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HUMAN RIGHTS AND THE EUROPEAN UNION

The Irony of a Bifurcated Narrative

by

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DECLARATION

In fulfilment of the requirements of the University of Warwick for the presentation of a PhD thesis I hereby declare the following:

This thesis comprises my own work and has not been submitted for a degree at any other university.

An early version of Chapter 3 was published as, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000) 25 *European Law Review* pp601-617.

ABSTRACT

Human rights remain an ambiguous and complex subject in the European Union. Although the instances of policies involving human rights issues have attained an increasing presence over the past thirty years there has been an institutional reluctance to mould a unified human rights policy worthy of the name. However, the EU's human rights practices have not been constructed in a wholly random way. They have evolved within discrete policy realms along coherent narrative lines. Specifically they have followed a bifurcated pattern. Internally, human rights are contingent. They are often referred to as "fundamental rights" signifying an underlying conception that owns a restricted definition based on a distinct European heritage. Scrutiny is erratic even casual. Enforcement is left to the Courts and other agencies. Externally, the story is different. Human rights are broad in concept. Collective notions of rights are adopted. Scrutiny can be intrusive and effective. Systems of enforcement, increasingly severe in scope and strength, have been applied.

Despite the extent of this internal/external bifurcation, little academic or institutional attention has been paid to the subject. This thesis attempts to rectify the omission. In analysing the history of the EU's human rights stories, it details the extent of the bifurcation phenomenon and reveals the genesis of its central discriminatory practice. It claims that by failing to address human rights in its early period other than in mythical terms the EU's discourse provided an environment whereby rights became implicated in the representation of European identity as superior and non-Europe as morally and ethically deficient. EU human rights practice developed with this key understanding imbedded in its narrative structure. A sense of irony, provoked by double-standards and discrimination, thus accompanies the EU's rights discourse rendering the EU's role in rights action suspect and the prospects for one unified policy remote.

INTRODUCTION

In 1992 I witnessed numerous human rights abuses. They took place in Lilongwe, the capital city of Malawi. The first victim was a teenage boy. I saw him sprinting from the central market as I sat at a roadside bar. He clutched a pile of clothes as he ran and was being chased by three young men dressed in red shirts and brown trousers. This was the uniform of the Young Pioneers, the enforcers and propagandists of Hastings Banda, Malawi's self-styled Life President. The boy could not escape. He dodged the pedestrians crowding the road, threw the clothes he carried over his shoulder but still they caught him. One of the Young Pioneers grabbed the collar of his shirt and swung him to the ground. The others laid in with their boots. They kicked at his head, at his legs, at his torso heedless of the screams and then the blood. After about a minute, maybe less, they stopped. They dragged him, still rolled into a ball, partially to his feet and back towards where the chase had begun. No one objected, no one seemed interested. The boy was a thief and that was what the Young Pioneers did to thieves.

A second abuse I both saw and imagined. All I glimpsed were the physical traces left behind by the violence. It was no less horrifying for that especially as it was of my own making or so I believed. The victim was a middle aged woman. I did not know her but I had seen her visit, from time to time, the house where I lived. She was the estranged wife of Mr. Manda, the Malawian who looked after my home, but came to see her children who stayed with their father. One day I found that my wallet had

been stolen. I kept it in a draw in my bedroom. It did not contain much of value, a driving licence, a few travellers' cheques. Still, I was persuaded by the organisation that I worked with to call the police. They came and interviewed Mr. Manda. He told me later that he thought it was his wife who had sneaked in during one of her visits. This, he had also told the police.

A few days afterwards, two women came to see me, friends of Mr. Manda's wife. They were distraught. They said the police had arrested their friend. She was not guilty but still a confession would be beaten out of her. I felt implicated in the possible violence that might be done. I agreed to go to the police and see what I could do. When I arrived at the station Mrs. Manda was lying behind the counter. I did not see her at first. It was only after I asked to speak to the Inspector that I saw and recognised the woman on the floor, resting her back against the far wall. Her face was swollen and cut. One eye was half closed. She kept licking her upper lip seemingly past wincing. And I knew what that meant. She had been here for some time and I began to imagine what had happened.

I was shown into the office of the police officer in charge of the station. I told him I wanted to drop any charges. I had made a mistake, I said. He did not believe me. This was what whites did. Run scared, afraid of the consequences of "justice". But eventually he shrugged and agreed to release Mrs. Manda later that day. If there was no crime there could be no culprit. I never saw the woman again although my empty wallet was returned to me a few days later.

The two events I witnessed were not isolated. They may have touched me personally but I was already aware that violence permeated through the country's "justice" system. The treatment of suspects, the conditions in police stations, the children left unnamed and forgotten in adult prisons were common concerns for groups such as Human Rights Watch and Amnesty International. The political oppression and dictatorial habits of Dr Banda's notorious regime had attracted growing attention from these organisations and now the so-called "international community", the donors, were taking notice.

In particular, I became aware that the European Community was beginning to show an interest in Malawi and its internal affairs. In the aftermath of the cold war and the ideological "victory" of democracy and the free market, the Community¹ (or European Union as it was imminently to become) had seemed to have adopted a new dynamic global approach. It was starting to get involved. Member States acting in concert through its auspices talked in terms of the recently drafted Maastricht Treaty. They sought to develop and consolidate "democracy and the rule of law" and respect for human rights and fundamental freedoms². Development aid began to be considered in tandem with notions of "good governance". The suggestion of conditions being attached to aid became an acceptable political response to human rights abuses. Something was being done.

¹ Throughout this work I have used the term "Community" to signify the whole historically linked project that incorporates the European Economic Community, the European Community and the European Union.

² See in particular the Preamble to the Treaty on European Union which confirms the Member States' "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". See also Article 177(2) (ex Article 130u(2)) of the EC Treaty: "Community policy in this area [development co-operation] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

The feeling I had at the time was that the Community had emerged as a potentially powerful agent for human rights enforcement. It had assumed a pivotal position of international influence. Not only was it now the largest aid donor but it also portrayed itself as a new ethically bound force for justice in the world. Respect for human rights were to govern everything it did, or so it claimed. It therefore possessed significant authority.

As if to confirm my impression, whilst I was still in Malawi, the Community issued a *démarche* to the Malawian government calling for improvements in prison conditions, in police behaviour, in the release of political detainees and the introduction of multi-party democracy. When no satisfactory action was taken by Dr. Banda's regime, aid was cut.

The removal of balance of payments support crippled the Malawian economy already disintegrating under the strains of the worst drought in decades. Within eighteen months Banda's regime imploded. Multi-party elections ousted him and his party from power. Democratic institutions were installed and aid was resumed. The Young Pioneers were disbanded. International assistance in improving human rights and the criminal justice system began to flow. The aura of oppression and brutality, a small part of which I imagined I had witnessed, appeared to have been lifted. Banda had gone and the era of human rights and good governance had come to Malawi. That was the story, a success for the Community that now placed human rights at the centre of its external affairs.

The message that the example of the Community and Malawi represented was striking. But on deeper reflection I wondered whether this story of human rights advancement was as impressive and untainted as it would at first appear. Was it really representative of a dramatic shift in ethical politics? Was respect for human rights a decisive influence in constructing policy? Did the principle infuse the whole of the activities of the Community? Did human rights really “now inform on everything the Union does” as Jacques Santer, the President of the European Commission, had suggested?³

My experiences in Malawi prompted me to investigate these questions. I began to consider the whole history of the Community’s portrayal of human rights. For it was only in placing the “new condition” in some kind of perspective that I felt I could hope to understand the deeper nature of human rights within the Community. It was during the investigative process that I then became imbued with a sense of ambivalence on the matter. I saw that the Community through its institutions had constructed a complex system of stories, sometimes in the shape of policies, sometimes in law, sometimes in practical action, sometimes in political rhetoric. And when analysing these narratives it became apparent that there had developed a fundamental division between them. From a relative silence on human rights issues early in the life of the Community, and later the establishment of a working principle that the Community was founded on respect for human rights, a “bifurcation” of rights discourse and action had seemingly evolved. An external approach had developed over time that was distinct from the internal in all of the three crucial

³ Jacques Santer, ‘Foreword to the Commission’s Report on the External Dimension of the EU’s human rights policy’ [1995] COM(95) 567 final.

aspects of human rights: their definition and scope; the methods of scrutiny employed; and the enforcement measures the Community was able, or chose, to use.

The effect of the nature of the bifurcation was to call into question the coherence and ethical basis for the Community's human rights policies. It suggested that there were fundamental uncertainties about the very values the Community expressed in this field. Not only was the distinction between internal and external approaches indicative of a gap between a universalising rhetoric of human rights and the Community's practices but it also suggested that some form of discrimination, perhaps racially motivated, had been instituted.

