *United Kingdom*, [2006] ECR I-7917, the Court clarified that Member States might grant the right to vote for the European Parliament to those who are not Union citizens for the purposes of Community law; or the fact that Arts. 194 and 195 EC confer the right to write to the institutions or complain to the Ombudsman on TCNs and foreign companies lawfully resident in the Union.

41. See recently Case C-50/06, *Commission* v. *Netherlands*, judgment of 7 June 2007, nyr.

42. Member States are entitled to impose administrative formalities, although those, as well as the penalties for failure to comply, need to respect the principle of proportionality; Case C-378/97, *Wijsenbeek*, [1999] ECR I-6207; and Directive 2004/38, cited *supra* note 7.

43. E.g. Case C-237/94, *O'Flynn*, [1996] ECR I-2617, para 18; Case C-195/98, *Österreichischer Gewerkschaftsbund*, *Gewerkschaft öffentlicher Dienst* v. *Republik Österreich*, [2000] ECR I-10497.

44. E.g. *D'Hoop*, *supra* note 23.

45. *D'Hoop*, *supra* note 23; the reasoning of the Court is a bit confused, referring both to discrimination on grounds of nationality and to discrimination on grounds of movement. The latter however was the deciding factor.

46. *Schempp*, *supra* note 33.

dence fell within the scope of Article 12 and 18(1) EC. In *Schwarz*,[47] the Court found that rules which allowed tax relief only in relation to fees paid to (some) private educational establishment in Germany fell foul of Article 18(1) EC since those rules had the effect of placing individuals at a disadvantage "simply" because they had exercised their right to move.[48] In *De Cuyper*,[49] a similar reasoning applied in relation to a residence requirement in relation to unemployment benefits: as a result, Belgian rules that provided that those in receipt of such benefits had to reside within the national territory were found to fall within the scope of Article 18(1) EC. The ruling in *De Cuyper* is a good example of the far-reaching consequences of the case law: pre-Union citizenship, the residence requirement would have not been subject to the proportionality/necessity scrutiny since it was compatible with Regulation 1408/71;[50] post-Union citizenship, the residence requirement needed to undergo the scrutiny as to whether it was justified (which it was).

As for the changes in the type of rule that can be brought within the scope of the Treaty, such development is visible in the cases of *Tas-Hagen and Tas* and in *Morgan*. In *Tas-Hagen and Tas*,[51] the issue related to a rule which made the award of a pension for civilian war victims conditional upon residence in the national territory. According to established case law (which has not been affected by the ruling) such benefits fall outside the scope of the Treaty,[52] and therefore are not caught by the prohibition of discrimination on grounds of nationality provided for in Article 7(2) Regulation 1612/68. However, the issue in *Tas-Hagen and Tas* was whether it was open to a Member State to refuse payment of such a benefit for the sole reason that the beneficiary had moved to another Member State. The Court, not surprisingly, found that the rules at issue affected the claimants' right to move and reside anywhere in the Community and for that reason (and not because of a change in classification of the benefit in question) fell within the scope of Article 18(1) EC.[53] In *Morgan*,[54] the German rules provided that in order to obtain a

47. *Schwarz and Gootjes-Schwarz*, *supra* note 34.

48. See also Case C-224/02, *Pusa*, [2004] ECR I-5763; Case C-520/04, *Turpeinen*, [2006] ECR I-10685.

49. Case C-406/04, *De Cuyper*, [2006] ECR I-6947.

50. Ibid.

51. *Tas-Hagen and Tas*, *supra* note 35; and Cf. also *Pusa*, *supra* note 48, which related to rules concerning enforcement for the recovery of debt. On these issue see Cousins, "Citizenship, Residence and Social Security", 32 EL Rev. (2007), 386.

52. Case 9/78, *Gillard*, [1978] ECR 1661; Case 207/78, *Even*, [1979] ECR 2019; in Case C-386/02, *Baldinger*, [2004] ECR I-8411, the Court did not consider the relevance of the Union citizenship provisions in relation to benefits for victims of war.

53. To this end cf. A.G. Kokott's Opinion in *Tas-Hagen and Tas*, *supra* note 35, esp. paras 25 et seq.

54. Case C-11/06, *Morgan*, judgment of 23 Oct. 2007, nyr.

study grant for studying abroad two conditions had to be satisfied: first, the claimant had to have been enrolled in a German institution for at least a year; and secondly, the claimant had to continue the same course of study abroad. Those conditions were very similar to those at issue in the case of *Wirth*,[55] where the Court found that the Treaty did not apply for lack of economic element. In *Morgan*, however, the rules were scrutinized under the right to move conferred by Article 18(1) EC: the Court then found that the rules imposed a barrier to movement, and that they were disproportionate.

The conceptual underpinning for both strands of case law is the same: rules containing a territorial element, such as a residence requirement, affect the right to move of Union citizens, as well as the right to choose their place of residence. For this reason those rules are compatible with the Treaty only insofar as they pursue a legitimate aim in a proportionate way. In this respect, the case law can be seen from two, not necessarily exclusive, perspectives. Thus, it can be argued that in all those cases what mattered was discrimination against movers: those who had moved, or who had returned after having exercised their right to move, were at a disadvantage compared to those who had not moved. Or else, it could be argued that the right to move enshrined in Article 18(1) EC is of broader application and that it also encompasses non-discriminatory barriers to movement.[56] The reasoning of the Court in *Morgan* seems to be going in that direction: and yet, some caution should be exercised since whilst the choice between the two approaches might be of little relevance in those instances in which the rules under scrutiny are those imposed by the Member State of origin, the finding that Article 18(1) EC also encompasses a prohibition on non-discriminatory barriers to movement might have more pervasive effects when applied to barriers imposed by the host Member State.

