

The EU Constitutional Treaty: Towards A European Citizenship For Third Country Nationals?

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1. Introduction

Citizenship is an essential element of governance; it is a source of rights, the most important of which is arguably the ability to shape policies that will directly affect an individual's life. Individual membership of the European Union is unlike traditional models of citizenship. Its nature is complementary; the nationality of one of the member states is an essential prerequisite. Although modern economies rely more and more on an immigrant labour force a significant number of this force is left out of the benefits of EU citizenship due to the divergent nationality laws in the member states. It is still early in the process of integration for a postnational citizenship, namely one based on criteria other than the nationality of one member state, such as legal residence. In the European Union sphere, it is sometimes thought that European citizenship will bring the Union closer to its citizens, thereby resolving its often criticised legitimacy deficit. This paper supports the rationale for a strong social Europe with a meaningful and inclusive citizenship, thereby truly reflecting the diversity of the European demos. The Constitutional Treaty does not change the complementary nature of EU citizenship: "citizenship of the Union shall be additional to national citizenship" (Article I.10). However, in a bid to make EU citizenship more credible, the EU has for the past ten years adopted a culture of rights, mostly applicable to EU nationals but also to a limited extent to third country nationals residing in the EU on a long term basis. This paper takes the view that the proposed Constitutional Treaty reinforces the move initiated by the Treaty of Amsterdam towards the acquisition of rights on the basis of residence rather than nationality. According to Marshall's evolutionary theory, citizenship is composed of a bundle of rights which are not necessary all introduced at the same time (Marshall, 1965). Could it be that the EU is slowly putting together a bundle of rights which in the longer term will lead to a comprehensive citizenship for non EU nationals?

Following a rapid overview of the historical background and the *acquis* in the field of treatment of third country nationals, this paper will attempt to answer this question by analysing the nature of the rights and their limitations contained in the Constitutional Treaty. It classifies the new rights in the Constitutional Treaty into two main categories: economic rights on the one hand and social and political rights on the other. It then assesses the role of EU institutions in the light of the new objectives set out in the Treaty. It starts from the premise that the economic element of EU citizenship prevails over other more symbolic political and social aspects. The paper then moves on to welcome and assess the impact the institutional reshuffle could have on policy content. The paper concludes that the Constitutional Treaty is in some aspects an innovative document strengthening the legal status of non-nationals. The new Treaty nonetheless remains deeply anchored in the past as new rights, often assorted with rigid limits, do not create a link between the Union and its residents strong enough to amount, at least partially, to postnational citizenship.

2. From Maastricht to Nice - a historical perspective

A culture of rights accessible to third country nationals is slowly emerging at EU level. Yet as for many other aspects in EU policies, the question of the status of non nationals has been the theatre of a struggle for retaining sovereignty, hampering the development of effective policies.

As early as 1984, the Economic and Social Committee had called for Community intervention in relation to the resident status of third country nationals. At the time however, member states were very reluctant to consider interference with what they regarded as their exclusive competence. With Maastricht, co-operation on migration related issues was given a new institutional structure: the third pillar. While the first pillar, i.e. the provisions contained in the EC Treaty, was characterised by supranational decision-making procedures, the third pillar only provided the basis for intergovernmental co-operation. The new third pillar provided that policy activity on third country nationals was of "common interest" and therefore should be the subject of co-operation.¹ Decision-making in the third pillar was characterised by the absence of judiciability and little European parliamentary scrutiny.² The effectiveness of measures agreed was also very weak due to the quasi-systematic use of declaratory instruments. For example, the 1996 Resolution on the status of third country nationals residing on a long term basis in the territory of the member states³ acknowledged that their integration contributes to greater security and stability and to social peace. This instrument, rather paternalistic in tone, did not bind the member states and as a direct result did not grant rights as such.