From these reflections emerged my research questions. How had this bifurcation come into being? What were its form, extent and nature? Why had it developed? And what were the implications of its presence? Was it indeed indicative or creative of a central discrimination that represented something far bleaker than merely a diversity of policies?

Such questions have set the parameters for this study. The thesis that has evolved as a result and the means by which it is presented are outlined below.

Outline of the Thesis

The intersection between human rights and the Community's law and practice has proved to be both a contentious and complex subject. It poses questions that span both the macro and micro levels of Community affairs. Indeed, few areas of Community law and policy have escaped scrutiny in this respect.⁴ As a result the subject has attracted significant scholarly and political attention. In particular, over the past thirty years, one can observe an ever-increasing growth in the production of Community institutional pronouncements and deliberations connected with human rights concerns. One need only look to the Council's Annual Reports on Human Rights, the first of which was published in 1999, to see how the scope of reporting human rights matters has been broadened in recent years.⁵ Critiques and commentaries upon specific human rights policies adopted by the Community have also proliferated, tracking developments and proposing reform.

The interest has been fuelled by recent decisions of the European Council that possess constitutional characteristics. First, in Cologne in 1999 it was determined that a "European Charter of Fundamental Rights" should be established that might be "integrated into the treaties."⁶ Second, in Nice in 2000 the Charter was adopted, for the present, as a declaration of intent rather than a legally binding document.⁷ The nature and role of human rights has thus been drawn to the very forefront of debate

⁴ For a recent example of a broad examination see Philip Alston *et al* (eds.) *The EU and Human Rights* (Oxford University Press, Oxford 1999).

⁵ An analysis of these reports is provided in Chapter 4.

⁶ European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, Presidency Conclusions - Cologne 3 and 4 June 1999 Annex IV

⁷ EU Charter of Fundamental Rights [2000] OJ C364/01.

concerning the constitution of the Community and how the law and practice of human rights should be developed.

It is within the context of on going constitutional activity at the heart of the Community's development that my identification and analysis of bifurcation must therefore be placed. On one level, my aim is to contribute to the evident challenge that has emerged with regard to the means by which human rights should or could be incorporated into a constitutional framework. Indeed, how human rights should be presented and how they should influence the policy that is continuing to emerge is an important consequence of my analysis. In short, I am looking to provide an insight into the character and potential future ethical direction of what may be called the "European Project" and the role of human rights within it. Bifurcation, I would argue, is of fundamental concern in this respect.⁸

It must be stated at the outset, however, that the *recognition* that a bifurcation, or at least a difference, exists in the Community's human rights policies is not novel. Various authors have detected the presence of a distinction. Philip Alston and Joseph Weiler have suggested that, "[t]here is an unfortunate, although perhaps inevitable, element of schizophrenia that afflicts the Union between its internal and external policies."⁹ Even the Economic and Social Committee of the Community has

⁸ This is not to say that other dichotomies, contra-dictions and inconsistencies in the expression and application of human rights by or within the Community might not be identified. One might think in particular about the human rights aspects of the Community's refugee and asylum policies. However, I am not engaged in a wholesale audit of human rights within the Community. That would require separate extensive treatment.

⁹ Philip Alston and Joseph Weiler, 'An Ever Closer Union in Need of a Human Rights Policy: The European Union and Human Rights' in Alston *et al* n4 above pp8-9. See also within that work, Andrew Clapham, 'Where is the EU's Human Rights Common Foreign Policy, and How is it

indicated an understanding that this distinction exists. The Committee made the point that the

“internal and external aspects of [human rights policy] cannot...be addressed separately...It is also important for the EU to establish a clear link between both arms of its human rights policy, with an eye to achieving its policy objectives in respect of non-EU countries, even if this only involves being asked to take a stand on values on which it challenges other countries and calls upon them to respect.”¹⁰

There is no lack of critical awareness, therefore, that a disparity between the Community’s internal and external human rights policies has been formed. But this is my point of departure rather than conclusion. For, despite the recognition of the phenomenon, little has been achieved to identify the nature of the distinction, to trace its evolution, to understand how it has come into existence, to question the “inevitability”, as Alston and Weiler might have us believe, of its presence, to evaluate its scope and definition, or to determine its significance in relation to the future shaping of the Community’s human rights policies.

Consequently, in this thesis I stress that the presence and nature of the bifurcation has direct implications for the Community’s human rights activities and constitutional structure. The possibility exists that the Community has embraced a strategy that by its nature excludes and discriminates and subjects those not *of* Europe, not of the “peoples” of Europe, to a process of differentiation. Such a core discrimination that may be implied from the process of bifurcation is likely to undermine any ethical claims that the Community wishes to project. It may also create conditions for

Manifested in Multilateral Fora?” at p641 in which the need for consistency between the internal and external dimensions of human rights policies is also advocated.

¹⁰ Opinion of the Economic and Social Committee on ‘The European Union and the external dimension of human rights policy’ [1997] OJC 206/117.

conflict rather than integration through human rights language by instigating double-standards that are unacceptable within and outside the Community. As a consequence, both the Community and its hopes for a credible human rights policy may be consumed by a double sense of irony. First, an “ironic distance” might arise for two constituencies, the people of the Community on the one hand and the international community on the other. For each, the bifurcation may prompt a reading of the Community’s policies and activities to be undertaken with scepticism and cynicism. Human rights initiatives may be treated with disdain. Far from drawing peoples together they may be viewed as fundamentally suspect, even duplicitous. Second, the Community’s human rights policy may become ironic in the sense that it begins to conceal attitudes of superiority and exclusion behind a language of universality and inclusion. The irony of a bifurcation that sees the representation of values and standards *disguise* more persistent, differentiated, complex and contradictory appreciations may then act to undermine the very precepts that purportedly underpin the whole Community.

In order to investigate the full breadth of bifurcation and these issues raised, I have adopted a methodological approach that I believe will most satisfactorily expose the subject. The aim is not only to trace the development of the phenomenon (necessarily an historical enterprise) but also to understand its current form and future trajectories. Chapter 1 gives a full explanation of my preferred approach. It sets out what I contend to be a profitable means for excavating the bifurcation of human

rights, its consequences and the “political unconscious”¹¹ that may have generated it. It not only details the material to be utilised for the analytical endeavour but also explains how such material, such text, may be read and interpreted. The crucial realisation I advocate is that the Community’s textual productions do not merely reflect the political will of its constituent parts or its institutions. They also shape the behaviour and indeed character of those institutions. The power of the text is therefore asserted. It is formed by, and in turn forms, both the polity and its policies. It is *both* generative *and* reflective.

In this respect I take as an initial inspiration the work of the “new institutionalists”. However, I build upon their approach by contending that the double movement of policy generation and reflection can be interpreted as being achieved through a process of narrative construction. From the site of the Community, I claim that ever-evolving institutional narratives emerge that set the direction and parameters of policy resistant to fundamental change. They structure institutional behaviour and the practices of governance as well as subsequent textual productions. They also condition the institutional “life” of the Community and influence the practices of its agents. It is the study of the human rights narratives that provides the focus for investigation and the base from which analysis of the scope and effects of bifurcation is undertaken.

¹¹ Philip Allott has contended that it is necessary to discover the Community’s “political unconscious” if its “philosophical and historical significance” is to be considered. He suggests that this can be undertaken through a form of genealogy following the work of Nietzsche and Foucault. I have adopted a similar approach. Philip Allott, ‘The European Community is not the True European Community’ (1995) 100 *Yale Law Journal* No1 pp2485-2500.

Having identified an appropriate methodology I then turn to a detailed excavation of the central aspects of bifurcation. To do so, I first concentrate on two key areas of *external* projection of the Community's human rights activities, namely development co-operation and enlargement. In both cases I examine the narrative of human rights that has emerged and analyse the three main components of rights practice; the definitions, measures of scrutiny and processes of enforcement. My reasoning for focusing on these two external policy areas is that by extracting the stories of human rights and comparing them with the interior condition the full scope of bifurcation can be revealed. Further evidence of bifurcation might be demonstrated in other external policy fields, notably foreign and trade policies, but the wide range of external activity touched upon within development and enlargement is sufficient to illustrate the depth and breadth of the phenomenon.

