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Introduction

The notion of the human face[1] of Europe merits evocation after almost 50 years of planned integration. What face does Europe now present or represent? A selective and inaccurate representation of the integrated European might be a white, prosperous and loyal democrat, an image often associated with EC/EU. But Europe represents many falling outside these simplistic images, not least many non-Europeans who reside there, who are politically and economically excluded from the *nouvelle Europe*. As Walker has pointed out, it is easier to define what Europe is not rather than what it is (Walker, 1996) and arguments about integration being exclusive or elitist are not novel. But there is a renewed need to question the exclusiveness of the integration process that resides in its increasingly focused discrimination (de Búrca, 1997).

The trend since the Single European Act has observed the perpetuation of a recently invented myth of the EU service the deity of democracy above all, and consequently engaging in language of rights window-dressing and political participation fripperies (e.g. the construction of European Union citizenship).[2] These citizen-friendly initiatives are intended to give the impression of a change of register or mood. This change serves the idealism of integration, since it depicts a Europe moving beyond the market-only-based phase and sighting a constitutional future on the horizon. In the cynical recognition of the realities of Treaty posturing and Intergovernmental Conference *grands projets*, some benign political duping would be supportable and indeed predictable; decorative rights provisions can be considered an inherentaspect of the early stages in most constitutional construction. But these EU initiatives have been accompanied by committed practices and policies, which function within the integration framework and have very tangible effects on people who have limited access to any political or juridical means of challenge, helping to create a realm of exclusion. Exclusivity on many levels has been written into the fabric of European integration and perpetuated in myriad ways: politically, with executive élites dominating; no effective or real legitimacy (Weiler, 1996 and de Búrca, 1996) or participation; the dual dilemma of ostensible domination by large states yet in reality more "rights" for nationals of small states; gender-based exclusions; the marginalization of the

[1] Laffan, 1996, p. 96, referring to Willy Brandt's use of the term.
[2] Art. 128 EC

unemployed, the disabled and many more in terms of the concrete exercise of EC-derived benefits. The EC/EU's increasing attachment to the discriminatory treatment of non-Europeans is the focus of this chapter. The operation of this "policy" can no longer be legitimately justified and sits uneasily within the current rhetoric of rights and democracy in the EU.

The concept of exclusion has become intimately linked with maintaining the perpetual motion of integration, in particular with one of its current manifestations, the identity issue. The Third Pillar, emerging immigration policy and citizenship considered together evidence the construction of a larger framework of alterity than is obvious from isolated discussion of these factors. Functioning as an inchoate whole, they ensure the effective exclusion of non-Europeans in many spheres and contribute to a negative direction for integration, one in which may be discerned the foundations of the formation of a European identity. This identity is being deliberately constructed based on opposition to an "other" - an other readily identifiable as emerging from European history (Fitzpatrick, 1997), but who for this purpose continues to be treated collectively as a negative reference point. The joint operation of exclusionary practices, coupled with the overt identity industry, and with casual and seemingly uncontrolled constitutional developments, are fundamentally at odds with the professed motivations for positive and enduring European integration.

That EU Member States demand power over immigration control and nationality is not at issue here. But what factors seduced the Member States into "polling" questions of inclusion and exclusion, issues that have traditionally resided at the heart of nation state sovereignty? There are undoubtedly ingrained, historically determined, race-related aspects of the EU's alterity politics, but this is both too simplistic and superficial an explanation. It is helpful to separate perception from reality in this sphere and to clarify some overused terminology in this context. There is a generally prevailing tendency across disciplines and discourses to speak of "immigrants", "migrants", Third Country Nationals etc. as if the people concerned constituted one amorphous "other", whether they be resident within or outside the EU. When the discussion is of "security" (Wæver, 1996) or integration imperatives, this "other" is assumed to be a threatening other, certainly of a "different" race and class, but distinctions are rarely made and the resulting vagueness conveniently serves to make arguments for controls or restriction easier. It is a small step from perceiving all non-Europeans as "immigrants", all immigrants as "illegal immigrants", all "illegal" as dangerous or as criminals. The race element of the hidden exclusion machine is often superficially suppressed, but it clearly forms an integral part and overt consciousness of this is only recently emerging.[3]

[3] COM (95) 653 on racism, xenophobia and anti-semitism, Council Doc. 6906/1/95, Final Report of the Consultative Commission on Racism and Xenophobia.