Finally, it should be queried whether the right to move and reside conferred by Article 18(1) EC can be relied upon to claim a right to move and reside anywhere in the territory of one's own Member State. In this respect, and notwithstanding the otherwise broad and teleological interpretation given to Article 18(1) EC, the Court has indicated that it does not apply to situations with no trans-border element.[57] However, as noted by Advocate General Sharpston, there is no textual obstacle to interpret Article 18(1) EC as being available also to Union citizens wanting to move, or choose their place of residence, within the territory of their own Member State.[58]

55. Case C-109/92, *Wirth*, [1993] ECR I-6447.

56. Cf. A.G. Jacobs Opinion in Case C-96/04, *Familiensache: Standesamt Stadt Niebüll*, [2006] ECR I-3561.

57. See *Garcia Avello*, *supra* note 29.

58. Case C-212/06, *Government of the French Community and the Walloon Government* v.

5. The material scope of the Treaty: The right to reside in the territory of another Member State

Article 18(1) EC confers also the right to reside in the territory of another Member State subject to the limitations and conditions contained in the Treaty and in secondary legislation. In particular, after the first three months of stay,[59] Directive 2004/38 makes the right of residence conditional upon possession of sufficient economic resources and comprehensive health insurance.[60] If the Union citizen satisfies these two conditions, then the right of residence can be refused only on public policy and public security grounds.[61]

However, since the right of residence is conferred directly by Article 18(1) EC, the conditions of sufficient resources and comprehensive health insurance must be interpreted having regard to the general principles of Community law, in particular proportionality and fundamental rights. As a result, even when the Union citizen fails to satisfy the black letter requirements of Directive 2004/38, she might still gain a right of residence directly from Article 18(1) EC.[62] Thus, for instance, in *Baumbast*,[63] the claimant could not rely on (then) Directive 90/364 to establish his right of residence since, although he had both sufficient resources and medical insurance, his insurance was not comprehensive as it did not cover emergency treatment.

Establishing the direct effect of Article 18(1) EC, the Court held that national authorities and, where necessary, national courts must ensure that the limitations and conditions imposed on the right to reside are applied having due regard to the general principles of Community law.[64] In the case at issue, the Court indicated that it would be disproportionate not to renew Mr Baumbast's residence permit given that, even though he did not have cover for emergency treatment, he had lived in the United Kingdom for several years; that his family resided there; that neither he or his family relied on British welfare provision; and that both he and his family had comprehensive medical insurance in another Member State. In *Trojani*, on the other hand, the

the Flemish Government, Opinion delivered on 28 June 2007, case still pending at the time of writing.

59. The right to stay for the first three months is unconditional; Art. 6 Directive 2004/38.

60. Art. 7 Directive 2004/38; the right to reside of those engaged in an economic activity is of course unconditional.

61. After the first three months of residence Member States cannot rely on the public health derogation; cf. Art. 29(2) Directive 2004/38.

62. See Dougan and Spaventa, op. cit. *supra* note 12, 699.

63. *Baumbast*, *supra* note 26.

64. *Baumbast*, *supra* note 26, para 94.

claimant's circumstances, and in particular his lack of economic resources, meant that the refusal of a residence right would not be disproportionate.[65]

Furthermore, the application of the principle of proportionality means that a Member State cannot refuse residency rights on the grounds that the resources are not the claimant's own, but rather are provided by a third party. In *Chen* the Court had already held that it would be contrary to the requirements imposed by Directive 90/364 (now subsumed in Directive 2004/38) to deny the right to reside to a minor on the grounds that she did not possess resources of her own but was relying on her mother's resources.[66] In *Commission* v. *Belgium*,[67] the principle of proportionality prevented Belgium to deny a right of residence to a Union citizen who was relying on an undertaking provided by her partner in relation to the availability of sufficient resources. The Court thus dismissed the Belgian Government's contention that since there was no legal obligation arising from such a partnership, there was an enhanced risk that the relationship might be severed and that, as a consequence, the Union citizen might become a burden on its welfare resources. In the eyes of the Court, such an approach was disproportionate since the loss of sufficient resources is always an underlying risk, whether those resources are the citizen's own or those of a third party.

5.1. *The right not to be discriminated on grounds of nationality as an ancillary right*

As we have seen, one of the main effects of Union citizenship is the redefinition of the scope of application of the Treaty, as a result of which anyone who has exercised her right to move and/or reside in another Member State pursuant to Article 18(1) EC, finds herself, for that reason alone, also within the material scope of the Treaty. As Article 12 EC provides for the prohibition of discrimination on grounds of nationality within the scope of application of the Treaty, the combined effect of Articles 18(1) and 12 EC is to confer upon *any migrant* the right not to be discriminated, directly or indirectly, on grounds of nationality.[68] Furthermore, since the situation is brought within the material scope of the Treaty by the exercise of the right to move, rather than

65. *Trojani*, *supra* note 28, para 36; the Court held that since Mr Trojani was lawfully resident he had in any event a right to equal treatment pursuant to Art. 12 EC, see *infra* section 5.1.

66. Case C-200/02, *Chen*, [2004] ECR I-9925.

67. Case C-408/03, *Commission* v. *Belgium*, [2006] ECR I-2647.

68. Economically inactive Union citizens benefited from a limited right to equal treatment by virtue of their status as service recipients; e.g. Case 186/87, *Cowan* v. *Trésor Public*, [1989] ECR 195; Case C-45/93, *Commission* v. *Spain*, (Museum admission), [1994] ECR I-911; Case C-274/96, *Bickel and Franz*, [1998] ECR I-1121, and see *infra* section 6.1.

(for instance) by the exercise of the right to engage in an economic activity, there is no "inherent" limit to the possibility to invoke the right to equal treatment. In other words, since the link with the Treaty is provided by the mere fact of moving, there cannot be any benefit or rule which is excluded a priori from the scope of the Treaty.

In this respect, consider for instance the case of *Bidar*,[69] where the Court held that a Union citizen lawfully resident in the territory of the host State could rely on the principle of equal treatment in relation to a student's loan, a benefit which previously would have been legitimately reserved to own nationals and migrant workers (and their families).[70] Or the case of *Garcia Avello*,[71] in many respects more exemplary of the pervasive effect of Union citizenship. In that case, the issue related to the Belgian rules on the determination of surnames. The Garcia-Avellos, a Spanish-Belgian couple, wished to have the surname of their children determined according to the Spanish rules on surnames, following which the surname is determined by combining the father's and the mother's last name. However, since the children had been born in Belgium, the Belgian authorities registered the children following Belgian law, without taking into account the fact that the children had already been registered at the Spanish embassy with the double surname. Pre-citizenship, the case would (or should) have fallen outside the scope of the Treaty;[72] however, since the matter fell within the scope of the Treaty by virtue of the fact that the children had dual nationality, and that (in the Court's view) the application of Belgian rules might have led to some sort of future inconvenience had they wanted to move to Spain, the principle of non-discrimination on grounds of nationality applied. As the right of non-discrimination encompasses also the right to be treated differently where the situation of the Union citizen holding the nationality of another Member State is not comparable to that of Belgium's own citizens, the Belgian authorities could not apply their own rules on the determination of surnames, as that would breach the right to equal treatment conferred upon Union citizens by Article 12 EC.