Thus in Chapter 2, the history of human rights in the Community's Development Co-operation policy is considered. A policy area that has been present within the Community's institutional structure ever since the Treaty of Rome, it represents the location from which the Community confronts the external in a structured and institutional manner. Through law, rhetoric, and practice, the Community has defined its relationship with the "South" (the term I adopt in preference to the "Third World" or the "Developing World"), distinguishing itself from the colonial relationship that previously subsisted under the regimes of its Member States. In so doing a wide definition of rights that encompasses both the traditional designation of civil, political, economic, social and cultural rights and collective rights such as the right to development has been applied. Furthermore, the Community has instituted an

extensive scheme for scrutiny and enforcement of all these rights that now includes diplomatic “consultations”, financial assistance and sanctions.

Chapter 3 then turns to the narrative of human rights in enlargement and the process of accession to the Community. Here, the distinction between the approaches to human rights internally and externally is lent added pertinence. Its importance lies in highlighting the distinction between the human rights conditions accepted and applied internally by the Community and those directed to states seeking to become members. The historical development of a textual human rights conditionality that has been projected as a requirement for those countries seeking full admission to the Community reveals the evolution of an intrusive and demanding policy. A strategy has been imposed to improve the human rights situation in all states seeking admission. An extensive understanding of rights has been applied in this respect so as to include civil and political rights, economic, social and cultural rights, and as a separate category, minority rights. The pressures that may be applied to bring about systemic change across the human rights spectrum have also developed into a sophisticated approach. This combines constant monitoring with potential enforcement of standards through the withdrawal of aid or the threat of a delay in, or denial of, admission to the Community.

After uncovering the narratives in the two external realms Chapter 4 details the scope of bifurcation evident from the contrast with the interior condition. In its definitions of rights the Community applies a narrow conception internally. Using a limited range of sources, particularly the European Convention on Human Rights, the emphasis is placed predominantly if not exclusively on individual rights. Collective

concepts, including minority rights, find little practical expression within the Community. There is therefore a broad divergence in the meanings ascribed to the rights discourse. Similarly, in relation to scrutiny, the Community possesses few effective means to monitor either its own or its Member States' human rights records. Some internal scrutiny is apparent but it lacks the consistency, resources and political force to match the approach taken externally. When it comes to enforcement, those measures applied to developing and acceding states also find no effective equivalent internally. Thus, across the spectrum of rights practice divergences appear that denote the significant scope of bifurcation. In this context recent initiatives that have been touted as addressing the distinctions must be acknowledged. However, the EU Charter of Fundamental Rights, the Council's Annual Reports on Human Rights, and the Vienna Monitoring Centre for Racism and Xenophobia, in particular, have as yet failed to counter the issue of bifurcation to any meaningful extent. Instead, they can even be seen to contribute to rather than rectify the perpetuation of bifurcation. By these measures focusing on instances of "incoherence" or "inconsistency" the fundamental separated trajectories of the institutional narratives remain intact.

Arguments that have been raised to explain the internal/distinction, which are rehearsed at the end of Chapter 4, do not provide an adequate rationalisation for the sheer extent of the bifurcation that has been described. Issues of competence and political sensitivity may be relevant but they fail to deal with the complex nature of the position. Consequently, my concern then for the remainder of the thesis is to explore how and why bifurcation has arisen and taken its current form. This requires a return to the formation of the Community's institutional human rights narratives.

Chapter 5 commences the process by advancing the proposition that the narrative conditions for bifurcation were set early in the life of the Community. Despite the absence of human rights principles in the EEC Treaty, the Community constructed a mythic account of institutional origin that attempted to deflect the consequences of that deficiency. In order to authenticate the Community as an international entity and a rightful holder of sovereign powers assumed from its Member States, it relied in part on a notion that respect for human rights was a founding principle of the Community. However, by failing to provide a coherent framework for the definition and application of these rights, or a constitutional structure for their uniform development, the Community created an enabling environment within which a bifurcation in human rights policies and narratives could evolve. No institutional constraint was built to prevent human rights policies taking divergent paths. Rather, the internal and external narratives were open to influences more concerned with politics and perhaps prejudice than principle. The very rhetoric of human rights as an independent and untainted construct promulgated by the Community was thus compromised in the process.

Chapter 6 then proposes that the present form and scope of bifurcation were inspired specifically by the Community's adoption of a discourse of European Identity. By seeking a means to encourage unity, or rather adherence to the European Project, through a mythic identity, an identity that looked towards a commonality of values frequently expressed in human rights related terms, the Community's institutional narrative took a hegemonic and exclusionary path. In asserting its authenticity as a representative institution of "Europe", and thus a legitimate site of power and re-

designation of sovereignty within its domain, the Community relied upon assumptions of difference. It sought a definition of itself on the basis of not only what it was but also what it was not. It therefore set the basis for distinction and the limits of its own possibilities.

In this context, the bifurcation in human rights policies (emanating from the stem formed by the myth of founding principle) was encouraged, if not rendered inevitable for two interrelated reasons. First, the nature of the process of collective identity formation can be interpreted as one of distinction. It creates dichotomous dimensions. The internal through a search for definitions of commonality amongst constituents, the external by delineating differences with others. Second, by making human rights a central component of a concept of identity, and by naming that identity “European”, the Community’s institutional narrative of human rights was implicated in the internal/external differentiation. Human rights were utilised as powerful symbols for both defining what Europe was and identifying where others were comparatively deficient in their social and ethical development. As no explanation or exposition was provided of human rights in that narrative foundation, they became fluid subjects, open to distinct definition and application through their development in the two separate spheres. Thus, the approach to human rights internally accepted the basic autonomy of the Member States. The Community only assumed limited responsibility for such matters. Externally there was no such restraint. The discourse and practice of human rights indicated a policy of engagement, interference and enforcement that was both different from and more exacting than the internal dimension.

Having provided an explanation for the creation and particular development of bifurcation I then offer some thoughts in the conclusion on the significance of the condition. I argue that the system of human rights narrative distinction has created a gap in practices that challenges the Community's fundamental claims that it respects human rights and applies them in a universal and indivisible manner. Bifurcation has encouraged a debilitating sense of irony with regard to its human rights policies. Paradoxically, the Community's human rights policies may themselves be criticised on human rights terms. Furthermore, in a related argument, I suggest that bifurcation is indicative of an exclusionary tendency that undermines the Community's ethical claims internally *and* externally. It emphasises the Community's discourse of human rights as a contingent enterprise reliant on location rather than principle. That the bifurcation might be interpreted as indicating a discriminatory project, one emanating from a view of a non-European or non-Western "other" as meriting different treatment from those states and peoples residing within the fortress of the Community, is I argue a damning consequential critique.

CHAPTER 1

MAPPING HUMAN RIGHTS, READING THE COMMUNITY

The thesis of bifurcation presupposes that a pattern can be discerned from the Community's activities that suggest its human rights policy has divided into two basic streams, the internal and external. The purpose of this chapter is to set out a means by which the phenomenon can be traced and the complex of visible or hidden influences that have generated it uncovered and interpreted. This presents both methodological and theoretical challenges.

As a starting point one needs to ask what the "Community" may mean and how policy is constructed by or within it. These issues have generated significant debate over the last fifty years and are by no means settled. Equally, the subject of human rights in the Community is a highly complex one. As Joseph Weiler and Philip Alston point out

"despite the frequency of statements underlining the importance of human rights and the existence of a variety of significant individual

policy initiatives, the European Union lacks a fully-fledged human rights policy.”¹

Indeed, numerous actors and institutions undertake human rights related activities across designated policy fields so as to suggest that any pattern is an illusory one. However, the approach of “new institutionalism” offers a method by which such a pattern within the context of the Community can indeed be uncovered. By focusing on the institutional character of the Community and examining the detail of the decisions made in its name it is possible to detect and follow the creation and development of connected decisions in any particular field. The basic premise of this approach is that the institutions, within which actors make their decisions, themselves help *shape* policy choices. They establish unwritten “rules” of doing business that act upon decision-makers so as to constrain their judgement. However, despite the persuasiveness of the central premise of this approach, there is an element missing that might undermine its appropriateness for my investigation. New institutionalism does not fully explain what it is that places this constraint upon actors, how the institutional context manages to control decision-making to follow a particular line.

I answer this challenge by advancing the argument that, for the Community, the institutional context is first and foremost defined by its “text” (a specific meaning of which I describe and adopt). In making this identification, I propose that the text functions as more than merely a representation of the Community’s history. It also

¹ Joseph Weiler and Philip Alston, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights’, in Philip Alston *et al* (eds.) *The EU and Human Rights*, (Oxford University Press, Oxford 1999) p7.

acts to provide greater definition of its form and scope. In other words, the text possesses a dual purpose. It is both the projection of the Community and a vital part of its project. It is both reflective and constitutive. The text cannot therefore be distinguished from the context for the purposes of investigation.