Some basic figures help to expose the realities[4] and put this discussion into perspective. There are around 18 million non-EC nationals resident in the EU. In that sense, this category of others might well be said to constitute almost a 16th Member State. However, that description serves to alienate further, as it perpetuates the impression that they constitute a group apart or separate, and are individually indistinguishable from each other. This is part of the exclusion ideology, the need to isolate and control and extra-European threatening force. But as the figures demonstrate, there is no simplistic race dimension here. For example, compare the number of USA nationals resident in the EU (339,758) with the number of Indian nationals (210,795) and, in general, the numbers of European (non-EU) nationals (4,128,544) with African nationals (2,698,224).[5] Yet the security discourse - and its distant relation, Member State-based pockets of nationalism - sees only the foreigners who fit the stereotypical images of otherness usually on a race or religion basis. The impression of the other usually peddled creates a confusion in terms of the perception of who is "European"; not all Europeans are uniformly of the same race or religion, not indeed "resident" in the territory generally regarded as "Europe".[6] For example, a Turkish national who has lived all her life in Germany without obtaining citizenship is not only seen to be more "foreign" than a resident of, for example, a French Departement d'Outre Mer, but - more importantly - is legally treated as such.

Who is and who is not European, who decides this, how is exclusion exercised and where do these issues fit within the pattern of integration?

Free Movement?

"A Turk […] doesn't go to the opera."[7]

The invention of European Union citizenship involved the association of the pre-existing fundamental freedom of movement of persons as its first listed "right" or attribute.[8] As an exercise in the conglomeration of conceptual confusions, it would be difficult to better Art. 8; but it begs the question to what extent this rearrangement of the constitutional position of free movement of persons represents a change in its legal character, which - in turn - directly affects the position of non-EU nationals. Whether or not free movement of persons policy in the EC/EU has undergone any transformation as a result of this reference in Art. 8 EC, its mention nonetheless affects the exclusion framework. Free movement of persons has developed around the

[4] See COM (94) 23 on Immigration and Asylum for entry and exit figures.
[5] COM (94) 23 Annex I.
[6] Art. 227 EC and Declarations No. 25 and No. 26 of the TEU.
[7] Z. Senocak (1993), *Atlas des Tropischen Deutschlands*, Berlin: Babel Verlag, p. 22, cited in Robins, 1996. In the EU, non-EU nationals in certain Member States may have to pay more to go to operas and museums than an EU national. Case C-45/93 *Commission v. Spain* [1994] ECR I-911.
[8] Art. 8a EC Treaty "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States…".

notion that it is an "insider" privilege and its new link with citizenship (which, as will be discussed below, evidences precisely the constitutionalization of discrimination) now renders this freedom a cornerstone of the exclusion order.

The discrimination-based history of free movement of persons is well documented; inequalities have been directly created and perpetuated by a combination of Treaty interpretation, secondary legislation and judicial pronouncements in this field (Cholewinski, 1996; Hervey, 1996; Plender, 1990), which effectively witness the whittling down of a seemingly large expression of the "freedom" in the Treaty to a right limited in the main to Member State nationals with an economic function. The uncertainties and lacunae produced by free movement law encompasses the situations of non-economic actors (for example, children or gypsies), non-married couples, homosexual couples and disparities between the various attendant rights contained in secondary legislation. But the position of non-EC nationals, they being effectively deprived of this so-called fundamental freedom, is the most significant discrimination allowed for and engendered by free movement law. Their admittance to the club of free movers is essentially limited or exceptional, contingent upon visas, or Association Agreement rights, or derivative and dependent on an EC national's primary right.

The creation of EU citizenship has increased the exclusivity in respect of non-Europeans, creating special (albeit limited or superficial) "new" rights for Member State nationals. In "constitutionalizing"[9] or elevating, in an as-yet undefined manner, the inequalities inherent in free movement provisions, non-Europeans have been doubly affected or excluded. Lack of thoughtful drafting of Art. 8 may partly explain this effect, but the implied freezing of provisions relating to the free movement of persons at this stage of its development without regard to its discriminatory effects may entrench that discrimination.

The alterity perpetuated or caused by provisions relating to the free movement of persons operate at practical, legislative and juridical levels. In general, these effects can be regarded as the necessary and predictable consequences of a confined, functional interpretation of this fundamental freedom. If Arts. 48-66 EC are narrowly interpreted as serving the demands of the reconstruction of Member State economies within the common or internal market, then it is not surprising that they should function to encourage a Europe of free-moving workers and consumers. But as to why certain workers and consumers (i.e. permanently resident non-EC nationals) should be physically/territorially confined and prevented from contributing in this manner is highly questionable. Even limiting the argument within an economy-based view of integration, this exclusion of 18 million EC residents from full participation in the market and related generation of the EC economy. If a combination of inherited race and immigration issues are not to have

[9] Commission of the European Communities, COM (93) 702, Report on the Citizenship of the Union, p. 2.

detrimental effects, there is a need to have a holistic view of integration as encompassing them. The most basic starting point is the abolition of this rather bizarre and discriminatory consequence of the process, the creation of a market for free movement that does not allow for the movement of all who find themselves within the territory of the market. This is not in any sense an abstract concept; free movement between Member States is one of the most tangible benefits of European integration and its closure to non-European residents often has very overt manifestations. Free movement of persons law has fostered a type of Euro-nimbyism, which has created a living standards boundary (Smith, 1996, p. 17) between the privileged free movers and the non-movers, in restricting the latter's ability to engage even in the most basic benefits of integration. Much debate on these issues necessarily acknowledges the inherent economic ideology behind Arts. 48-66 EC, but the EU's *mauvaise foi* in relation to the peoples of Europe can only deepen when principles of participation are declared in the Treaties and yet not fully evidenced by "citizens" and denied almost completely to non-citizens.