The right not to be discriminated against on grounds of nationality is naturally relative: thus, it remains open to the Member States to exclude non-nationals from certain benefits when the non-national Union citizen is

69. Case C-209/03, *Bidar*, [2005] ECR I-2119.

70. Case 263/86, *Humbel*, [1988] ECR 5365.

71. *Garcia Avello*, *supra* note 29. See generally the critical case note by Ackermann, 44 CML Rev. (2007), 141–154.

72. In Case C-168/91, *Konstantinidis* v. *Stadt Altensteig*, *Standesamt und Landratsamt Calw*, *Ordnungsamt*, [1993] ECR I-1191, the Court accepted that rules on transliteration of a Greek name could fall within the scope of the Treaty to the extent they affected the pursuit of an economic activity.

objectively in a different situation from the national. In this respect, the ruling in *Tas-Hagen and Tas* should not be construed as affecting previous case law on benefits awarded because of the special link of nationality, such as war veteran pensions.[73] In relation to those benefits, the national and non-national are not in comparable circumstances and therefore the host Member State does not have to justify the exclusion of non-nationals from such benefits. It is important to stress that the non-comparability assessment differs from the justificatory assessment inherent in cases of indirect discrimination for two reasons: first of all, because if the two situations are deemed comparable, directly discriminatory rules can be justified, if at all, only having regard to the Treaty derogations. Secondly, because if the situations are not comparable, the matter is not affected by Article 12 EC and, since it does not need to be justified, there should be no need to scrutinize compliance with proportionality and fundamental rights. Thus, in cases of non-comparability, the personal circumstances of the migrant Union citizen should be immaterial.

Furthermore, it is open to Member States to justify indirectly discriminatory criteria, especially in relation to the award of welfare benefits. Thus, the Court has accepted that entitlement to benefits might be conditional upon lawful residence.[74] However, the Court has also clarified that once the Union citizen is lawfully resident in the host State, by virtue of national or Community law, he/she is entitled to equal treatment and therefore the only avenue open to the Member State in order to avoid granting the benefit is that of terminating the Union citizen's residence.[75] Moreover, since the right to reside derives directly from the Treaty, the Member States have to respect the principle of proportionality and fundamental rights before terminating residence. This means that reliance on welfare provision cannot automatically lead to termination of residence, and the personal circumstances of the claimant must be taken into account.[76]

The stress upon lawful residence might lead to the conclusion that the right to equal treatment is conditional upon such a requirement being met.[77] How-

73. This would still be the case in relation to a claim against the host State for benefits awarded because of the special link of nationality, such as war veteran pensions, see Case 207/78, *Even*, [1979] ECR 2019. As said above, however, once the claimant fulfils the criteria for the award of such benefits, Member States cannot make the entitlement of such benefits conditional upon residence in the national territory: *Tas-Hagen and Tas*, *supra* note 35.

74. E.g. *Martínez Sala*, *supra* note 21; *Trojani*, *supra* note 28.

75. E.g. *Grzelczyk*, *supra* note 25; *Trojani*, *supra* note 28.

76. *Grzelczyk*, *supra* note 25; this principle has been codified in Art. 14(3) Directive 2004/38.

77. In *Trojani*, *supra* note 28, the Court held that a Union citizen can rely on Art. 12 EC if he/she has been lawfully resident for a certain time or has a residence permit (para 43); see also *Bidar*, *supra* note 69, para 37.

ever, the opposite is true. Any migrant can rely on Article 12 EC to claim equal treatment with nationals,[78] but welfare provision can be legitimately reserved to lawfully resident Union citizens, as such a requirement might either not breach the principle of equal treatment at all, since residents and non-residents are not in comparable situations *vis-à-vis* welfare provision;[79] or it may be justified, in that it is legitimate for the Member States to require that those who claim welfare benefits are lawfully resident in their territory.

Moreover, Member States are entitled to lay down criteria for entitlement to benefits which, whilst affecting non-nationals more than own citizens, pursue a legitimate aim and are proportionate. In particular, the Court has accepted that Member States might impose conditions relating to length of stay in relation to certain benefits (unemployment allowances;[80] maintenance loans[81]), so as to ensure that the claimant has a real link with the domestic employment market or is sufficiently integrated in the host-State.[82] For instance, in the above-mentioned case of *Bidar*, the Court held that it was legitimate for a Member State to confer entitlement to a student's loan only to those students who had demonstrated a certain degree of integration in the host State; and, found that, as a matter of principle, rules which require residence for a certain length of time, before qualifying for the benefit, would be appropriate. However, the Court also clarified that those rules cannot be so rigid, or may not be applied in such a rigid way, as to prevent someone who has established the required degree of integration from obtaining the benefit.

6. Reversing reverse discrimination: The right not to be discriminated against on grounds of nationality as a self-standing right

We have seen in the previous section that migrant Union citizens can always rely on Article 12 EC since they always fall within the material scope of the Treaty. The next issue worth analysing is whether the right not to be discriminated against can be relied upon by Union citizens who have not exercised their right to move. As we said above, static citizens fall within the personal scope of the Treaty by virtue of Article 17(1) EC; the question is therefore

78. E.g. Case C-274/96, *Bickel and Franz*, [1998] ECR I-1121.

79. See Dougan and Spaventa, op. cit. *supra* note 14, p. 181; and also Dougan, op. cit. *supra* note 15, at 629.

80. *Collins*, *supra* note 29.

81. *Bidar*, *supra* note 69.

82. *Collins*, *supra* note 29. Cf. also Barnard, Annotation of *Bidar*, 42 CML Rev. (2005), 1465, who talks about a "quantitative approach" to equal treatment (at 1468).

whether Article 12 EC can be interpreted as being one of the rights conferred upon Union citizens to which Article 17(2) EC refers.[83] This question is of paramount importance not only in order to determine the scope of the Treaty, but also, and more importantly, in order to understand the true nature of Union citizenship.

If the right to equal treatment is construed as being conditional upon status, albeit a migratory one rather than gender or wealth, the potential of Union citizenship cannot stretch beyond a pro-integrationist rhetoric, which touches upon the lives of a comparatively negligible amount of citizens. If, on the other hand, Union citizenship is destined to become the fundamental status of Member States' nationals,[84] enabling those who find themselves in comparable situations to be treated equally, its effects cannot be made conditional upon migration, anymore than they can be made conditional upon economic circumstances.