However, in considering the formation of any policy field, particularly a complex one such as human rights, it is not simply the presence of text that can determine how decisions follow a particular pattern. Rather, it is the organisation or configuration of the text that shapes the field's impetus and parameters. This is my central theoretical stance. The text, and by extension the actions and practices of the Community in human rights, are organised, configured and constrained through the operation of what I have termed "institutional narratives". Stories develop, and constantly evolve, within the institution of the Community across time to make the text understandable. In so doing they weave past and present decisions together to form a complete and intelligible whole, an institutional logic as it were that provides the rationale for any particular policy choice. Every new decision therefore is constrained to the extent that it needs generally to represent itself as authorised by and complicit with the Community's narrative in the relevant policy area.

Adopting such a theoretical approach necessitates combining a literary and historiographical reading of the Community's text with standard policy analysis. Indeed, by combining the approach of new institutionalism with that of the "new history" (used to describe the work of such authors as Hayden White and Dominick LaCapra) I suggest a means by which the theoretical and methodological dilemmas posed at the beginning of this chapter may be solved. Thus an explanation of how the

Community's policies and practices in human rights have formed along bifurcated lines and how they may continue to corral future decision-making can be provided.

1.1 The Community as Context

Since its inception the Community has presented peculiar problems that revolve around its description, definition and development. For the Community is, in many ways, a phenomenon, an entity that is “neither society nor nation nor state”.² It has not evolved as an institution or regime in the way that nations of Western Europe have evolved. It has not evolved as a *society* that has organised itself into an institutional form. It has not emerged as a simple product of culture or popular uprising.³ Rather, it was created through agreement between States and more or less independent actors, albeit ones complicit in those States (including those “founding fathers” such as Jean Monnet). It has developed subsequently both by external intervention (through the influence and practices of Member State governments as well as other actors) and internal initiative (through its institutions).

The novelty of the Community as a political entity has meant that the means by which it has come into being and has since developed have been difficult to identify

² Philip Allott, ‘The Crisis of European Constitutionalism: Reflections on the Revolution in Europe’, (1997) 34 *Common Market Law Review*, p444.

³ Hartmut Kaelble, tells the story of the Community as a ‘top-down’ process rather than a product of social movement. See, H. Kaelble, *A Social History of Western Europe 1880-1980* (Gill and Macmillan 1987) p161.

with any certainty.⁴ As a result a wide range of theoretical interpretations has been applied to the subject, in particular the process of “integration”. There are those who advocate that the Community has emerged as the product of intergovernmental agreement⁵ and those who see it as a developing polity, a structure that has evolved from a gradual process of autonomous assumption of power through a process of “spill-over”.⁶ There are those like Joseph Weiler who claim that the Community is a “non-unitary” polity⁷ and those who suggest the promise of a post-modern regime.⁸ Yet others talk of the formation of policy networks, whereby the Community is one focal point for various actors wishing to co-operate with a view to shaping political decisions.⁹ There are also those who have focused on the institutional nature of the Community that might seem to be evident from the entity’s construction.¹⁰

Howsoever conceptualised, one core acknowledgement is implicit. The Community has become an important source of governance, an entity from which emanate decisions and actions, law and regulations, that both influence and direct the political

⁴ Indeed, there might be little to be gained by attempting a totalising description. Any exclusionary definition may well prove restrictive in terms of the interpretation of action. Activities that do not ‘fit’ any description become ignored thereby rendering any evaluation of policy open to the criticism of being falsely constructed.

⁵ See for instance Andrew Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmental Approach’ in Simon Bulmer & Andrew Scott (eds.) *Economic and Political Integration in Europe* (Blackwell, Oxford 1994) pp29-80.

⁶ The functionalists and neo-functionalists such as Ernst Haas represent such a view. See Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stanford University Press, Stanford 1958).

⁷ The term employed by Joseph Weiler in his classic essay, ‘The Transformation of Europe’ revised and reproduced in *The Constitution of Europe* (Cambridge University Press, Cambridge 1999) at p14.

⁸ See Ian Ward, ‘Identity and Difference: The European Union and Postmodernism’ in Jo Shaw and Gillian More (eds.) *New Legal Dynamics of European Union* (Clarendon Press, Oxford 1995). See also, Harm Schepel, ‘Legal Pluralism in the European Union’, in Peter Fitzpatrick and James Henry Bergeron (eds.) *Europe’s Other: European Law Between Modernity and Postmodernity* (Ashgate, Aldershot UK 1998) pp47-66.

⁹ See, for instance, Manuel Castells, *The Power of Identity* (Blackwell, Oxford 1997).

¹⁰ See in particular Simon Bulmer, ‘Institutions and Policy Change in the European Communities’ (1994) 72 *Public Administration* pp423-444 and Paul Pierson, ‘The Path to European Integration: A Historical Institutional Analysis’ 29 *Comparative Political Studies* pp123-163.

and economic endeavour of its constituents.¹¹ Indeed, as Helen Wallace has commented, “the origins of the EC lay precisely in an attempt to build hopes of better governance for (western) Europe through the integration project.”¹² Such governance has manifested itself formally through the creation of a legal order and institutional structure reliant upon notions of supremacy, direct effect and direct applicability to give it force. Informally, the level of governance is less transparent but can be inferred from the application both of “soft law” in certain areas of competence *and* the systems of cooperative action that are channelled through and by the Community institutions. Consequently, the debate about the nature, extent or existence of a Community constitution has not been without substance. It reflects a realisation of the Community’s legal, normative and persuasive capacities.¹³

Whether or not the Community has limits to its powers or competence, therefore, it still possesses sufficient definition to consider it as some form of political construct. It has thus been variously referred to as an “international regime”¹⁴ or “order”¹⁵ or “institution”.¹⁶ Whatever the epithet, it has been implicit that the Community has come to represent a complex institutional intersection of ideas, interests, law and practices for the management of local, national and international political and

¹¹ By constituents I mean the Member States and all other persons, legal or otherwise, who are directly affected by the Community’s actions and decisions.

¹² Helen Wallace, ‘European Governance in Turbulent Times’ in Bulmer and Scott n5 above pp87-96.

¹³ For that matter it is irrelevant that informal means of decision-making can be contrasted with the structures of law-making otherwise adopted within the Community. Whether formal or informal, decision-making continues to be channelled through the Community.

¹⁴ Andrew Moravcsik, n5 above, p30.

¹⁵ See for instance Wolfgang Streeck, ‘Neo-Voluntarism: A New European Social Policy Regime?’ in Gary Marks *et al* (eds.) *Governance in the European Union* (Sage, London 1996) p66.

¹⁶ See Bulmer, n10 above. See also T. Koopmans who has referred to federalism as perhaps explaining the evolution of European integration “as an institutionalised form of intense but peaceful collaboration between States.” See T. Koopmans, ‘Federalism: the Wrong Debate’ (1992) *CMLR* pp1047–1052 at p1052.

economic problems. It is from this *mélange* that political programmes emerge and are both defined and pursued. From Member States to non-governmental organisations, from corporations to trades union, from national and European bureaucrats to individuals, the Community is recognised as a source of decision-making that warrants engagement in order to shape decisions.¹⁷ And it is also clear that the locus for the engagement, whether formal or informal, is placed primarily in the institutional framework of the Community. In short, that which incorporates all those institutions created through treaty, law and subsequent practice as well as those interlinking networks that connect them.¹⁸

Without the appreciation of the institutional character of the Community, without accepting its institutional setting as context, any discussion of a policy field produced by the Community, such as that which relates to human rights, would be difficult to sustain. Consequently, whatever description is applied, the Community warrants consideration for its ability to generate a “pattern of rule” or “collective governance” that might give rise to policy formation.¹⁹ In other words, the Community can be seen as a legitimate albeit highly complex and constantly evolving institutional structure for identifying and considering policy creation and implementation.

¹⁷ Such engagement may take the form of lobbying, policy networking, informal advocacy and legal action. For a brief review of this ‘sub-systemic level’ policy shaping activity see John Peterson and Elizabeth Bomberg, *Decision-Making in the European Union* (Macmillan, London 1999) pp21-28.

¹⁸ By this I mean the committees, working groups and authorised bodies as well as the Council, the Commission, the Parliament, the Court of Justice and the Court of Auditors from which they derive their authority.

¹⁹ As Antje Wiener has discussed in the context of ‘citizenship’ the “administrative procedures and policy contents” of “policy substance” are related to the “emergent turf of a new polity”, a “political space” in which political struggle takes place. She can thus proclaim “the process of policy-making has become the key locus for establishing the patterns of EU governance.” See Antje Wiener, ‘The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance’ (1998) 4 *European Law Journal* 3, pp294-315 at p297 and p298 respectively.