There are different levels of discrimination and inequality in terms of inequities between categories of non-Europeans seeking to move within the Union. For example, the expansive rights of non-resident EFTA nationals compared with other (resident) non-EC nationals. The tendency to evoke Asian or African non-EC nationals in this context is misleading, as this contributes to perpetuation of the image of a defined and less culturally-aligned category of other. There is rarely mention of injustices done to permanently resident US citizens or Australians, for example. It would be surprising indeed to read dramatic media accounts of Paris intellectuals fighting for the rights of 300 New Zealanders or Canadians taking refuge in a church[10] or indeed ECJ free movement jurisprudence involving non-nationals from countries of the North.

Limited free movement may be explicable by resorting to concepts of sovereignty and traditional state control over entry and inclusion, but considering the fundamental rationale of free movement (intended to allow entry to all qualifying Member State nationals), what motivations can be found for exclusions of people legally resident here? It is difficult to deny the ethno-cultural basis for this policy; Member States are willing to honour the entry of the vast majority of those to whom other Member States have granted inclusion, but not to second-class residents considered not fully part of any Member State system.

On a practical level, the implications of exclusive free movement on non-Europeans are pervasive. A simple comparison with movement of goods provisions displays an irony of integration; i.e. goods produced by permanently resident non-EC nationals may freely move within the entire territory of the EC, but their producers may not. The position of the non-EC national fishing boat worker must be complicated also by the fact that free movement is available to Europeans only. Equally, certain occupations and professions are

[10] "French Celebrities support African's Paris church sit-in", *The Times*, 20 August 1996, p. 10.

presumably, by their very nature, closed to a non-European. For example, airline crew member or a long-distance lorry driver, or indeed work for the EC institutions. ERASMUS/SOCRATES programmes, part of the European identity creation machine, are also closed to non-EC nationals. To what extent do free movement restrictions hinder political involvement of non-Europeans? For example, the attendance of a local councillor at a Committee of the Regions meeting might require a visa. These few examples serve to highlight the absurdity and injustice of selective free movement of persons.

The day-to-day discriminations are theoretically less significant than the fact that there is normative and judicial facilitation of this policy. The role of the ECJ in this regard has been important; the Court does not emerge in a totally negative light from an analysis of its position towards non-EC nationals under the free movement provision, but its part in the development of the tradition of exclusion is important. In terms of the initial expansion of the concept of free movement from a narrow, EC-worker only basis, the ECJ played a crucial role (Craig and de Búrca, 1995, ch. 15) and its jurisprudence on aspects of the derivative rights of non-Europeans has been a positive contribution to the precarious and confused position they occupy. However, the case-law has inherently been based on the connection of the "outsider" with a Member State national (Hervey, 1996; Schermers, 1993). For all the temporary practical benefits jurisprudence such as *Singh* or *Rush Portugesa*[11] may bring, they contribute to furthering the "second class" position of non-EC nationals, when a truly rights-based or Art. 6 EC-based line of reasoning would have ensured a different, more long-term outcome. It would not have required a massive leap of judicial imagination for arguments of the kind raised in AG Tesauro's Opinion in *P. v. S. and Cornwall County Council*[12] to have been used in respect of the permanently resident non-EC national in cases such as *Demirel, Diatta* or *Morson*.[13] This type of expansive reasoning would have taken the emphasis away from their seemingly functional-only position (in the sense conveyed both by the secondary legislation (i.e. Arts. 10-12 Regulation 1612/68) and the jurisprudence, as their having a role only in supporting the EC migrant working as s/he moved or as in the case of *Rush Portugesa* serving the function only of "cheap" labourt, which could be "imported" for temporary periods only). A possibility that has not been fully exploited by the Court is the logical extension of the reasoning in *Cowan*[14] to allow for an expansion in practice of the rights of non-nationals (O'Keeffe, 1993) as wide interpretation of the decision would, in principle, cover most occasions when a person moves to another Member State. But this would have facilitated the kind of fundamental approach to the issue that is necessary. Focusing on the inertia or non-expansive approach of the ECJ in this context forces a reflection upon the overall role of law in this aspect of integration. The normative system is shown to be weak or

[11] For example *R. v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* (Case C-370/90) [1992] ECR I-4265 and *Rush Portugesa Lda v. Office National d'Immigration* (Case C-113/89) [1990] ECR I-1417.
[12] Case C-13/94, 30 April 1996. See further de Búrca (1996b).
[13] *Demirel v. Stadt Schwäbisch Gmünd* (Case 12/86) [1987] ECR 3719, *Diatta v. Land Berlin* (Case 267/83) [1986] ECR 567, *Morson and Jhanjan v. Netherlands* (Cases 35/82 and 36/82) [1982] ECR 3723.
[14] *Cowan v. Trésor Public* (Case 186/87) [1989] ECR 195.

impotent in the face of the exclusionary forces and influences (de Búrca, 1997). Further, there has been a failure to recognize the impact upon an identifiable group of persons subject - without attendant remedies - to EC law, nor has there been a realization of the full potential of the application of general principles of EC law in this context.