In this respect, there is a tension within the Court's case law. On the one hand, the effect of Union citizenship is to free nationals of Member States from the requirement of economic activity, or economic self sufficiency. On the other hand, the rights that Union citizens derive from the Treaty seem to be still conditional upon the establishment of a cross-border dimension of sort.

In this respect, whilst it is true that the right to residence is still inexorably linked to the economic fortunes of the citizen, the migrant citizen enjoys palpable rights regardless of economic status. First of all, the right to move which, as we said above, is unconditional; secondly, and more importantly, the migrant enjoys a right to be treated in a proportionate way exactly because, whilst the ambition of Union citizenship may naturally clash with the economic reality of national welfare States, the requirement of possessing a given amount of resources is construed as a limitation, however legitimate, to the rights granted to Union citizens. If, then, we free ourselves from preconceptions about sharing a portion of our collective wealth with those who are in temporary need, is there a convincing basis, textual or teleological, to defend the position according to which static Union citizens are not as dignified citizens as those who migrate?[85]

83. See also Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context*, (Kluwer Law International, 2007).

84. Although the Union institutions take a more restrictive stance as to the significance of the "fundamental status" of Union citizens; cf. whereas 3, Directive 2004/38 which states "Union citizenship shall be the fundamental status of nationals of Member States *when* they exercise their right of free movement and residence. …" (emphasis added).

85. It should be noted that Directive 2004/38 applies only to Union nationals "who move to or reside in a Member State other than that of which they are a national" (Art. 3), and therefore

In order to answer this question it is necessary to examine the scope of application of Article 12 EC, as construed by the Court, to assess whether such a provision is capable of granting rights only when the claimant falls within the personal scope of the Treaty *and* the situation falls within its material scope; or whether it is sufficient that *either* the claimant falls within the personal scope of the Treaty *or* the situation falls within its material scope.

6.1. *The scope of application of Article 12 EC in the case law of the Court*

According to its wording, Article 12 EC applies within the scope of application of the Treaty; however, the Treaty does not specify whether, in order for the right of non-discrimination to apply, it is sufficient for the claimant to fall within the personal scope of application of the Treaty; or whether it is also necessary for the matter to fall within the material scope of the Treaty. In other words, is Article 12 EC one of the rights granted as such to Union citizens, which would mean that it is also available to static citizens; or is Article 12 EC an ancillary provision which can be relied upon only to the extent to which the citizen also falls within the material scope of application of the Treaty?

We have seen above that the Court's approach to the scope of application of Article 12 EC, at least in those cases relating to Article 18(1) EC, seems to indicate the ancillary nature of that provision. Thus, in *D'Hoop*,[86] the Court held that the principle of non-discrimination on grounds of nationality applies within the scope *ratione materiae* of the Treaty, and a similar statement is to be found in *Schempp*.[87] Furthermore, in *Garcia Avello* the Court explicitly held that the material scope of the Treaty had not been affected by the Union citizenship provisions and therefore the Treaty does not apply to

static Union citizens do not come within its scope and cannot claim a right to equal treatment by reason of either Art. 24 of that Directive, Art. 12 EC, or the general principles of Community law. In this respect, the Directive is narrower than the existing case law, in that it does not specify that the returning migrant should be equated to the migrant for the purposes of Community law (Case C-370/90, *The Queen* v. *Immigration Appeal Tribunal et Surinder Singh*, ex parte *Secretary of State for Home Department*, [1992] ECR I-4265). However, this is unlikely to have any bearing on the existing case law. The abolition of reverse discrimination has been long advocated by the scholarship, see e.g. D'Oliveira**,** "The Community Case – Is reverse discrimination still permissible under the Single European Act?" in *Forty years on: the Evolution of Postwar Private International Law in Europe*, Kluwer, Amsterdam, 1990, 71–86; and more recently Nic Shuibhne, "Free movement of persons and the wholly internal rule: Time to move on?", 39 CML Rev. (2002), 731.

86. *D'Hoop*, *supra* note 23, para 28.

87. *Schempp*, *supra* note 33, para 17.

purely internal situations.[88] Thus, in the citizenship cases, the Court considers the scope of application of Article 12 EC to be limited to those cases in which the situation falls within the material scope of the Treaty.

However, the Court's reasoning is not always persuasive. Thus, the Court has held that a situation might fall within the material scope of Community law by sole virtue of a provision of secondary legislation, even when the claimant does not fall within the personal scope of said secondary legislation. For instance, in *Martínez Sala*,[89] the Court found that the benefit in question fell within the material scope of Community law by virtue of Regulations 1612/68 and 1408/71. And yet, it is questionable whether secondary legislation which guarantees equal treatment in respect of benefits for economically active people, might bring the situation within the material scope of Community law even when the claimant is not economically active and therefore does not fall within the personal scope of the relevant provisions.[90] In other words, the situation fell within the material scope of the Treaty since an economically active migrant would have had the right in question, even though such right was granted *only* to economically active migrants because those who are active contributors to the host State's economic life have a right in Community law to become active claimants. The link with the material scope of the Treaty in this case is so artificial and flimsy to seem rather meaningless.[91] And, in the above-mentioned case of *Garcia Avello*,[92] the Court applied Article 12 EC in conjunction with Article 17 EC, and not in conjunction with Article 18(1) EC. The latter provision was not relevant since the rules at issue in the case (rules determining surnames) did not affect the claimants' right of residence, and the claimants had not exercised their right to move.

Furthermore, there are several cases – also pre-citizenship – in which Article 12 EC was applied despite the fact that the situation did not appear to fall within the material scope of Community law.[93] Take for instance the *Cowan*

88. *Garcia Avello*, *supra* note 29, para 26.

89. *Martínez Sala*, *supra* note 21.

90. It is important to stress that in *Martínez Sala* the situation did not fall within the material scope of the Treaty by virtue of Art. 18(1) EC since the Court held that it was not necessary to investigate the legal effect of such provision. Similar confusion in relation to the material scope of the Treaty can be found in *Bidar*; however, in that case, as in *Grzelcyck* the situation fell in any case within the material scope of the Treaty by virtue of Art. 18(1) EC.

91. Similarly circular is the reasoning in the pre-citizenship Case 293/82, *Gravier*, [1985] ECR 593.

92. *Garcia Avello*, *supra* note 29.