Despite the gross inadequacies of the third pillar system, lessons had been learned about what could be done at supranational level and the policy instruments provided by the Maastricht Treaty proved that there were sufficient grounds amongst member states to go further in the process of developing new initiatives. In 1997, the Treaty of Amsterdam communautarised migration-related issues by incorporating a new title on visas, immigration, asylum and free movement of persons in the EC Treaty. The EU institutions were given competence to define the conditions of entry and residence, including long-term residence permits (Article 63.3.a), and the rights and conditions under which "nationals of third countries who are legally resident in a member state may reside in another member state" (Article 63.4). Indeed, during the post-Maastricht phase there had been increasing recognition that insufficient attention had been paid to the role of third country nationals in EU labour markets. Yet their inclusion was necessary to meet the needs for both skilled and unskilled workers.⁴ Adequate measures needed to be adopted so as to secure a better integration of migrant workers and their families. Contrasting with the third pillar, objectives were set up, albeit narrow in ambition.⁵

The new EU powers constituted a major change as EU institutions had only been loosely associated under the old Maastricht third pillar. The Commission, which emerged as the big winner of the institutional reshuffle, used its newly acquired right of initiative to play a very pro-active role on migration related issues. It issued a number of proposals, the most significant of which was the 2001 proposal for a directive on the status of long term resident third country nationals.⁶ The directive lays down a qualifying period of five years of residence on the territory of one member state. The applicant must also establish that he/she has adequate and stable resources, sickness insurance and that he does not constitute a threat to public order or domestic security. Once the long-term residence status is granted, non-nationals should enjoy a set of civil rights, including reinforced protection against expulsion, family reunification, freedom of movement and a limited access to employment.

Recent years have seen progress in terms of political will. In 1999, the Tampere European Council concluded that the status of long term resident third country nationals should be approximated to the status of member states' nationals i.e. with a set of similar rights. In June 2002, the Seville European Council further acknowledged the importance of the contribution by third country nationals to economic, social and cultural life. To put this rhetoric in practice was one of the major challenges for the Convention on the Future of Europe. The Constitutional Treaty represents a noticeable attempt at enhancing a culture of rights accessible to all.

3. An emerging culture of rights

It is in the right of free movement that citizenship is most developed. Arguably economic considerations have achieved precedence over the 'patriotic' elements of citizenship in the EU.

Globalisation and the ever fading notion of frontiers have changed the nature of the relationship between the individual and the state. In a democratic society, civil rights are common place and should a new right be added to the list an ordinary reaction would be to wonder why it was not there in the first place (Weiler, 1996). It is well known that EU citizenship entails essentially economic rights and the Constitutional Treaty allows to some extent some of these rights to be extended to third country nationals. Whether these rights will in the near future develop into a form of citizenship for non EU nationals residing on the EU territory remains to be assessed in the longer term. This, however, will remain a rhetorical question for as long as the freedom of movement for non-EU nationals is assorted with strict limitations. Unfortunately, the incorporation of the Charter into the Treaty, although positive in itself, does not provide for an alternative route to citizenship for non-EU nationals.

3.1. A 'wobbly' economic citizenship for third country nationals

The setting up of the internal market called for a greater mobility of businesses and workers in Europe. Free movement was then to play a crucial role in the building of an Economic Community and, as a direct result, became a cornerstone of EU citizenship. Membership to the European Community has long been understood essentially in terms of economic rights; EC citizens were initially perceived as factors of production mainly. The most significant rights inherent to European citizenship will be exercised by a member state national outside his own country. Unsurprisingly, the right to free movement gave rise to considerable case law and the European Court of Justice played a very active role, taking the view that freedom of movement is a fundamental principle and a foundation of the EC. In this context, the general prohibition of discrimination on the grounds of nationality as provided for in Article 39.2 TEC has been of a vital importance and the Court developed an extensive jurisprudence on the principle of equal treatment.⁷ Indeed, one of the principles underpinning the creation of the internal market was that EC citizens should not be deterred from using their right to free movement. This right, however, was exclusively for the benefit of EC nationals in the founding treaties, and the ECJ has steadily refused to extend the scope of these provisions beyond the concept of family reunification. In other words, immigrants could only derive right to free movement from their economically active EU family member.⁸

The first sketches of an economic citizenship for third country nationals appear in the Treaty of Amsterdam. Incorporating elements of the Schengen agreements, it gives the Council competence to ensure the absence of controls on third country nationals and to define the rights and conditions under which they may reside in other member states (Article 62.1 and 63.4 TEC).