An image of EC free movement law emerges as operating through the combination of a less-than-coherent normative base, coupled with an ambiguous and incoherent system of protection to create a judicially-supported culture of otherness. Recent proposals[15] demonstrate institutional cognition of the effects of this background, but it is arguable that, even if these proposals reach the legislative stage, the denial and limitation of this basic "fundamental" freedom for so many years and its focused discriminatory influences will take some time to fade. Their success will be further marred if the impact of citizenship and Third Pillar measures are not acknowledged as forming part of the environment of the marginalization of the "outsider" in the EU.

Citizenship as Discrimination

"Le vrai sens de ce mot [citoyennété] c'est presque entièrement efface chez les moderns."[16]

The first part of *Du Contrat Social* was devoted to research of the means whereby man passes from a state of nature to the civic state ("*l'état civl*"); citizenship plays a primary role here. Similar reasoning applied to an analysis of European integration exposes its failure to allow Member State nationals to move from a state of low-level political participation to that even resembling a civic one. EU citizenship does not further this progression to any extent. Citizenship was one of the major discoveries to emerge from the Maastricht excavation of the large hole that constituted the lack of legitimacy and dearth of democracy in the erstwhile Communities. Despite being obvious and, indeed, inherent for many years, these problems underwent a transformation into crisis status at the time of the TEU (de Búrca, 1996). An intrinsic aspect of this crisis was conceived as one of the solutions. Criticisms of this development have been many (d'Oliviera, 1994 among others). The negative effects of the concept are immediately more important than any positive ones, to the extent that it has created by default and by dual definition a selective European demos and a European "non-demos". Whatever the nature of its fabricated character, this *sui generis* citizenship is here to stay and it is important to prevent further discriminatory orientation and to observe its potential as an inclusionary concept (Habermas, 1992).

[15] COM (95) 653 on racism, xenophobia and anti-semitism, Council Doc. 6906/1/95, Final Report of the Consultative Commission on Racism and Xenophobia.
[16] J.J. Rousseau (1762), *Du Contrat Social*, Book I, Chap. VI.

A brief examination of Art. 8 EC reveals it to be anything by citizenship in the accepted sense of that status, but rather a layer of Maastricht-inspired constitutionalism that can be regarded as a significant but conceptually-flawed development. As a construct, historically and politically, citizenship is inherently discriminatory - the ultimate justified and accepted form of state discrimination (Brubaker, 1992). It is, therefore, not surprising that the Art. 8 definition should reflect this in being confined to EC nationals. It was, at one level and especially in its current form, a conservative and predictable outcome of the IGC process. But that which renders this citizenship doubly discriminatory is the attachment of essentially economic rights and benefits to the new citizens, i.e. the ring-fencing of free movement benefits. The second, related effect of Art. 8 is the implied legitimation of race-based nationalism and exclusion (Weiler, 1996). It does little to encourage participation of the "peoples of Europe"; it has reinforced the non-participation of permanently resident non-nationals. Sparse though the political and civil rights emanating from Art. 8 are, their selective application to a Member State-determined circle of beneficiaries emphasizes in a concrete way that the EU is making little effort to encourage a real multicultural or multiracial composition of the "European demos", or to promote the notion of that the "peoples" of Europe might encompass others than those declared to be European by EU rhetoric (a definition that, in fact, excludes both Europeans (e.g. Poles or Slovenes) and non-Europeans). There is no evidence of openness in Art. 8 and little demonstration of political maturity or sophistication.

Habermas has proposed a decoupling of citizenship from nationality as a partial panacea for the discriminations flowing from Western European definitions of citizen (Habermas, 1992). This suggestion of a post-national citizenship offers the possibility of diminishing the perpetuation of the EU self and the non-EU other as one of the attributes of integration, and would allow for the separation of the EU from the Member State traditions of entrenched ethno-culturalism. Decoupling nationality at EU level would represent a threat to that over-protected virtue of integration, state sovereignty, as any notion that the definition of citizenship status might be within "Brussels'" competency would go to the root of nation-state-based definitions of sovereignty.[17] But the problem may lie partly with the use of language in Art. 8 EC; that which has been defined there cannot be properly regarded as citizenship. However, taking a positive perspective, there might be said to be the genesis of the kind of post-national status that Habermas proposes. This will not develop if Member State nationality remains as the foundation of EU citizenship, but if the motivations for and the purpose of the concept are seriously revised, then a status that does not have to be founded in nationality can be envisaged. It would be a concrete representation of integration, detached from the Member States in terms of definition and rights, open to nationals and non-nationals with a