My preference for considering the institutional nature of the Community as a productive means for defining context reflects the recent analytical advances made in the name of “new institutionalism.” The basic premise of this branch of political science is that “institutions matter”.²⁰ They are not neutral but rather act so as to shape political behaviour. It is the institution (or interaction of institutions) that helps direct not only the strategies of actors operating within that context but also the “goals actors pursue”.²¹

But what in theory are these institutions? Although not an uncontested question by any means, they could range from the formal rule and practice structures created by any government, state or organisation to informal social norms and practices.²² W. Richard Scott suggests that they “consist of cognitive, normative and regulative structures and activities”, are “transported by various carriers – cultures, structures and routines” and “operate at multiple levels of jurisdiction.”²³ Their possible scope is therefore extensive.

At the site of the Community one might witness numerous such institutions operating simultaneously. Given the earlier noted working definition of the Community as an entity that acts as a source of collective governance this is hardly surprising. Thus, any institutional analysis must consider the impact of norms,

²⁰ Simon Bulmer, ‘New Institutionalism and the Governance of the Single European Market’ (1998) *Journal of European Public Policy* 5:3 pp365-86.

²¹ Kathleen Thelen and Sven Steinmo, ‘Historical Institutionalism in Comparative Politics’ in Thelen and Steinmo (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis*, (Cambridge University Press, Cambridge 1992) p8.

²² For a useful, albeit brief, review of the central tenets of new institutionalism see, *ibid.* pp1-32.

²³ W. Richard Scott, *Institutions and Organisations* (1995) p33 quoted by Walter Powell, ‘Fields of Practice: Connections between Law and Organisations’ (1996) *Law and Social Inquiry* p960.

values, conventions, and even prejudices on the activities and decisions of the formally termed institutions (the Commission, Parliament, Council and Court etc) as well as those committees, working parties, NGOs, national and European bureaucracies, pressure groups, and lobbyists, as they operate within the European domain. Together, these amorphous institutions influence those actors acting within the Community in a complex web. As John Peterson and Elizabeth Bomberg have summarised it, new institutionalism “highlights how ‘players’ [i.e. the actors operating within the Community including the formally created institutions] become socialised to the rules of the game in EU decision-making”.²⁴

Such is the inherent message in the “new institutionalist” approaches that have appeared in Community studies over recent years.²⁵ The Community is perceived as the context. It is the institutional nature of this context that provides the “persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain states and shape expectations.”²⁶ These “rules” are examined empirically by incorporating “detailed analyses of particular cases”²⁷ and bringing together “high-profile politics” with “day-to-day policy making”.²⁸ In so doing, a governance regime can be re-constructed so as to determine how any particular policy is structured.

²⁴ Peterson and Bomberg, n17 above, p17.

²⁵ For these purposes I include within the definition of “new institutionalists” those such as Paul Pierson who have tried to evoke a “historical-institutionalist analysis”. See Pierson, n10 above.

²⁶ R. Keohane ‘Neoliberal Institutionalism: a Perspective on European Governance’ in R. Keohane (ed.) *International Institutions and State Power* (Westview Press, Boulder 1989) p1-20 as quoted by S Bulmer n20 above p368-369.

²⁷ Pierson, n10 above, p163.

²⁸ Bulmer, n20 above, p376.

Despite the rigorous nature of this methodology and the persuasiveness of its arguments, however, it is, as Peterson and Bomberg suggest, more a “set of assumptions” than a “proper theory”.²⁹ In particular, it is difficult to discern the rationale that describes *why* actors should act in such a way, why they are constrained within an abstract “pattern of rule”. In many respects, it is taken as read, assumed as *a priori* that institutions help shape political action. The formation of a political choice once made precludes others from intervening. But this notion of “path dependency” relies too heavily on the belief that actors become wedded to policy in effect because of the “sunk costs” in agreeing it or in the difficulties that would be faced in negotiating a substantive change.³⁰

Such a view I suggest is too functionalist in character to explain and more importantly interpret the nature and possible trajectories of a policy field such as human rights. Equally, the understanding that barriers to reform establish an inherent institutional conservatism fails to explain how the Community’s human rights activities have developed *despite* the absence of explicit agreement. Rather, so many questions arise that relate to law, values, standards, beliefs and ethics engaging judicial as well as political, cultural and social interpretation, that a deeper explanation of the Community’s activities is required. This is made particularly necessary given the relatively ill-defined nature of the Community’s human rights “policies”.

²⁹ Peterson and Bomberg, n17 above, p21.

³⁰ *Ibid.* p19.

The situation is made more complex by the fact that the Council, Parliament, Commission and ECJ have all contributed to policy statements and action on human rights related matters without necessarily engaging in any exercise of co-ordination.³¹ Indeed, the lack of coherence in human rights related decisions has been a constant criticism of the Community of late.³²

Consequently, if we are to be able to identify any pattern within this morass, to identify the possibility of a bifurcation in human rights policies that I have suggested may exist, a more persuasive understanding of how the Community's activities have become structured and constrained is required. Although still adhering to the central contentions of the new institutionalism, my suggested starting point is to return to the means by which the Community interacts with itself and its constituents as well as the outside world, by which it projects itself, its decisions and its themes and project(s). In short to its "text". For herein lies the material from which I suggest policy patterns can be discerned and thus extracted.

³¹ Other bodies such as the Court of Auditors and the Economic and Social Committee, as well as committees emanating from the Lomé Convention also contribute to the discourse of rights in the Community.

³² See Andrew Clapham, 'Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?' in Philip Alston *et al*, n1 above, pp636-641.

1.2 The Community as Text

Perhaps due to its *sui generis* character, or possibly the fact that it has evolved without a general social movement or popular uprising, the Community has had to look to self-constituting means to project its existence, decisions and policies. From its inception, it has recorded and projected itself as a polity through an increasingly sophisticated and comprehensive documentary archive. This may be the product recently of a desire for transparency (witness the vast internet programme that has been created³³) but in truth the transmission or communication of message, gesture, action, project and policy has always occurred largely through published text. Indeed, there is some argument for saying that the Community has become primarily a textual enterprise, a “print community” that has arisen as such in the absence of any mass movement that could otherwise ensure its development through social practice.³⁴

The existence of this print community may be borne out by the preference that has been accorded to text in the life of the Community. Since 1957 it has overseen the production of a mass of law, literature, opinion, data and information concerned with its creation, its history, development and its workings. Largely the assumed responsibility of the Commission, it regularly generates remembrances of its progress and explanations of its purposes and ambitions as well as simply recording the “output” of the Community’s institutions. Rather than put on public displays or

³³ See <http://europa.eu.int/>

³⁴ There are intended echoes here of Benedict Anderson’s consideration of “print capitalism” that played a vital role, he claims, in creating nations as “imagined political communities”. See, Benedict Anderson, *Imagined Communities* (Verso London, 1991).

dramas that herald its presence in European life and seek to promote its ambitions it has chosen (with some relatively minor exceptions) to *publish* its project(s) in preference to its (their) demonstration.³⁵ It has even eschewed, on the whole, the oral and visual for the textual despite the modern preoccupation with television and film in Western popular culture. As Delanty has commented, “[m]ost attempts to create a European cultural identity are pathetic exercises in cultural engineering.”³⁶ Consequently, the Community has looked largely to its *textual projections* to help define and promote its political field and identity. Even when it *has* sought to rely on non-textual projections, such as the ritual that might be ascribed to the regularly held Inter-governmental Conferences, parliamentary sessions, the interventions of troikas of Community representatives in areas of conflict, the holding of Europe Day, or the appearance of the Community’s blue flag on car number plates and signs indicating that construction projects have been funded by the Community, invariably the message is confirmed and communicated through text.

Given this preference for text it seems persuasive to suggest that it is to the Community’s text that we must turn to determine how the policy flows and patterns of rule in relation to human rights are both presented and constructed. In this sense, I suggest that the text can be viewed as not only *representing* constituting acts but also as acting in itself as a collective act of constitution. Deliberate and cumulative, the text provides the most complete historical record of decisions, practices and attendant musings that the Community has projected. It records and represents the

³⁵ Timothy Garton Ash has pointed out that the “EU has no public drama. The nearest one gets to political theatre is at important summits...but they are largely reported as international diplomatic fencing matches.” News Review *The Sunday Times* 6.5.2001 p6.

³⁶ Gerard Delanty, *Inventing Europe: Idea, Identity, Reality* (Macmillan Press, London 1995) p128.

constitutional events and discourses that have moulded the Community and the actions undertaken in its name. Equally, it performs a function. In essence it serves to establish a constitutional presence, representing those institutions already described as formal (law and regulation) and informal (practice, precedent, convention and prejudice) that influence policy-makers. The text thus establishes the conceptual boundaries for possible action. It is both *reflective* of the Community institution and *generative* of its actions.