The European Constitutional Treaty reinforces the move towards the acquisition of economic rights for non-EU nationals and refers in several places to free movement of legally resident third country nationals. The Charter of Fundamental Rights for example grants a limited right to freedom of movement and residence to non nationals. In addition, Article III-267 provides that European laws or framework laws shall define the rights of legally resident third country nationals, including the conditions governing freedom of movement and of residence in other member states.

Albeit a positive evolution, the Constitutional Treaty does not bring groundbreaking innovations. In fact, the Directive concerning the status of third country nationals who are long-term residents already provides for a general right to free movement granted on the basis of residence rather than nationality.⁹ These provisions however do not grant equivalent economic rights to non EU nationals. In other words the Constitutional Treaty failed in effectively prohibiting restrictions on non-nationals' exercise of their right to free movement.

There is a direct link between freedom of movement and access to economic activities. It is quite unlikely that the former would be granted if it could be construed at national level as a threat to the welfare state. European economic citizenship itself remains a privilege for those EU nationals who intend to move and reside for economic purposes, as economically non-active persons need to establish that they possess adequate financial means. Similarly, the 2003 Directive on the status of long term resident third country nationals provides (in Article 5-1) that the applicant for residence in another member state must establish that he/she possesses adequate resources so as to avoid having recourse to social assistance systems. In other words, freedom of movement

is best put in practice in so far as access to national labour markets is unrestricted. With this regard, the European Court of Justice has gone well beyond the mere prohibition of nationality discrimination as provided for in the EC Treaty. Access to an economic activity can only be limited for reasons of public policy, security or health. It also entails a right to move and reside for the purpose of seeking employment. An EU national cannot be required to leave if he/she can provide evidence that he is continuing to seek employment and he has genuine chances of being engaged.¹⁰ Furthermore, an EU national having exercised his right to free movement has also the right to remain in the host country after having been economically active.¹¹

Access to employment for third country nationals on the other hand is highly controversial. In a context of economic slowdown and high rate of unemployment, governments tend to give priority to their own nationals to fill job vacancies. Consequently and following lengthy debates, the 2003 Directive on the status of long term country nationals allows member states to give preference to Union citizens and to third country nationals who reside legally and receive unemployment benefits in the member state concerned (Article 14-3.2). In addition, the directive provides that member states may limit the total number of persons entitled to be granted right of residence (Article 14-4). The 2001 proposal, clearly watered down by the Council, had initially copied the regime applicable to EU nationals and imposed on member states the obligation to ensure that settled non nationals would benefit from equal treatment with nationals as regards access to employment and self employed activities provided that the job in question did not entail involvement in the exercise of public authority. Under the proposed Constitutional Treaty, third country nationals do not enjoy a right to equal treatment either. Article I-4 prohibits any discrimination on grounds of nationality in the field of application of the Constitutional Treaty but within the limits of EU citizenship (i.e. as defined in Article I-6).

In addition, Article III-267 reasserts the member states' right to determine volumes of admission of third country nationals coming from third countries to seek employment. One may wonder about the possible conflicts which this Article may generate with other provisions. For instance, although this provision aims at safeguarding member states' (discretionary) right to establish quotas and in theory should not affect the situation of already resident third country nationals, could there be a case for a member state to argue that free movement for non nationals will ultimately affect its right to determine the total number of persons entitled to be granted right of residence? In other words, there is no firm guarantee that the rather restrictive Article 14-4 of the 2003 Directive is not reproduced in future legislative actions.

The Constitutional Treaty also leaves room for possible further discrimination with regard to social security. In order for freedom of movement to take full effect, EU nationals should enjoy the same tax and social advantages as national workers. Residence requirements for example would constitute a form of indirect discrimination.¹² Accordingly, the Constitutional Treaty provides a legal basis for measures securing for migrant workers the aggregation of all periods of employment in different countries for the purpose of acquiring the right to receive social benefit and calculating the amount of payments (Article III-136). However, Article III-136.2, introducing the so-called 'emergency brake', represents a significant step back as it allows a member state to suspend the decision-making procedure should a proposed measure affect "fundamental aspects of its social security system". By contrast, the exercise of economic rights for EU nationals is not contingent on discretionary measures.