[17] See, for example Declaration No. 2 TEU and the Edinburgh Decision, 12 December 1992, Section A, Citizenship, which hint at fears of this nature.

refocusing of its benefits and rights at EU level.[18] The usual basis that is proposed for entry into this status is residence - not, however, determined by the Member States, as this would simply perpetuate discrimination. It may improve the status of permanently resident non-nationals within the EU and indirectly lead to a narrowing of the chasm between both real and received impressions of European and "outsider". Ironically, it might allow for the possibility of eligible others to become more European than Europeans themselves, as their loyalties or ties within the territory might not be split so clearly between a Member State and EU as in the case of nationals.[19]

The persistence of the connection between EU citizenship and Member State nationality will allow individual Member State law and policy to continue dictating inclusion into EU citizenship. This may take the form of individually-directed decisions by national administrations[20] that directly bar European-level rights, or a more generalized determining of nationality law, such as the granting of Portuguese citizenship to nationals of Macao. This in fact allows a Member State individually to dictate who the "peoples" of Europe are and consequently who the "outsiders" are. An effect of the current confused tenor of integration is that this power, which would at any rate not be affected by the suggested development of the Habermassian notion of post-national citizenship, affects all the other Member States because of free movement provisions. Integration has promoted and encouraged free movement, but left untouched Member State ability to control inclusion into each state. This trend will be reinforced with enlargement, as it will entail dealing with the effects of the discriminatory citizenship laws of some of the Member States-in-waiting (see Barrington, 1995 for discussion of the Baltic States and the treatment of their Russian populations). This will involve existing Member States taking on board further definitions of "others" or "outsiders", thereby demonstrating a lack of control over this basic aspect of integration.

The invention of citizenship can be seen to play an instrumental role in the perpetuation of discrimination towards both specific and wider groups of non-nationals. Conversely, it provides a potential base for addressing the nature of the EU's relationship with "others" within. This has not gone entirely ignored by institutional actors; the Consultative Commission on Racism and Xenophobia's Report to the Council suggests that "Consideration should be given to the possible extension of citizenship of the Union to all persons who have resided permanently in the territory of one of the Member States for five years".[21] This would be a positive development in terms of a reorientation towards a more inclusive status. However,

[18] Has been well commented upon (see Closa, 1992 and d'Oliveira, 1994), Art. 8 EC offers few Community or Union related rights.
[19] Laffan, 1996, p. 88.
[20] Some such examples would include the refusal of UK citizenship to the Al Fayed brothers (resident for 30 years) (*The Independent*, 21 February 1996), or the treatment of citizens of Mali as potentially polygamous and therefore unfit to become French citizens (Errera, 1994).
[21] Council Doc. 6906/1/95. See also COM (95) 653.

beneficial though this would be for resident non-nationals, the EU's nascent immigration policy would ensure that discrimination towards non-residents continues.

EU Immigration "Law"

"La question du droit d'asile est devenue un enjeu de la lutte révolutionnaire […] 'car elle a pour enjeu de determiner quels sont les droits et les devoirs reciproqués des nations'".[22]

If free movement law can be regarded as responsible for the institutionalization and normalization of "outsider"-directed discrimination, and Art. 8 citizenship as having constitutionalized it, the introduction of Title VI (The Justice and Home Affairs Pillar or Third Pillar) TEU is intended to ensure its practical implementation. This particular outcome of the Maastricht IGC negotiations is a surprising development from the perspective of EU constitutional history. It involves a relocation of competence in the areas of immigration and asylum, which are traditionally regarded as untouchable by the institutions[23], and it evidenced the inclusion at Treaty level of matters normally reserved for the sphere of administrative activity at a national level. Title VI has spawned a wealth of commentary, in which its provisions are widely criticized and its lack of success highlighted (Fernhout, 1996; Walker, 1996).

The Third Pillar's bailiwick encompasses nine areas identified as being of "common interest" (Art. K.1 TEU) broadly encompassing asylum and immigration policy, police co-operation in the areas of drug trafficking, terrorism and international crime. There has, therefore, been a deliberate linking of traditional "security" issues with immigration and asylum by association, thus rendering the latter also as matters of security for the Union. Thus classifying immigration and asylum lends the ultimate authority and justification to actions to prevent their increase. This ideology belies completely the reality of the numbers entering[24] as immigrants or as asylum-seekers[25], and renders mention of rights hypocritical in this context.[26]

But for whom are these security measures intended? Who or what is being protected against the "threat" of asylum-seekers, for example? Who does the Third Pillar represent and who gives it legitimacy? If one accepts the need for security measures of this order, does this imply that the Member States have insufficient power in this regard? Or is it, perhaps, in fact a question of the survival of the state or nation or integration itself that is at issue? In other words, if JHA can be accepted as having a primary role in controlling