93. In other cases, the situation could be more easily brought within the personal and material scope of the Treaty because of its indirect effect on intra-Community trade or free movement rights; e.g. Case C-92/92, *Phil Collins*, [1993] ECR I-5145; Case C-360/00, *Land Hessen* v. *G. Ricordi & Co. Bühnen- und Musikverlag GmbH*, [2002] ECR I-5089; and Case C-28/04, *Tod's*

case.[94] There, the Court held that a British tourist could rely on Article 12 EC in relation to a rule which discriminated on grounds of residence and nationality in establishing the eligibility criteria for a crime compensation scheme. Or the Spanish museum admissions case,[95] where the Court relied on Articles 49 and 12 EC to find that discriminatory entry conditions fell within the prohibition of discrimination provided for in the Treaty; and similarly, *Bickel and Franz*,[96] where Article 12 EC applied because the claimants were migrant service recipients. In those cases, whilst it is clear that the situation fell within the personal scope of the Treaty, it is open to debate whether the situation fell within its material scope.

In this respect, consider what was mentioned above in relation to the personal *vis-à-vis* the material scope of the economic free movement provisions. In relation to those provisions, in order to bring himself or herself within the personal scope of application of the Treaty, the Union citizen has to satisfy two conditions: cross-border link *and* economic activity (including the passive economic link provided by the fact of receiving an economic service). In the cases mentioned above, the personal scope of the Treaty had been effectively triggered. Mr Cowan, Mr Bickel and Mr Franz, and the tourists were in another Member State (cross-border link) to receive services (passive economic link).

However, the situations under consideration fell outside the material scope of Article 49 EC, a fact demonstrated by the need to rely on Article 12 EC. The conditions relating to crime compensation schemes and translation in court proceedings do not affect the citizens' possibility to receive economic services; and the museum entry conditions did not fall within the material scope of Article 49 EC for lack of remuneration. And yet, in those cases, Article 12 EC applied.

Similarly, consider the ruling in *Ferlini*,[97] where the Court accepted that Article 12 EC could be invoked by a worker to whom Article 39(2) EC was not applicable. In that case, there was a cross-border situation since Mr Ferlini was a non-national working for one of the EC institutions in Luxembourg.

Spa et al v. *Heyraud SA*, [2005] ECR I-5781, on copyright and related rights; Case C-43/95, *Data Delecta*, [1996] ECR I-4661; Case C-323/95, *Hayes*, [1997] ECR I-1711; Case C-122/96, *Saldanha*, [1997] ECR I-5323 on security costs in judicial proceedings.

94. Case 186/87, *Cowan* v. *Trésor Public*, [1989] ECR 195

95. Case C-45/93, *Commission* v. *Spain* (Museum admission), [1994] ECR I-911; see also Case C-388/01, *Commission* v. *Italy* (Italian museums), [2003] ECR I-721, where however the Court applied Art. 49 EC alone; for a critique of the latter ruling see Davies, "'Any place I hang my hat?' or: residence is the new nationality", 11 (2005) ELJ, 43.

96. Case C-274/96, *Bickel and Franz*, [1998] ECR I-1121

97. Case C-411/98, *A Ferlini* v. *Centre Hospitalier de Luxembourg*, [2000] ECR I-8081.

However, because of the special arrangements which apply to Community employees, the principle of non-discrimination for migrant workers contained in Article 39(2) EC and in Regulation 1612/68 was not applicable.[98] Nonetheless, the Court found that Mr Ferlini could rely on Article 12 EC. As said above, two conditions need to be met in order to fall within the personal scope of Article 39 EC: that of being a worker (or a work-seeker), and the cross-border link; on the other hand, Article 39(2) EC relates to the material scope of that provision. Mr Ferlini fell within the personal scope of Article 39 EC by virtue of being a migrant worker, but he did not fall within the material scope of that provision, or else Article 39(2) EC and Regulation 1612/68 would have applied. Yet, the Court had no problem in applying Article 12 EC.

The reason why such cases might seem inconclusive is that, in all of them, there was an element of migration. Thus it could be argued that the personal scope of the economic free movement provisions is fulfilled by having exercised, or exercising an economic activity; and that the material scope of the Treaty is triggered by the exercise of the right to move.[99] Viewed in this light, the above cases would not indicate anything new: for Article 12 EC to apply, the situation must fall within both the personal and the material scope of the Treaty. And yet, as was said in section 2 above, if such were true the case law of the Court on purely internal situations would be more difficult to justify.[100] In particular, if the personal scope of Article 39 EC were to be triggered by the sole fact of being a worker, it is unclear why the rights of non-discrimination on grounds of nationality contained in Article 39(2) EC, and the rights conferred by Article 39(3) EC, undoubtedly constituting the material scope of that provision, should be reserved to migrants.

Thus, it seems that in several cases Article 12 EC applied only by virtue of the situation falling within the personal scope of the Treaty. If those cases are justified having regard to a teleological interpretation of the Treaty,[101] there is no reason why the same approach should not be adopted in relation to static Union citizens, since they also fall, by virtue of Article 17 EC, within the personal scope of the Treaty. It is argued then that the right not to be dis-

98. Art. 7(2) Regulation 1612/68, *supra* note 5, on freedom of movement for workers within the Community.

99. On the other hand there is evidence to suggest that migration alone is sufficient, at least in certain cases, to trigger Art. 12 EC. See e.g. Case C-224/00, *Commission* v. *Italy*, (fines for road offences), [2002] ECR I-2965; and also Case C-29/95, *Pastoors and Trans Cap*, [1997] ECR I-285.

100. E.g. Joined Cases C-64 & 65/96, *Uecker and Jacquet*, [1997] ECR I-3171.

101. And in fact such an interpretation is much preferable to the artificial stance taken in Case 59/85, *Reed*, [1986] ECR 1283, where the Court qualified the right for a worker to have his/her partner living with him/her as a social advantage in order to ensure that the right to equal treatment in relation to the partner's residence rights would be upheld.

criminated against on grounds of nationality (or movement/residence) should apply also to static Union citizens so that, provided the non-migrant is in a comparable situation with the migrant, she should have a right to equal treatment.

6.2. *What if? The application of Article 12 EC to purely internal situations*

We have argued above that the Court has already in the past applied Article 12 EC to situations which, whilst falling within the personal scope of the Treaty, did not fall within its material scope; and that this approach should be extended to allow static Union citizens to rely on the Treaty when they are in a comparable situation with the migrant, and find themselves at a disadvantage only because they have not exercised their right to move. The implications of this step are not as far-reaching as one might think, since Article 12 EC would not entail a free-standing right to review of legislation in terms of proportionality and fundamental rights; nor would it serve the purpose of granting rights beyond those which are conferred upon migrant Union citizens. Rather it would become a vehicle to ensure true equality between nationals of Member States through Community law, rather than through national law.