The reflective/generative nature of the text is indicative of a close relationship between context and text. Appropriately enough for an exercise in history, which is my initial concern, such a view takes its cue from historiography. Dominick LaCapra, in particular, has suggested that, “[f]or the historian, the very reconstruction of a “context” or a “reality” takes place on the basis of “textualised” remainders of the past.”³⁷ Equally, as Fredric Jameson points out, the “text” may liberate us “from the empirical object – whether institution, event, or individual work – by displacing our attention to its *constitution* as an object and its *relationship* to the other objects thus constituted.”³⁸ Text and context are seen as connected constructs, each informing on the other. For this reason the text provides a conduit for interpretation and understanding.

³⁷ Dominick LaCapra, ‘Rethinking Intellectual History and Reading Texts’ in Dominick LaCapra and Steven Kaplan (eds.) *Modern Intellectual History: Reappraisals and New Perspectives* (Cornell University Press, New York 1982) p50. (pp47-85) Some discussion concerning the problem of the distinction (or lack of it) between context and text can be found in Hayden White, *The Content of the Form* (The Johns Hopkins University Press, Baltimore 1987) pp185-213.

³⁸ Fredric Jameson, *The Political Unconscious; Narrative as a Socially Symbolic Act*, (Methuen & Co, London, 1981) p297.

It is important to re-iterate that a meaning of “text” in this respect looks beyond the strict documentary nature of writing emanating from the Community and encompasses the very activity that the text both represents and performs. In LaCapra’s interpretation the text possesses both documentary and worklike aspects. “The documentary situates the text in terms of factual or literal dimensions...The worklike is critical and transformative”.³⁹ The text is therefore, in the words of Hayden White, a “process” not simply a “product”.⁴⁰ It represents (and, in a formative and circular sense, acts upon) the network of relations that arises within the Community. Policy is thus also subject to this circularity of interaction between text and practice. Indeed, the term ‘policy’ might even be utilised as shorthand for the political manifestation of the textual nature of constitution and representation. It suggests a course of action that evolves over time and assumes a formation that enables a classification to be ascribed to a particular field of activity. Indeed, the very naming of a policy, or subject area such as “human rights”, is tantamount to a textual intervention that both mirrors a political choice and acts as a means of ring-fencing a subject. The articulations that can then be ascribed to that policy, act so as to establish an authorised version of decisions that sanctions and helps confine the past and future institutional discourse in the designated field. Thus the text provides a powerful constraining force on both activity and discourse.

The interpretation of text as a constitutional operation is tacitly, if not explicitly, acknowledged on a number of levels by the Community. The development of a

³⁹ LaCapra n37 above pp52-53.

⁴⁰ Hayden White, ‘Method and Ideology in Intellectual History’ in LaCapra (ed.) n37 above pp280-310.

concept of *acquis communautaire* reflects the institutional desire to organise and present the text as both constituting and constitutional. It records a textual history and prescribes the future actions of the Community and those operating within its system in a constantly evolving and *re-volving* process. Even though the *acquis* may be subject to various interpretations, to the extent that Knud Erik Jorgensen feels able to conclude that “there are several meanings of *acquis* in circulation”,⁴¹ the very adoption of the concept by the Community illustrates the institutional preference for text as a constituting and guiding record and force. The text may be of indeterminate extent but there remains nonetheless a strong suggestion that the Community’s governance emerges from a discernible textual base.⁴² The requirement that the *acquis* be adopted by acceding states as a precondition of entry to the Community is recognition of such an interpretation.

Notwithstanding the above, it would be inadequate to rely upon any specific notion of the *acquis* to provide the limits to textual investigation in relation to any particular policy. The concept continues to occupy contested territory and any arbitrary definition would be subject to dispute. Although it may be restricted to the full body of law that has been produced by the Community this would not adequately take into account “soft law” initiatives or other indicators of the Community’s activities. Consequently, it is to the *whole* of the Community’s text that we must look in our analysis. Inevitably this moves us far beyond the narrow confines of the “history-

⁴¹ Knud Erik Jorgensen, ‘The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice’ (1999) *European Integration Online Papers* Vol.3 No.5 at <http://eiop.or.at/eiop/texte/1999-005a.htm>

⁴² Article 2 (ex Article F) TEU refers to the objective of the Union “to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may be revised”. The link between the *acquis* and policy is thus made explicit.

making decision” as well as the “Community law”. Such a limited perspective would be manifestly too restrictive, particularly given the need to chart not a designated policy set of documents relating to human rights but the *policy flow* in this respect. In other words, law and history-making decisions can only provide snapshots of evolving courses of action. Their examination alone cannot uncover the processes which give rise to those decisions or indeed their day-to-day interpretation and application. Nor will they reveal those Community practices that implement, contradict or ignore the decisions. In order to uncover the richness of the Community text and its reflective and constitutive functions we have to consider the law *and* the rhetoric, the legislation and the pronouncements that precede decisions and interpret them. Each part is potentially relevant and contributes to the text and context and thus provides the source material for reading the Community and interpreting its institutional unconscious.

The above analysis takes us only so far, however. It is a clarification of the new institutionalist methodology already discussed. However, the identification of the importance of looking to the text to examine the Community’s human rights policies is the first step for establishing a working method of analysis. There still needs to be an appreciation of how any policy field such as human rights comes to be defined as such within the text and how patterns emerge that influence future action and behaviour within the Community. In this respect, I am not only concerned with the text *per se* but also the *means* by which it is organised. In other words, how policy is *configured*, brought together and rendered communicable and understandable by and within the text. To bring forth this configuration, and to enable us to define and track the human rights policy streams, requires an acknowledgement of the literary and

historiographical aspects of the text. It requires in particular an appreciation of the presence and operation of narrative, or as I prefer in the Community context, “institutional narrative”.

1.3 Institutional Narrative

Narrative has been identified as a universal means of communication. Roland Barthes describes it as “international, transhistorical, transcultural.”⁴³ It acts as a powerful means of making sense of complexity particularly within the confines of a text. It is also a process of integration. Narrative mediates and combines ideas and the perception of events and actions into an understandable, digestible and manageable whole. It can be “understood as the human endeavour to make sense of history by telling a story”⁴⁴ operating to assimilate disparate phenomena and thus explain them. Consequently, it has been described as an instrument of power, or as Peter Fitzpatrick has suggested “a simple mode of mastery characteristic of the West.”⁴⁵ At an extreme level, in the words of Jean-François Lyotard, a meta-narrative may be formed, denying alternative stories and *prescribing* discourse.⁴⁶

⁴³ Roland Barthes, *Image, Music, Text* (Fontana Press, London 1977) p79.

⁴⁴ Richard Kearney, ‘Between Tradition and Utopia; the Hermeneutical Problem of Myth’ in David Wood (ed.) *On Paul Ricoeur: Narrative and Interpretation* (Routledge, London 1991) p66.

⁴⁵ There is a presumption in Fitzpatrick’s analysis that the “use” of narratives has been the focus of domination in Western modernity. He does not preclude the universal potential through such a perspective. See, Peter Fitzpatrick, *The Mythology of Modern Law*, (Routledge, London 1992) p42.

⁴⁶ See Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, G. Bennington and B. Massumi (trs.) (Manchester University Press, Manchester 1986).

The demonstration of the power of narrative has been particularly observed in the writing of history. Hayden White has advocated that narrative in historical discourse serves, “to transform into a story a list of historical events that would otherwise be a chronicle.”⁴⁷ In this guise, narrative explains “past structures and processes” by drawing together otherwise unconnected events and actions and projecting them as a sequence of causes and effects.⁴⁸ Paul Ricoeur went further to contend that narrative is a fundamental method for enabling the passage of time in human experience to be understood and explained.⁴⁹

At a collective level narrative may also be used as a continuing and common source of reference that legitimates, in particular, a political institution’s existence, history and project(s).⁵⁰ It acts as a means for communicating a collective sense (or knowledge) of identity and direction. In other words, narratives *organise* or configure an institutional text so as to transmit, disseminate and render comprehensible a collective enterprise. It is in this sense that what I term “institutional narratives” are formed. An “institutional logic” becomes applied to the text, a logic that is “autocentric” and self-sustaining and is supplied by the institutional narrative. In such a way, narratives of origin and continuing legitimation act not only to constitute

⁴⁷ White, n37 above, px.

⁴⁸ White, n37 above, p43.