[22] Robespierre in the French National Assembly, 1791, cited in G. Noiriel (1991) *La Tyrannie du National*, Paris: Calman-Levy.
[23] See *Germany and Others v. Commission* (Cases 281/85, 283-5/85, 287/85) [1987] ECR 3203, where a number of Member States objected to the Commission's attempt to propose a Decision relating to migration policies affecting workers from non-EC countries.
[24] Total non-EC national immigration into the EU (1991), 1,232,636, (1992), 274,798; emigration (1991) 506,250 - COM (94) 23.
[25] Total number of asylum seekers in EU (1991) 447,275, (1993) 420,718 - COM (94) 23.
[26] The TEU Preamble, Art. F.2. and Art. K.2 all refer to the protection of fundamental rights by the Union.

entry and exclusion, what are the motivations that underlie its operation? If it is intended that European Citizens are to be protected, why is the connection between citizens and the JHA so fragile? Much of the 1996 IGC preparatory material[27] refers to the need to increase "protection" for citizens; had the citizen not been invented under TEU, from where would the authority derive? Finally, is it just the citizens who need such rights, or are the 18 million permanent resident non-citizens regarded as part of the threat?

The brief history of the Third Pillar, a story of movement from Daedalic adhocery to byzantine bureaucracy, is well documented (see, among others, Korella and Twomey, 1993; Bieber and Monar, 1995; Monar and Morgan, 1994; Walker, 1996). It is an analysis that reveals the gradual removal of state activity in these areas to the safe zone of the JHA committee maze, where the state élites may practice low politics, free from the interference of either national or community institutions. The secrecy that surrounded developments during the Ad Hoc Phase and which continues under JHA, the confusion as to the status of the measures and provisions emanating from the process, and the limited participation of the Community institutions (in particular the ECJ, which under Art. L TEU has been refused jurisdiction in the area), are by now well-rehearsed criticisms of the Third Pillar.

The pre-history of the immigration aspects of the JHA was characterized by the careful targeting of the two remaining avenues for entry into the Community states, i.e. family unification and asylum. The developments in the area of asylum can perhaps be regarded as the most significant of the Ad Hoc Phase with the emergence of the Dublin Convention[28] and also several resolutions on substantive aspects of asylum. Many of these developments were supported by a perceived mass increase in the numbers of persons seeking asylum in Member States at the end of the 1980s. It was this period that witnessed the development of the concepts of "manifestly unfounded" asylum applications, "safe host/third countries" and countries in which there is generally no serious risk of persecution.[29] All of these developments may be criticized on the basis of contravening the spirit, if not the letter, of the Geneva Convention on the Protection of Refugees. As in the case of family unification, many of these innovations were "incorporated" into national laws and there were widespread restrictive changes in asylum laws throughout the EC.[30]

In a sea of bureaucratic inventions, it was easy to lose sight of the nature of asylum and its particular reference to the recent history of Europe, and indeed its intimate relationship with the development of the Communities. It says little for integrative progress to observe the treatment of asylum policy under the JHA. It is superficially perplexing as to why the EU cannot locate a common humanitarian interest in excepting

[27] See, for example, the Reflection Group's Report, SN 520/95.
[28] Bulletin EC No. 6 (1990) p. 155.
[29] For a full discussion see Guild (1993).
[30] See for example Wisskirchen (1994).

this from the field of security, in making an effort to develop a procedurally just system for handling the relatively small number of the world's refugees who manage to enter the EU Member States. The association of asylum with crime and terrorism artificially constructs a reality and, in post-1989 Europe, asylum-seekers have partially taken the place of nuclear threat and Communist influence. Mere unarmed, impoverished and generally fearful individuals[31] with the potential to harm nothing more than perhaps the Member State social security systems have been identified as threatening. Perceptions are perpetuated at many levels and it is a short route from the Treaty classification of asylum seekers as threatening, to popular images of all (non-European) foreigners as threatening; the other as dangerous and therefore to be physically excluded.

JHA does not constitute the only element of emerging EU immigration law; Arts. 100c and 100d EC give the EC institutions competence "to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States" (Art. 100c. EC). The confusions created by the potential clash of competencies and powers between JHA and Art. 100c have been noted (Fernhout, 1996; Muller-Graff, 1994). Policy-making in this area raises several questions. In effect, it creates the category of Community immigrant without a relevant, and procedurally defined, Community immigration law. It allows for discrimination on several grounds; first, on the basis of selection of the countries on the "blacklist" of countries whose nationals will require visas;[32] secondly, in discriminating between countries that are geographically proximate, but which would have different visa status; and finally in reinforcing the discrimination to which long-term resident non-EC nationals are already subject by allowing visa entrants more freedom of movement than the former category.