There are two areas where this interpretation might have a perceptible impact on the rights of individuals: family rights and the right to have one's own personal circumstances taken into account when the Member State is limiting the right to equal treatment conferred by Article 12 EC.

In relation to the rights of third country national family members, the static citizen would have the same rights as those enjoyed by migrant Union citizens. Here, the right to equal treatment would probably determine a limited change in the substantive situation of the claimant since, often, the right of residence of third country spouses and children is recognized by national law.[102] And yet, the right to equal treatment might be relevant in respect of relationships between non-married partners. Here, the migrant does not have a right to be accompanied by his/her registered partner in those Member States which do not recognize partnership; however, according to Article 3(2) Directive 2004/38, Member States are under a duty to "facilitate entry and residence" of the "partner with whom Union citizen has a durable relationship, duly attested". If the right not to be discriminated against on grounds

102. And the Court has been generous in allowing Union citizens to establish the cross-border link even in situations which were, for all intent and purposes, purely internal; see e.g. *Carpenter*, *supra* note 10; and generally Nic Shuibhne, op. cit. *supra* note 85, 731.

of nationality or movement were to apply to static Union citizens, then the Member State would bear the same duty towards its own static citizens that it bears towards migrant Union citizens.

Furthermore, and as we shall consider in more detail below, the right to equal treatment might be of relevance, in certain instances, in allowing the claimant to rely on the general principles of Community law, and in particular the right to family life and the right to have one's own personal circumstances taken into account. In this respect, consider the factual situation at issue in *Carpenter* where deportation of the spouse was considered by the Court to be an undue interference with family life.[103] Or the situation at issue in *R* where the Court held that deportation of a divorced third country national spouse would constitute a disproportionate interference with the children's right to reside in the United Kingdom.[104] The right to equal treatment would impose on national authorities, where that is not already the case, the duty to take into consideration the fundamental rights of the claimant, and to act proportionately. It is exactly this right to review which would have the most pervasive effect in national constitutional law. In this respect, the reticence of the Court, and the resistance of the Member States, is probably not due to the fear of creating more substantive rights for own citizens,[105] but rather the effect that extending the scope of the Treaty to purely internal situations would have on national procedural rules and on national rules concerning hierarchy of norms.[106]

Here, consider that whenever a situation falls within the scope of Community law, the general principles are directly applicable, so that a rule which conflicts with the principle of equality, proportionality or fundamental rights might be set aside by any court seized with the matter. This constitutes a significant advantage for the claimant since, even when fundamental rights are recognized to the same extent in national law, the direct applicability of fundamental rights and proportionality might result in a speedier, less expensive and possibly more effective way of enforcing one's rights. However, it is exactly the availability of the right of "diffuse judicial review" which is problematic, since it has the effect of bypassing the constitutional arrangements put in place by the Member States for the review of legality of legislation,

103. *Carpenter*, *supra* note 10.

104. *Baumbast*, *supra* note 26.

105. Although in some instances that might also be the case; cf. the proposed UK protocol to the Reform Treaty in relation to the effect of the Charter and the debate about the right to strike in Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti*, Opinion delivered on 23 May 2007, case still pending at the time of writing.

106. See section 7 below on the constitutional effects of the Union Citizenship case law.

especially in those cases where, as we have seen above, the national rule, or its application, does not *per se* conflict with Community law. To allow non-migrants to rely on Article 12 EC (albeit in limited circumstances) to achieve a degree of fundamental rights protection which is not available according to national constitutional law might then be a step too far in the interpretation of the Treaty.

These objections bear considerable weight; however, those are objections to the case law of the Court, and not so much to the possible extension of its effects to purely internal situations. In other words, either one argues that the Court has gone too far in say *Baumbast*, *Bidar*, and also *Carpenter*, or there is a challenging argument to be made as to why crossing a border should make such a difference to claimants' rights. Here, take for instance *Bidar*. How could it be maintained that a British national who is in exactly the same situation as Mr Bidar, but for the fact that she had been raised in a third country, should not have a right to a student loan? Why should Mr Carpenter have a right to family life, but a less resourceful person who happened not to have a remote link with an intra-Community situation (or did not have access to good legal advice) should not?

Another objection to the possibility of allowing static Union citizens to rely on the combined effect of Articles 17 and 12 EC is of a more fundamental nature. Here, it could be argued that the "complementary nature" of Union citizenship, which is not to replace national citizenship, is at odds with the possibility of allowing static Union citizens to rely on Article 17 EC when the situation does not have a Community/European dimension, especially given the pervasive constitutional consequences of doing so.[107] Seen in this light, Union citizenship would simply be a step further in the process of European integration. This approach would also be justified by a teleological interpretation of the Treaty, which is aimed at regulating situations with a cross-border dimension. However, the Court has gone far beyond a cross-border *telos* in its interpretation of both the economic free movement provisions and the citizenship provisions. Consider for instance cases where the existence of a potential recipient / provider in other Member States is sufficient to establish the cross-border element;[108] the *Baumbast/Bidar* approach mentioned above, where the balance struck between competing interests by the legislature is recognized as legitimate and proportionate in the abstract and yet, in practice, it is held hostage by the Court's own vision of the merits of the particular case; and *Garcia Avello*, where the barrier to movement was

107. I am extremely grateful to Francesco De Cecco for having raised this objection.
108. See also Spaventa, op. cit. *supra* note 83, Ch.7 and *supra* note 11.

merely hypothetical, based on the assumption that the claimants *might* want to exercise in *future* their right to move to Spain.

Thus, whether one likes it or not, there is a perceptible trend in the case law of a rights-driven jurisprudence, rather than just an integrationist driven one. And once we accept, if indeed we do accept, that such rights-driven approach is legitimate, then such an approach must necessarily drive the interpretation of the citizenship provisions as a whole, so as to have a legally coherent system. Or else, the impression one might get is that of a Union where decisions as to the rights of individuals are left to random choices rather than persuasive hermeneutic arguments.

7. The constitutionalizing effect of Union citizenship: Introducing flexibility in national law

So far we have analysed the way Union citizenship has affected (or should affect) the scope of the Treaty; it is now time to consider its constitutional implications on domestic systems.