⁴⁹ See in particular, Paul Ricoeur, *Time and Narrative Volume I* Kathleen McLaughlin and David Pellauer (trs.) (The University of Chicago Press, Chicago 1984). Ricoeur makes a powerful argument that, “time becomes human to the extent that it is articulated through a narrative mode and narrative attains its full meaning when it becomes a condition of temporal existence” at p52.

⁵⁰ It may also do the same for social or other institutions but my concern is with the political in the context of the Community.

a political institution but also to “sanction and sanctify” its continued existence and its actions.⁵¹

Such a process has been similarly described by J.G.A. Pocock in his portrayal of the role of “sovereignty and historiography” in the context of a national community. These factors he describes as being “a voice controlling one’s present and a voice controlling one’s past” respectively.⁵² The combination he suggests may be a “necessary means by which a community asserts its identity and offers an identity to the individuals composing it.”⁵³ In a matching fashion, institutional narratives operate to govern an institution’s past and present through a process of “integration” or what has been termed “emplotment” in relation to literary or historiographical narratives.⁵⁴ In this respect I use the term “integration” less to echo the theme of integration in Europe than to draw on the integrative processes of narrative described by Roland Barthes. He suggests that the “complexity of a narrative can be compared to that of an organization profile chart, capable of integrating backwards and forwards movements”.⁵⁵ Thus “integration guides the understanding of the discontinuous elements”.

⁵¹ This echoes Pierre Bourdieu’s description of the use of ritual to “sanction and sanctify” social organisations. See Pierre Bourdieu, ‘Rites of Institution’ in *Language and Symbolic Power* (Polity Press, Cambridge 1992) pp117-126 at p119. We might also refer to examinations on the development of nations for similar insights. See, for instance, Anthony Smith, ‘The Nation: Invented, Imagined, Reconstructed?’ in, Marjorie Ringrose and Adam J. Lerner (eds.) *Reimagining the Nation*, (Open University Press, Buckingham 1993) in which, at p16, he indicates that, “later generations of a particular community are formed in their collective life through the memories, myths and traditions of the community into which they are born and educated”. I suggest that all are in essence forms of narrative.

⁵² J.G.A. Pocock, ‘Deconstructing Europe’, in Peter Gowan and Perry Anderson (eds.) *The Question of Europe* (Verso, London 1997) p308.

⁵³ *Ibid.*

⁵⁴ See in particular, Paul Ricoeur, *Time and Narrative Vol. I* (University of Chicago Press, Chicago 1984).

⁵⁵ Roland Barthes, ‘Introduction to the Structural Analysis of Narratives’ in *Image Music Text* (Fontana, London 1977) p122.

Equally, the institutional narratives may also be interpreted as re-enforcing and instilling authority in the political institution as well as those who narrate the stories in its name. As White relevantly alluded with regard to the writing of history, narrative assumes a role for “dominant social groups...in controlling what will pass for the authoritative myths of a given cultural formation”.⁵⁶ Institutional narratives thus have the capacity (and the function) to connect the authority of the past, the reality of the present and the emancipatory potential of the future. They link ideas about a collective past with a “horizon of expectancy”.⁵⁷

In this sense, therefore, institutional narratives (often in the form of myth) seek to transcend time so as to portray the institution as a continuing and existing entity. As a consequence there is then imposed a tendency to define the limits of all subsequent discourse and action within the institution’s domain. Although the narratives will alter shape over time they will maintain a coherence that is rather like an autobiography of a living individual, a work in progress, one that is constantly under review but always based on the story that has been formed thus far. Policy and practice will therefore take place within these narrative boundaries.⁵⁸ The exact nature and content of the decisions made will not be entirely predetermined but in the

⁵⁶ White, n37 above, px

⁵⁷ Richard Kearney uses a similar formula in interpreting Paul Ricoeur’s work on myth. See Kearney, n44 above, p.62.

⁵⁸ Jean-François Lyotard has shown a similar appreciation in relation to societies. He contended that narratives “allow the society in which they are told, on the one hand, to define its criteria of competence and, on the other, to evaluate according to those criteria what is performed or can be performed within it.” The same holds true, I would suggest, for the institution. See Lyotard, n46 above, p20.

absence of some form of rupture they are likely to remain within legitimated margins.⁵⁹

This is not to say that oppositional or contra-dictory narratives cannot be told or heard within or by an institution. There is still scope for negotiation and external influence. But the extent to which that is permitted depends on the degree of tolerance that might allow for such uncertainty and opposition within the narrative structure. Without that tolerance, which might be characterised in the political field by the degree of democratic structures in place, oppositional narratives and counter-narrative decisions become difficult to install. In this sense, all succeeding narratives are captured to a greater or lesser degree.

In the case of the Community and its human rights activities I suggest that institutional narratives have developed that make sense of the Community's text within which those activities are represented. In other words, human rights policies are made comprehensible (and coherent) by and through the institutional narratives at work. They appear in individual policy fields, such as in development and accession policies, but also more generally within the whole story of the Community.

Thus rather than see the Community's human rights text as no more than a mass of loosely connected and disparate projections, it should be viewed as organised along

⁵⁹ In the event that there appears a rupture between any part of the institutional narrative and the lived life of those with whom it comes in to contact, or opposing and contradictory narratives are produced at the same site, the irrelevance or ambiguity of the stories may result in the de-legitimation of the institution and its policies. It is then that, as White again suggests, a crisis may be reached. "Myths and the ideologies based on them presuppose the adequacy of stories to the representation of the reality whose meaning they purport to reveal. When belief in this adequacy begins to wane, the entire cultural edifice of a society enters into crisis". White, n37 above, px.

fundamentally structured lines. Any and all projections are subjected to an institutional interpretation that is centrally informed by the sense applied by the direction and form of the institutional narratives that have evolved. The narratives may never stay static, always being effected by the addition of each new textual projection, but they nevertheless follow a path that is dependent to a greater or lesser extent on all the text that has gone before.

It is in this sense that we return to the precepts of new institutionalism. Indeed the idea of “path dependency” becomes more understandable. Rather than rely on a functional explanation for constrained behaviour the notion of institutional narratives affecting the general direction and form of any policy field describes the means by which the Community’s text acts on both the conscious and subconscious levels of the decision-makers. These actors then follow not a precedent but a story, always subject to interpretation at the margins but centrally understandable as a continuing narrative.

Consequently, any given policy field, in this case human rights, may only be understood in depth if the institutional narratives that configure the text in this respect are uncovered. In doing so, both those formal and informal institutions that we have already encountered may appear as more or less hidden influences on the form of the institutional narratives at work.

It will be apparent from the above analysis that my central contention is that although the Community may not possess a fully-fledged human rights policy, institutional narratives still operate so as to frame the Community’s discourse and practice in this

field. They continue to operate so as to talk about and guide Community practice albeit in disparate ways (as my investigation into bifurcation in the succeeding chapters aims to show), and to organise the Community's version of its history of action in human rights matters. They also act so as to lay down parameters for future policy direction. Thus, it is to the institutional narratives on human rights, evident from the Community's text, that one must turn in order to attempt to understand and explain what I have tentatively suggested is a bifurcated human rights practice, a bifurcated set of narratives indeed.

1.4 Excavating the Institutional Narratives of Human Rights

The nature of this interpretative exercise requires a reading of the text that does not (indeed must not) privilege the history-making decision or even the applicable law that has developed. Rather one must look to *both* the formal and informal representations relating to human rights that are apparent in the text. In this respect the investigation is genealogical in nature.

In looking to a genealogy one inevitably evokes a Foucauldian notion of investigation.⁶⁰ Even though not entirely unintended, the similarity with this intellectual approach is more concerned with the rigour of examination that Foucault presumes rather than necessarily the reasoning that accompanies it. In this respect,

⁶⁰ See in particular, Michel Foucault, 'Nietzsche, Genealogy, History' in *Language, Counter-Memory, Practice* (Cornell University Press, New York 1977) pp139-164.

the approach I advocate also “requires patience and a knowledge of details”.⁶¹ More importantly perhaps, it requires a reading of materials beyond those institutionally designated as “relevant”. Rather I am concerned with those “assemblages” evident in the Community’s text as they relate to human rights. In other words, “the systems of classification; administrative practices and principles; laws and juridical practices; theories; strategies, and programmes of governance”⁶² that are produced within and by the Community. From such sources the institutional narratives that serve to organise human rights policies can be excavated.

At the same time as uncovering the institutional narratives at work, an interpretative approach to their form and content provides the means by which those narratives might be understood. In particular the possibility of determining the undercurrents (or “rules of the game” as the new institutionalists may have it) that have influenced the narratives’ form and direction(s) presents itself. The surface of the text must be dislodged therefore and the underlying tensions and contradictions revealed. Inevitably this involves a literary turn at least to the extent that the approach acknowledges the presence and importance of rhetoric and the semiotic character of adopted terminology.