If the past performance under JHA is to be repeated, then the pattern will be for continued secret developments in a confused committee system. However, 1996 IGC preparations reveal the possibility of a transfer of much of the competencies in this field to the EC Pillar. While this would ensure important institutional procedures and safeguards, is it appropriate for the EC institutions to determine issues of who to include and exclude, given their current state of legitimacy? What will be important for the future - and this may be facilitated by EC competence - is co-ordination of the different strands of racism and xenophobia control measures. There is clearly an important connection between the two, but that said, racism does not just apply at point of control. Equally, on the other hand, to equate too closely racism developments with immigration would reinforce the notion that the only persons who might be subjected to racism are outsiders, non-Europeans. The Member States may struggle to maintain control over their own legislation in this area,[33] but if the EU is to continue to develop the mechanisms for constructing a common "alien", it

[31] The definition of "alien" for the purposes of asylum procedure in the Dublin Convention and in derivative national legislative measures is confined to non-EU nationals and does not therefore conceive of the possibility of an EU national needing to seek asylum in another Member State.

[32] COM (93) 684, COM (95) 346 and COM (95) 347.

[33] See for example *The British Approach to the European Union Intergovernmental Conference 1996*, HMSO, 1996.

would be doubly inappropriate for discrimination to operate in terms of different race protection legislation in each Member State.

Any discussion of immigration issues in Europe inevitably becomes complicated, because Member States still effectively retain the power to determine their individual immigration and asylum laws, and act quite independently (if in a similarly restrictive vein) in this regard. But, as has been pointed out, the actual substance is increasingly being determined in an EU sphere - one which is closed or does not allow access in terms of examination of processes, procedures, budgets, policy objectives, etc. What is confusing about the operation of immigration policy in the Member States is that any individual affected by the prevailing legislation or policy cannot easily seek judicial remedies beyond the national "face" of that legislation (except perhaps in terms of recourse to the European Convention on Human Rights institutions), in order that an EU-level inspired and negotiated instrument be examined in that context. That means that an Art. 177 EC reference, for example, might not easily be granted in respect of a question relating to national immigration or asylum laws, and (ECHR input apart) this renders JHA output free from an appropriate constitutional scrutiny.

Exclusion and Identity

"The problem lies in the fact that, in order to be strong enough, the so-called self-identity of Europe needs to be exclusive and different."[34]

Having examined the basic foundations of an exclusion policy in the Union, the question is what objective do they serve? To what extent can it be said that the EU (in as much as that itself exists) wishes to establish an "identity"? At one level, the answers are simple; identity is referred to three times in the TEU in the Preamble,[35] in Article B[36] and in Article F.[37] What is striking about these references is: first, the intimate relationship between defence and security, and identity of the Union; and, secondly, the fact that it is identity of the Union (and in conflict also the identity of the Member States) that is at issue, rather than any connection with a notion of fostering a sense of European identity or Europeanness among "the peoples of Europe".[38] This confusion as to what identity and what form of identity is being fostered is in a sense a separate issue; the point is that the constitutional forces in the EU are aware and desirous of the creation of

[34] T. Ozal (1991), *Turkey in Europe and Europe in Turkey*, Nicosia: K. Rustem & Brother, cited in Robins (1996).
[35] Member States "Resolved to implement a common foreign and security policy, and the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity…".
[36] Art. B TEU where, as one of the Union's objectives is listed "to assert its identity on the international scene, in particular through common foreign and security policy…".
[37] Art. F.1. "The Union shall respect the national identities of its Member States…".
[38] See further Weiler (1996).

an identity for the Union and this is formulated in the main in terms of an external identity, one that has a manifestation outside rather than inside the entity. The emphasis is less on identifying a positive source or sources for the "European identity" to develop or be nurtured, but rather it is formulated in negative terms in the form of presenting a strong, security-based identity externally.[39]

The JHA (and its control companies) is rendered more explicable in this light; common defence is identified as a major objective of the new Union. The application of this policy would have been easier in a pre-1989 past; now the defensive strategies are relocated to security against the more easy targets identified under JHA. The defence element, if it can be said to be at all present, is related to economics[40] and sense of threat to culture (a restrictively defined, Member State version) rather than defence in any real sense of the word. Integration can be perceived as useful if fulfilling this objective, which is fostering the preservation of the elements conservatively identified as necessary to the Member State. Therefore, in those terms, JHA, ostensibly a reduction in Member State sovereignty, is in fact a retrenchment of its elements.

The procession of exclusion, from acceptance of discriminatory movement within the territory to the common definition of aliens and asylum control, appears less than coincidental. It has become a cliché to speak of fortress Europe and, indeed, when links are made between what might have been seen as some of the foundations of that fortress and the wider motivations of those building it, it becomes apparent that, whatever edifice is being constructed, it is from a position of weakness or defensiveness rather than strength. This reflects poorly on the direction for future integration. The supportive background or structure might be located in fast-moving, short-sighted integration, which involves a tendency to forget the history of Europe - a history incorporating both negative (colonialism) and positive (the Islamic past of parts of Europe itself, for example) plural influences. IT may be partly accounted for by what Habermas has called the chauvinism of prosperity (Habermas 1992). In the EU, the chauvinism has become confused as, arguably, the forces of recession are even more influential than that of prosperity.