We have mentioned above that the Court has held that any limitation to the right to move and reside granted by Article 18(1) EC, or of the right to equal treatment granted by Article 12 EC, must comply with the general principles of Community law, and in particular with the principle of proportionality and fundamental rights as general principles of Community law. At first glance, the requirement to comply with the general principles of Community law is a natural, and consistent, consequence of the direct effect of Article 18(1) EC. In this respect, consider that the Court has long held that any limitation to a right conferred directly by the Treaty must comply with the general principles of Community law.[109] However, the case law on Union citizenship seems to have more far-reaching constitutional effects. Here, it is necessary to distinguish between the case law on the restrictions imposed by the Member State of origin (e.g. *D'Hoop*, *Tas-Hagen* etc.) and the restrictions imposed by the host Member State (e.g. *Baumbast*, *Bidar* and maybe *Avello*).

Thus, in relation to the former, the reasoning of the Court so far mirrors its reasoning in relation to barriers to the economic free movement rights: the legislation must pursue an aim legitimate with Community law; and *the way*

109. E.g. Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para 37; and for the need to comply with fundamental rights, see e.g. Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT)* v. *Dimotiki Étairia Pliroforissis (DEP)*, [1991] ECR I-2925; and Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH* v. *Heinrich Bauer Verlag*, [1997] ECR I-3689.

in which it does so must be the least restrictive means available (or a proportionate way of achieving that aim).[110] In this respect, the rules are assessed in the abstract, so that they are either compatible with Community law in relation to all migrant citizens; or they are inconsistent with the requirements of Community law and they must be amended in relation to *all* migrants. Here, the effect of the case law is simply to grant a directly effective right to move to those who could previously rely on the Treaty only insofar as they could argue that they were service recipients wishing to go to another Member State.

However, in relation to some of the rules imposed by the host State, the assessment of proportionality is considerably more pervasive. Thus, the national authorities must take into due consideration the personal situation of the claimant so that even when the rule in the abstract is compatible with Community law, its application to that particular claimant might be contrary to the requirements of proportionality or fundamental rights protection. Here, consider that the national rules at issue in *Baumbast* or *Bidar* implemented correctly secondary legislation; and the said secondary legislation was itself compatible with the Treaty. The cases did not concern the exercise of discretion by the Member State, since the conditions of sufficient resources and comprehensive health insurance were prescribed and defined by Directive 90/364. And yet, the effect of Article 18(1) EC was to impose a proportionality assessment of otherwise legitimate requirements. This resulted in an obligation for the authorities to take into account the personal circumstances of the claimants, and led to the need to disapply the relevant provisions of national law in relation to those claimants. It is this "personalized" assessment of proportionality which brings about a qualitative change in the expansion of judicial review of national rules.

This qualitative change is of constitutional relevance both in relation to the Community's own system, and in relation to the domestic constitutional systems. In relation to the Community system, Dougan has remarked that the novelty of this approach is to extend the review of proportionality beyond the accepted categories of "derogations from harmonized norms, the conferral of administrative discretion, or the exercise of ancillary powers, so as to cover also the merely mechanical implementation of the relevant Community

110. Although *Hendrix*, *supra* note 4, might be signalling a shift in the Court's approach towards home State barriers, insofar as that case could be read as introducing a *Baumbast* sort of reasoning also in these cases. However, the case is not conclusive since the Dutch legislation at issue left some discretion to the relevant authorities and it could therefore be argued that the obligation to take into account the personal circumstances of the claimant arose as a result of that discretion.

secondary legislation."[111] By requiring such "indirect review" of Community legislation, the Court is curtailing the discretion of the legislature since even when legitimate Community secondary legislation would authorize (and require) a certain course of action, such course of action needs to be assessed in its proportionality. This means that it is no longer open to the Community legislature to exclude altogether a certain benefit or a certain category of claimants from the scope of the Treaty.

In relation to domestic constitutional systems, this case law has even more pervasive effects. Here, in order to fully appreciate the implications of the *Baumbast* ruling it is necessary to recall in general lines traditional systems of judicial review.[112] Broadly speaking, judicial review is a function of hierarchy of norms.[113] We can distinguish two radically different forms of review: that which takes place in relation to executive acts; and that which takes place in relation to legislative acts. In relation to executive / administrative acts which have effects on a given individual, or group of individuals, i.e. in relation to those acts which are not of general application, the power of review, whether reserved to specialized administrative courts or tribunals, or left to ordinary courts, is more pervasive, being aimed at guaranteeing the proper exercise of power and discretion by public authorities. In this respect, the personal situation of the claimant is usually taken into account by the judiciary.

Judicial review exercised in relation to legislative acts, or acts of general application, however is radically different: the act is measured against the constitutional yardstick; the balance between competing interests is assessed in a more abstract way; and a broader discretion is left to the legislature, since it is recognized that, within the limits set by the constitutional system, such balance is the expression of policy choices which pertains to the legislature.[114] Furthermore, given the seriousness of the effects of a declaration of nullity, which is valid *erga omnes*,[115] access to such review is usually more limited, and the assessment of constitutionality is reserved to one or more higher courts.[116] The centralized approach to constitutional review is aimed

111. Dougan, op. cit. *supra* note 15, at 626.

112. For an excellent comparative overview see Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis" 6 LIEI (1979/2), 1.

113. This is the case even when the legality of a piece of legislation is assessed in relation to unwritten principles, such as presumptions of intention in the UK constitutional context.

114. The difference between administrative and constitutional review is also present in the Community system, and so is the extent to which the Court is willing to interfere with the broad margin of discretion left to the legislature; e.g. Case 331/88, *Fedesa*, [1990] ECR I-4023.

115. This is the case even when the effect of such nullity can be tamed as to its temporal application.

116. The situation is of course different in the United Kingdom where there is no written Constitution and Acts of Parliament cannot be declared "unlawful" by any court, although fol-

at guaranteeing a number of interests, such as the uniformity and certainty of the law; the possibility for the legislature to intervene in defending its legality; as well as the need to reserve the decision on complex legal (and political) issues to experienced judges.

This traditional constitutional arrangement, which reflects given (if different) notions of the separation, and the respective strength, of the different powers of the State, is strained, if not together challenged, by the "proportionality" cases. The expansion of the personal and material scope of the Treaty, together with the *ad hoc* proportionality assessment required by the Court in (almost) any circumstance concerning the migrant, transforms the legislative act of general application, into a quasi administrative act where the authorities always have to exercise discretion in applying the black letter of the law to Union citizens. As a result, the application of a piece of domestic legislation might be incompatible with Community law in the case at issue,[117] and yet be compatible with Community law in a situation where the circumstances are different. Mr Baumbast might have gained a right to reside due to his length of stay and his family circumstances, and yet a Ms Kesselring having her health insurance in Germany and no emergency cover would find it more difficult to establish a right of residence if she had no prior connection with the UK. Mr Bidar might have the right to a university loan to pursue his education in the United Kingdom, and yet a Ms Esposito who went to the United Kingdom solely to pursue her secondary education at a private school, and whose family resided in Italy, might find the Court less keen in imposing upon the British tax payer the burden of financing her student's loan.