Critics have expressed concerns that the Treaty of Amsterdam merely provided for flanking measures to ensure free movement. There is a clear attempt in the Constitutional Treaty to enhance the political and social rights of non-nationals and the inclusion of the Charter of Fundamental Rights of the Union is to play an important role in the representation of migrants' interests in EU law.

3.2 Political and social rights - two steps forward, one step backward

The Charter had initially been promulgated as a declaratory act and was annexed to the Nice Treaty in December 2000.¹³ By enshrining a common set of rights and values, it is thought that the Charter will make the Union more palpable to its citizens. Could it do more than that? The Charter ignores the interface between national and EU citizenship: fundamental rights apply

to all individuals, including non nationals, having regard to their nature as humans rather than as citizens of a given state. By including the Charter in the Treaty itself, the Constitutional Treaty significantly improves the likelihood of seeing the proclamation of those rights and principles positively influencing the nature and interpretation of EU and national policies relating to the treatment of third country nationals. With this regard, whether the articles of the Charter will give rise to direct effect or not is crucial. Direct effect will allow an individual to invoke the Charter articles before the national courts which, in virtue of the principle of supremacy of Community Law, would push aside national provisions violating the rights contained in the Charter. Some member states felt uneasy about the nature of some of these rights. The UK for example has expressed concerns about the effect the so-called solidarity rights could have on national industrial laws and pressed for a compromise on a possible legal effect of the Charter. As a result, the rights provided for in Part II of the Constitutional Treaty have more of a symbolic value than a real innovative character. Article II-112 establishes a difference between rights and principles, the former only are susceptible to giving rise to direct effect. Principles on the other hand, need to be implemented by EU law before they can become judicially cognisable. Confusingly, the Charter does not determine which provisions fall into which category, although a memorandum was annexed to the Constitutional Treaty as a way of providing guidance in the interpretation of the Charter.

The Charter draws most of its inspiration from various international human rights instruments such as the European Convention on Human Rights and the Universal Declaration of Human Rights. Marshall has demonstrated that citizenship is usually formulated in terms of groups of rights: civil rights, protecting individuals against unnecessary state interference, political rights, guaranteeing the opportunity to shape policies directly affecting individuals, and economic and social rights, ensuring an individual's fair share in the nation's wealth (Marshall, 1950). The Charter broadly encompasses this definition, at least regarding civil rights by providing for rights relating to Freedoms and Dignity (Articles II-61 to II-79). Provisions relating to social and economic rights on the other hand, are strictly qualified and dependent on how member states or the Union have legislated in this area. Article II-81, for example, prohibits any form of discrimination on grounds of nationality, but only within the scope of application of the Constitutional Treaty. Because the Constitutional Treaty does not provide for a right to equal treatment for non-nationals, this article will probably remain without practical effects. Similarly, under Article II.94 everyone residing and moving legally within the Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. As mentioned earlier, the Constitutional Treaty does allow elsewhere individual member states to derogate from this principle.¹⁴ With regard to political rights, the Charter grants a handful of so-called "citizen's rights" to every individual, with the notable exception of the right to vote and to stand as a candidate to municipal and parliamentary elections, a right also mentioned in Part I of the Constitutional Treaty. A third country national could for instance invoke his right to good administration, to access to documents, to refer to the Ombudsman or to petition the European Parliament.

In sum, one should not overestimate the scope of the rights enshrined in the Charter. Some of the most tangible political rights find their basis elsewhere in the Constitutional Treaty. A major innovation in terms of citizenship for instance was to add a citizen's right of initiative. Under Article I-47.4, one million citizens could invite the Commission to submit any proposal when they consider that an act of the Union is required to implement the Constitutional Treaty. Non-nationals would have benefited greatly from this right as their status will depend very much on the good will of the institutions to implement various provisions in the Constitutional Treaty. This is another missed opportunity to achieve representation of migrants' interests at EU level.