In the interplay between Member State complexes in relation to inclusion and identity, and the independent drive for a continuing integration, issues of identity, otherness and exclusion have an awkward and unfortunate collision. If integration is regarded as irreversible, it demands an increased consciousness of why it is happening and, moreover, whom it is serving. Implicit in that is the recognition that, if we cannot identify accurately the Europeans, then it is easier and more convenient to define who we *are not* integrating. The whole complex history of the relationship between Turkey and Europe is relevant in this regard. It serves as a long-running example of the EU's inability to deal with a potential "insider" - which it deals with by constantly redefining the meaning of "outsider" (Robins, 1996). This can be explained by the EU's selective

[39] See further Laffan (1996) and Wæver (1996).
[40] But see Spencer (1994a).

and flexible attitude to what European means, and partly because of the hybrid insider/outsider character that Turkey presents.

The success of the internal market has fostered the increased picket-fencing of the Union, a Union that, however, is not closed to all elements of otherness (Korean car factories bearing gifts of employment and technological innovation will easily enter, whereas the individual Korean will meet with more difficulty). But the negative aspects of the successful Delors drive has been a deliberate closure to create an illusion of isolation, of superiority within. The collaboration of identity and exclusion begin the demythologizing of the myth of neutral integration. In one sense, it is not surprising that integration should have mothered a discriminatory monster; what is less explicable is the manner in which this has occurred. The genesis may be identified in the inspired 1980s efforts to promote spontaneous integration, but much confusion now surrounds the actors (Member States and institutions) and their motives, as much of the drama now takes place in the closed boudoir of the bureaucrats.

Conclusion

The exclusionary trends in the integrative process that emerge are marginalization, identity manipulation, Member State domination and a lack of a moral dimension. Behind the façade of the large and open internal market resides a more exclusive boutique. The policies in the Pillars are overtaking the integrative foundations. There has been a reversal of many of the traditional concerns; problems associated with integration through law replaced by that of integration without law in the context of a reorientation towards Member State values and preferences. There, arguably, has not been progression "beyond the sovereign state",[41] but a reassertion or redefinition of the latter determined by nationalist influences, and a perpetuation of provinciality and parochialism. It calls for analysis of the EU's failures that are less likely to be located in Danish referenda results than the state of rights, discrimination and the notion of justice in the Union. *Après le marché unique le deluge*; with peace and prosperity allegedly achieved, both pro- and anti-integrationists are caught, rabbit-like, in the glare of the lack of purpose. The casual constitutional developments that emerge from the IGC process seem incapable of dealing with deeper issues.[42] European integration appears to abhor a vacuum, but fails to fill it with discussion and input of sophisticated theoretical analysis into the Treaty revisions.

These issues highlight the running sore of integration, which is tensions on competence between Member States and the institutions they created to help achieve integration. They have parted in terms of identity -

[41] N. MacCormick (1993), "Beyond the Sovereign State", *Modern Law Review* 56.
[42] Art. F2 TEU as an example.

the institutions were not programmed to cover this; in principle, they should be seen to protect the identity of the Member States, but their wide powers and functions have naturally spawned a role for them in creating a European identity. In terms of inclusion and exclusion, the very existence of the strong centre has created the need for a unified approach, but this has in turn forced a reassertion of Member States' interests here as the state (élite) stakes its sole prerogative to uphold the values of the nation. The machinery of integration could provide the basis for an informed inclusion policy - not divorced from history, but decoupled from the nationalism, narrow-mindedness and other legacies of the European past. The IGC process itself is an inherent part of the dilemma; its ethos and tradition (where beef issues are bartered against Bosnia) fundamentally discourages or prevents conceptually constructive thinking.

Europe has long relied on the fiction of the barbarian other.[43] Integration offered the opportunity for an education in otherness, not a perpetuation of exclusion. Free movement of persons' provisions are inherently an important participatory force if so conceived or interpreted; Union citizenship presents a scope and mechanisms for a wider concept of inclusion that would be impossible at the nation-state level. Even within the mechanisms of the Third Pillar there is the potential to seek a highest (rather than lowest) common-denominator approach in policy and law-making. More generally, the important contribution (economically, politically and culturally) of the "other" needs to be recognized. If integration contains, as of necessity it must, an intrinsic attachment to progress, then it currently has failed in that regard. What is Europe today? It is obviously more than from "Plato to Nato" to saying No. Identity, citizenship and co-operation on questions of inclusion are signs of a phase of integration beyond the level of institutions, but they lack a positive focus.

"The petit-bourgeois man is unable to imagine the Other. If he comes face to face with him, he blinds himself, ignores and denies him."[44] The EU and integration need to serve a purpose larger than that of reinforcing the petit-bourgeois and his need for an Other. These are eighteenth-century concerns, ill-suited to progression towards the twenty-first.

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[43] "What are we going to do now that the barbarians aren't there any more. They may have been the solution", Dante, *Divine Comedy*.

[44] R. Barthes (1957), *Mythologies*, (1993) (translation), London: Vintage, p. 151, where the following is footnoted: "The petit-bourgeois is the man who prefers himself to all else" (Gorki).

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