It is therefore the need to take into account the personal circumstances of the claimant that entails a qualitative change in the type of judicial review of national legislation required by Community law. In this respect, the *Baumbast* line of case law can be usefully juxtaposed to the traditional approach adopted by the Court in relation to the scrutiny of proportionality of rules imposing barriers to movement. There, a piece of legislation which is found to be incompatible with Community law is incompatible with Community law in relation to *all* migrant economic operators.[118] Thus, if a rule is found to be a barrier to market access in the context, say, of the freedom of establishment, such rule is a barrier for all economic operators wishing to penetrate

lowing the Human Rights Act courts can issue a declaration of incompatibility between the Act of Parliament and the ECHR.

117. Cf. e.g. operative part of the ruling in *Baumbast*, *supra* note 26; in *Bidar*, *supra* note 69; also *Carpenter*, *supra* note 10.

118. E.g. recently Case C-442/02, *Caixa-Bank*, [2004] ECR I-8961; Case C-79/01, *Payroll Data Services (Italy) et al*., [2002] ECR I-8923.

that market.[119] On the other hand, whether the denial of a right to residence for lack of resources and comprehensive health insurance is compatible with Community law will depend solely on the facts of the case and on the personal circumstances of the claimant: consider in this respect the difference between the facts of *Baumbast* (integrated member of the host-community, with an established and prolonged link with the host State, with family, and representing a small financial risk for the United Kingdom), and *Trojani* (not as integrated, with no family, and representing a considerable financial risk for the host State).[120] Whilst it is true that Community law does not formally affect domestic constitutional arrangements, in that it does not require or empower the national judiciary to declare the nullity of domestic legislation, it empowers, and requires, *any* judge to set aside domestic law when its application would be disproportionate having regard to the personal circumstances of the claimant. It is this power of "diffuse judicial review" of the application of legislative acts, even if limited, that constitutes the greatest constitutional effect of the introduction of Union citizenship.

Finally, it should be noted that the effect in the domestic constitutional system of this case law is different in nature from that described above in relation to the constitutional effects in Community law. Here, it has been remarked that the citizenship case law has the effect of curtailing the extent to which the Community legislature can in practice decide the limits of the rights conferred by the Treaty. However, the effect of Union citizenship is not to impose upon national (or Community) authorities a scrutiny of the proportionality of Community legislation.[121] An example might be of use in illustrating the difference. Take for instance the case in which the free movement of goods is limited by means of Community secondary legislation, say to react to the spreading of a pernicious or dangerous disease amongst farm

119. *Caixa-Bank*, previous footnote; *Payroll Data Services*, previous footnote.

120. This step towards the "administrativization" of the enforcement of national law, whereby the authorities find themselves under a Community law duty to consider the case in its nuances even when it fits the black letter of the law, is not an isolated phenomenon and in certain respects is also visible in the health care cases, where the Court imposed upon the national authorities substantive duties to review the denial of reimbursement for health care received abroad even though such a refusal was consistent with the provisions of Regulation 1408/71; see especially Case C-157/99, *Geraets-Smits* and *Peerbooms*, [2001] ECR I-5473; Case C-385/99, *Müller Fauré* and *van Riet*, [2003] ECR I-4509. Further, a similar approach has been adopted in *Carpenter*, *supra* note 10; however I am inclined to consider *Carpenter* as a citizenship case; see Spaventa, "From *Gebhard* to *Carpenter*: towards a (non-)Economic European Constitution", 41 CML Rev. (2004), 743; and id. op. cit. *supra* note 83, Ch. 6

121. On this point see also the discussion in Dougan, op. cit. *supra* note 15, who seems to advocate an alignment between the *Baumbast* approach and the case law on secondary legislation.

animals. The national authorities would be under a Community law obligation to take the necessary action to implement these measures, and if there is no discretion left to the national authorities, the application of Community law would be more or less automatic. In this case however, there would be no possibility for an individual to claim "special treatment" before the national authorities. Here, the Community legislation would either be proportionate or disproportionate;[122] there is no evidence to support the possibility of the Court allowing for Community law to be disapplied because of the claimant's individual circumstances.[123]

8. Conclusions

There cannot be any doubt that the introduction of Union citizenship has had far-reaching effects, and that it has considerably broadened both the personal and the material scope of the Treaty. Any Union citizen falls now within the personal scope of the Treaty, regardless of an economic or cross border link. And, the rights of movement and residence conferred by Article 18(1) EC have been interpreted broadly so that Union citizens can challenge both the rules of the Member State of origin, when those affect in any way the right to move and/or reside in another Member State; and the rules of the host Member State, when they limit movement, residence or discriminate on grounds of nationality. Furthermore, it has been argued that the right not to be discriminated against on grounds of nationality conferred by Article 12 EC should be considered as one of the rights granted by the Treaty to Union citizens, so that static Union citizens who find themselves in a comparable situation to migrant Union citizens would have a right to equal treatment deriving directly from Community law. Such an interpretation would be consistent both with the existing case law on Article 12 EC, and with the demands of a meaningful concept of citizenship.

The very idea of citizenship sits uncomfortably with an a priori differentiation between citizens based on the sole ground that a border has been crossed. This is all the more the case given that the Court, in its case law, has adopted a *constitutional* interpretation, rather than a mere integrationist one. Thus, the *Baumbast* line of cases, with its stress on an *ad hoc* proportionality assessment, reshapes the duties that national authorities, as well as national courts, bear towards Union citizens. This has wide-ranging constitutional effects, empowering the individual and rendering judicial protection more

122. Cf. e.g. Case C-189/01, *Jippes and others*, [2001] ECR I-5689.
123. See also *Hendrix*, *supra* note 4.

effective. Whilst such an approach might be problematic since it subverts traditional centralized systems of judicial review, it would nevertheless be arbitrary to confine its effects to those who are either sufficiently resourceful – or sufficiently well advised – so as to be able to establish a cross-border link. In a Union built on the principle of equality, there should be no space for an Orwellian approach whereby some citizens are more equal than others.