With regard to acts implementing the principles enshrined in the Charter, they will have to rely essentially on the provisions contained in the Chapter relating to the area of freedom, security and justice. The Constitutional Treaty did not substantially modify Article 63.3 of the Amsterdam Treaty which, from the view of the Convention Working Group on justice and home affairs, was already adequate in terms of ambition. Quite significantly however it expressly gives the Union competence to define the rights of third country nationals residing legally in a member state (Article III-267.2.b). Thus the proactive stance adopted by the Commission is given full recognition. Indeed the 2003 Directive concerning the status of long term resident third country nation-

als aims at granting rights similar to those of EU citizens. In addition to an enhanced protection against expulsion, settled non nationals shall enjoy equal treatment with nationals in a number of important domains such as employment, education, social security, etc. It is regrettable however that neither the 2003 Directive nor the Constitutional Treaty provides simply for a general right to equal treatment. Rather, it seems that we are heading towards a form of 'denizenship' i.e. an enhanced status for legal migrants, granting rights on a piecemeal basis. A further factor for unequal treatment is to be found in the continuation of opt-outs by the UK, Ireland and Denmark written in the Protocols secured in the Treaty of Amsterdam, whereby these countries retain the option to participate in decisions relating to the treatment of third country nationals on an ad hoc basis.

Despite the weaknesses above-mentioned, the incorporation of the Charter in the Constitutional Treaty certainly reinforces its legal impact. The Commission and the European Parliament have started to refer routinely to the Charter as a source of inspiration. Should the Constitutional Treaty come into force, the European Court of Justice and the Council will also have to take into account fundamental rights in their decisions.

4 The institutions as a remedy

4.1 *The European Court of Justice: a fairer treatment for third country nationals?*

Although the Treaty of Amsterdam transferred measures relating to migration policy under the jurisdiction of the ECJ, important derogations to the competence of the Luxembourg Court can be found in the current treaties. Article 68.1 TEC limits the use of preliminary rulings to national courts or tribunals against whose decisions there is no judicial remedy. In other words, the ECJ is competent to give preliminary rulings for questions of interpretation raised by the highest national instances only, which means that - in the rare occasions a case will reach that stage - there will be long delays before a national judge could refer to the ECJ. A second limitation results from Article 68.2 TEC which provides that the ECJ shall not have jurisdiction on measures ensuring the absence of control on persons at internal borders if they relate to the maintenance of law and order and the safeguarding of internal security. Finally, Article 68.3 TEC stipulates that individuals will not be able to benefit retroactively from a ruling on a question of interpretation raised by the Council, the Commission or a member state.

The Convention needed to address these limitations. Indeed, not only does the ECJ have a unifying role, and its binding case law is a tool for effective harmonisation across the member states, it also fulfils an important democratic function. Judicial protection is an essential feature of citizenship, especially in sensitive areas such as Justice and Home Affairs where individual liberties may be at stake.

The Constitutional Treaty unifies the Court's jurisdiction and enhances its role significantly: in addition to granting the Court competence to give preliminary rulings at all levels of instances without restriction (Article III.369), the new Treaty removes the exception regarding jurisdiction on border checks. This is an unprecedented move and it could give the ECJ the opportunity to expand the nature of the European demos to third country nationals, or at least to those exercising their right to free movement.

It has been hinted indeed that the ECJ is not driven by human rights considerations but by establishment of free movement. Nonetheless, the incorporation of the Charter in the Constitutional Treaty may promote the role that the ECJ could be playing in the promotion of human rights. Problems however may rise from the interpretation of the horizontal clauses contained in the final articles of the Charter. These final clauses aim at limiting the impact Part II of the Constitutional Treaty could have on member states' actions. The provisions of the Charter are addressed to the EU institutions and to the member states but only when they are implementing Union law (Article II-111.1).¹⁵ According to Article II-111, fundamental rights cannot be used to expand Community competencies. This paragraph at first sight seems almost superfluous as the ECJ has always refused to extend the scope of Community law in the name of fundamental rights (Vranes, 2003).¹⁶ However, with regard to the principle of equal treatment, it is worth noting that the ECJ has applied the principle of non-discrimination on grounds of nationality in a great number of cases, going well beyond what was originally provided in the EC Treaty. Should it be willing to expand the effect of the Charter, the ECJ could well do path-breaking work towards

the creation of a European economic citizenship for non-nationals.

In other words, the impact of the Charter and the rights provided in it will depend a lot on the role the ECJ will be willing to assume. With this regard the importance of the *locus standi* i.e. the circumstances where the ECJ will have the occasion to interpret the Charter, is vital. In other areas of EC law, the current conditions for an individual to bring a case before the European Courts are quite restrictive and interpreted strictly by the ECJ¹⁷. The ECJ has made it clear that it favours a decentralised judicial system, leaving the dealing with individuals to national courts. Although the Constitutional Treaty unifies the jurisdiction of the ECJ, it does very little to expand the *locus standi*. A person may institute proceedings against any act which is of direct and individual concern or against a regulatory act not entailing implementing measures if it is of direct concern (Article III-365). Various reasons can account for this: costs, delays and a deliberate choice for judicial subsidiarity. According to Article I-29, member states shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law. But if this provision aims at securing a right to an effective remedy, it also reinforces the member states' appropriation of European citizenship.

4.2 A more efficient and democratic decision-making

The Constitutional Treaty provides that the Union shall develop a common immigration policy under the ordinary legislative procedure which grants the European parliament co-decision powers. This is a very positive development. The current decision-making on Justice and Home Affairs is indeed characterised by its lack of transparency and democratic control. Currently, the European Parliament, to be consulted by the Council, has little role to play unless the Council so decides. Article 67 TEC provides that after the transitional period there could be a move towards co-decision, a decision nonetheless subject to unanimity in the Council. The consultation powers have certainly enhanced the role of the European Parliament as it was merely informed by the Council under the Maastricht Treaty. Nonetheless, these provisions do not provide an adequate answer to the Union's legitimacy deficit and the European Parliament currently has no or little power of influence over decisions affecting directly the lives of the people it is supposed to represent. The European Parliament has always developed a very pro-active stance in the area of Justice and Home Affairs, and its long awaited involvement in the decision-making procedure will certainly help to reinforce the move towards the adoption of a comprehensive policy towards legally resident third country nationals.

A major achievement for the Constitutional Treaty is that it provides for qualified majority voting to be the rule in the area of Justice and Home Affairs. Remarkably, the Treaty of Amsterdam had set for the first time deadlines for the adoption of measures relating to asylum and visas but no such agenda was provided for measures safeguarding the rights of nationals of third countries (Article 61 TEC). This is unsurprising given the cumbersome decision-making procedure, requiring unanimity in the Council which has so far resulted in endless discussions significantly watering down the Commission proposals. It took more than two years for the Council to agree on a final draft of a directive on the status of long-term resident migrants, i.e. twelve months more than the expected deadline. Unanimity cannot be sustained, especially in the light of enlargement. The Treaty of Amsterdam gave the Council the opportunity to adopt all or parts of the title on asylum and immigration provisions by a qualified majority vote (Article 67 TEC). Despite the unpromising precedent of a similar "passerelle" clause contained in the Maastricht Treaty, the Hague European Council of November 2004 has instructed the JHA Council to apply the procedure provided for in Article 67 no later than April 2005. The switch to qualified majority voting, will allow faster decisions while, as the Convention Working Group rightly put it, promoting compromises on a higher level of ambition and honouring the European Council commitments. Some countries, such as Spain, with an economy relying significantly on immigrant labour force have already expressed their interest in pushing through measures facilitating access to labour markets to legal migrants.

Article III-136 relating to social security for migrant workers is also subject to the ordinary legislative procedure, that is qualified majority vote and co-decision, with the notable proviso of the emergency break allowing a single member state to interrupt the procedure should it consider that a fundamental aspect of its social security system could be affected. Not only could this

emergency break adversely affect the speed and the overall quality of decision-making, it could also deprive the European Parliament of its powers by interrupting the legislative procedure. An 'emergency' brake, however, should not amount to a veto right and it is quite unlikely that member states will have systematic recourse to this procedure. Admittedly, it will serve a political purpose, heads of government being able to reassure public opinion that migrant workers' families will not be in a position to 'swamp', say, health services.

5. Conclusion: a missed opportunity; but a necessary evil?

The Constitutional Treaty is to be welcomed as an attempt at responding to the positive signals sent by the European Council at Tampere in 1999 and steadily renewed since then. The European Union is moving towards establishing a culture of rights for both its citizens and legally resident non-EU nationals, as evidenced by the incorporation of the Charter of Fundamental Rights in the Treaty. Also, the Constitutional Treaty strengthens the Union's competence to secure freedom of movement for non-nationals and the panoply of rights attached to it. Finally, the Constitutional Treaty will contribute to more efficiency, democracy and transparency, thanks to the enhanced role of the European Court of Justice and the European Parliament as well as the switch to qualified majority voting.

Arguably, however, what the Constitutional Treaty truly achieves in terms of treatment of legally resident non-EU nationals is little more than a barely disguised public relations exercise. On the one hand, the Constitutional Treaty opens an avenue for a more inclusive citizenship, on the other, the quasi totality of the envisaged policies will depend on the good will of member states. By definition, however, citizenship rights should not be dependent upon discretionary measures from the state. The right to a citizens' initiative, as provided by Article I-47.4 of the Constitutional Treaty, is a strong sign that EU membership is moving away from the mere setting out of economic rights towards a more comprehensive citizenship. If this is the case, third country nationals are lagging far behind: the Constitutional Treaty does not even provide for an absolute right to free movement. In short, by failing to provide for a general right to equal treatment, the Constitutional Treaty missed the opportunity to achieve a more inclusive European Union.

If the Constitutional Treaty fails to be ratified, the Amsterdam provisions, as amended by the Nice Treaty, will continue to apply. Some of its provisions such as qualified majority vote and co-decision will nonetheless be implemented. The existing Treaty objectives, however, are less ambitious and the Charter has no legal effect. It has been said that a crisis will follow if the Constitutional Treaty is not ratified. Yet, an electroshock could be just what the EU needs to produce a truly innovative document. But no matter how seducing this scenario is, it is also very perilous. For a crisis to be beneficial it needs to be manageable and there is no guarantee that the current heads of state and government will be in a position to do so.

Notes

¹ Article K.1 provided that the following areas were recognized as being of common interest:

immigration policy and policy regarding third country nationals, including their conditions of entry and movement within the territory of member states, conditions of residence, including family reunion and access to employment

² the European Parliament was to be regularly informed (Article K.6). The ECJ could potentially have jurisdiction to interpret and rule on conventions (Article K.3.2.c).

³ 04/03/1996, OJ C80 of 18/03/1996.

⁴ See for example the Commission Communication on Immigration, Integration and Employment (COM (2003) 336 of 3 June 2003).

⁵ Article 2 TUE provides that: "the Union shall set itself the following objectives: (...) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement is assured in conjunction with appropriate measures with respect to border controls, asylum, immigration and combating of crime".

⁶ COM (2001) 127 proposal leading to the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents.

⁷ See for example Royer (1976) ECR 497 on the right of entry and residence, Commission v France (1986) ECR 273 on direct discrimination, Sotgiu (1974) ECR 153 on indirect discrimination.

⁸ Caisse d'Allocation Familiales v Meade (1984) ECR 2631.

⁹ COM (2001) 127/ 2003 :109 :EC of 25 November 2003.

¹⁰ Antonissen (1991) ECR I-4265 paragraph 21.

¹¹ Commission v Belgium, Case C-344/95 of 20 February 1997.

¹² Commission v Luxembourg (1993) ECR I-817.

¹³ On the process of drafting of the Charter and a discussion of its legal status, see Christopher McCrudden (2002), The future of the EU Charter of Fundamental Rights UACES On-line Reflection Papers. Available at <http://www.uaces.org/E54Paper1.pdf> and Grainne de Búrca, Grainne (2003), "Fundamental Rights and Citizenship", in de Witte, Bruno (ed.), Ten Reflections on the Constitutional Treaty for Europe. Available at <http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf>.

¹⁴ It is worth noting however that not only is this paragraph not in line with previous case law, it also seems hardly justifiable that member states could violate fundamental rights when they are entitled to derogate from EU law.

¹⁵ ERT (199) ECR - 12928.

¹⁶ Article 230.4 allows a person to institute proceedings against a decision if it is of direct and individual concern. These conditions have been interpreted very strictly by the ECJ. In UPA, the Court ignored the liberal approach presented by Advocate General Jacobs and refused to relax its rigid case law on the conditions for standing (UPS (2002) ECR I-833).