In this respect, rhetoric I take not in the pejorative sense but rather as the art of persuasion or the effective use of language.⁶³ For here is the means by which

⁶¹ *Ibid.* p140.

⁶² Mitchell Dean, ‘A Genealogy of the Government of Poverty’ (1992) *Economy and Society* Vol.21 No.3 p216.

⁶³ The argument for a concentration upon sources of history other than the traditional historical text and to examine “discourse and rhetoric” with equal attention has been articulated by a number of historians. See in particular Hans Kellner, *Language and Representation* (University of Wisconsin Press, Chicago 1989).

messages and therefore understandings of policy aims, content and direction may be promoted both within the Community and beyond its strict institutional borders. The consideration of rhetoric may also reveal some of the problems, pressures and perspectives that have been assumed or applied by decision-makers from time to time.

Looking to rhetoric also unlocks the performative use of language adopted by the Community's text. Dominick La Capra, albeit discussing intellectually significant texts, highlights the importance of this facet. He claims that rhetorical devices of

“composition and arrangement point to internal contestations or ways texts differ from themselves in their functioning and interaction with contexts, for texts in variable ways may combine symptomatic, critical, and more “undecidable” relations to given signifying practices.”⁶⁴

Similarly, they may indicate the “manner in which documents “process” or rework material in ways intimately bound up with larger sociocultural and political processes”.⁶⁵ The lesson that LaCapra provides relates to the need to re-read the text, appreciating the role rhetoric plays in both the formation of policy and its analysis to uncover the political unconscious that lies beneath. Thus, the rhetoric that appears in the relevant text emerging from the Community's institutions and actors or agents *are* relevant for my investigation of the bifurcated human rights policy field.⁶⁶

⁶⁴ Dominick LaCapra, *History & Criticism* (Cornell University Press, London 1985) p38.

⁶⁵ *Ibid.*

⁶⁶ In this respect there is a wealth of material available. See, for instance the EU Bulletin, the daily press releases, and latterly the whole mass of documentary information that is produced at the *europa* web site, n33 above.

The designation and adoption of specific words, terms, names, nomenclature, and slogans within the Community's print community can also provide indications of intent and understanding that can inform on the nature and scope of any articulated or practised policy area.⁶⁷ This will not be without its difficulties, however. One must appreciate the fact, as Thomas Diez has suggested, that language meanings "cannot be fixed" nor can they be disassociated from political or social context.⁶⁸ Nor indeed can they be considered as unambiguous. Paul Craig and Gráinne de Búrca make the point that the "inherent ambiguity" of language employed in the Treaties "is used in part because of its capacity to contain or mediate very different views amongst the Member States about the nature of the enterprise in which they are engaged."⁶⁹ However, the interpretations adopted by those States do not detract from the power of discourse that helps structure the practices and subsequent discourse of the Community as a political entity in its own right.

Similarly, the text of the Community cannot be treated as "closed". It does draw on external references, although these references may be articulated and thus subsumed and altered within the text. This holds true particularly for the subject of human rights, which has created a dynamic, evolving language in international and national political relations over the past fifty years that in turn has informed, and been

⁶⁷ This point has been well made by Thomas Diez, who has subjected 'Euro-speak' to discursive analysis from a number of perspectives. See, Thomas Diez, 'The Politics of Integration Discourse' (1999) *Journal of European Public Policy* 6:4 pp598-613. However, it is not the intention to privilege the "politics of integration discourse" referred to by Diez (p612) as they might appear in critiques of the Community. Rather, the discourse emanating from the institution must be accorded equal if not greater attention.

⁶⁸ *Ibid.* p611.

⁶⁹ Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* 2nd edition (Oxford University Press, Oxford 1998) p46-47.

adopted by, human rights language utilised by the Community. Consequently, the language of human rights has always been subject to contestation and negotiation.⁷⁰ Terms such as “universalism”, “indivisibility”, even “human rights” have acquired meaning in the Community that is not only shaped by international discourse but also by its own interpretation placed on these terms. Griánne de Búrca may infer that the critiques applied to “rights talk” have yet to reach the Community but I would suggest the adopted or altered meanings do reflect and in turn reflect upon the Community’s engagement and policy choices in these matters.⁷¹

Nonetheless, an appreciation of the semiotic importance of terminology, the corpus of words and phrases adopted by the Community that have been made the subject of repetition,⁷² can assist in identifying themes of meaning that might otherwise be forgotten or ignored. The very fact of a term’s acceptance through re-iteration (and indeed the discarding of a term) demonstrates a choice that may reflect the motivations behind the conjunction between term and action. Admittedly, such terms might be unstable, changing meaning over time, but this does not render their analysis irrelevant. Indeed, semiotics provides the impetus for scrutiny regardless of the apparent waywardness in meaning. Concern with such matters therefore introduces the possibility of the uncovering of a “politics of discourse”, as Diez

⁷⁰ One only has to consider the battle lines drawn over terminology at the United Nations during the composition of human rights treaties and declarations to appreciate the extent of this. See, for instance, the debate that has raged over the existence and/or content of a ‘right to development’ covered in Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford 1996) pp1112-1127.

⁷¹ Griánne de Búrca, ‘The Language of Rights and European Integration’ in Jo Shaw and Gillian More (eds.) *New Legal Dynamics* (Clarendon Press, Oxford 1995).

⁷² It is the reiteration of terms that transforms them into a form of ‘authorised’ language. This might be called “Euro-speak” in the Community context (which Diez adopts, see Diez, n67 above) or, more generally, an institutionally adopted terminology.

contends, that in turn may assist in the understanding of the potential field of any given policy.⁷³

The conjunction therefore between the excavated institutional narratives and the application of interpretation based on the textual qualities provides the methodological focus that I contend will provide a deeper understanding of the Community's bifurcated human rights policies. It will enable the text to be read and the bifurcation mapped.

1.4 Conclusion

The discussion in this chapter has been directed to establishing a framework for analysis of a complex subject. It looks beyond current methods of European studies whilst building on some of the tenets of new institutionalism. Although this is a question of methodology, it entails an approach that looks to the text as both the source and the subject of policy. In turn this requires an understanding of the performative and reflective nature of institutional writing that not so much obviates the need to examine action as acknowledges its textual nature and rendition. Practice and text at the site of the Community are highly interwoven.

The bulk of alternative approaches to Community policy study may not be so specific about this connection but they operate with it as an unspoken order of things. The

⁷³ Diez n67 above.

text and the institutional narratives that organise it will always provide crucial conditioning factors in the making of decisions. In other words, every decision made in relation to human rights in a particular area will be made in the context of the narrative that has preceded it. More than mere reference will be made to the relevant text. A reading of previous documents will take place that by its very act will ensure an assimilation of the narrative that has developed to that point. There will be the reiteration of past precedents, the adoption of established phrases and terminology. In doing so at both a conscious and unconscious level decisions will be constrained by the existing narrative. And with each reading and each decision, the story will subtly evolve, ever changing, albeit slowly, within general parameters.

With the above in mind, the succeeding chapters attempt to apply my preferred method of reading to the formation of what I intend to show is a bifurcated human rights policy within the Community. I begin by examining human rights practice in two external areas, development and accession policies in order to provide examples of the external stream of the Community's narratives. These will then be compared with the internal condition.

CHAPTER 2

HUMAN RIGHTS AND DEVELOPMENT POLICY

The first external policy area I have identified for exploring the evolution and current state of bifurcation is 'Development Co-operation'. In particular, I am concerned with the Community's relationship with the African Caribbean and Pacific (ACP) states, that being the "the most complete expression" of the Community's development policy according to the European Parliament.¹

There are two reasons for selecting development policy as central for the discussion of bifurcation. First, the policy has been present within the Community's institutional structure ever since the Treaty of Rome. It has formed an important focus for external relations and has been affected by the Community's initiatives in foreign policy. Both the European Political Co-operation and the Common Foreign and Security Policy frameworks have played a significant part in the relations with developing states. Tracking the progression of human rights within the policy will therefore provide the opportunity to consider the full historical collection of similarities and distinctions with the internal human rights position. Second, the field of development represents the location where the Community confronts its "other",

¹ See European Parliament Resolution on the Commission Communication entitled 'Democratisation, the rule of law, respect for human rights and good governance' A4-0411/98 [1998] OJ C104/185 paragraph 1.

those not of Europe, the “uncivilised”, “undeveloped”, “strangers”, in a structured and institutional manner. Through law, rhetoric, and practice the Community has defined its relationship with the “South” (the term I adopt in preference to the “Third World” or the “Developing World”). The resulting texts and their treatment of human rights thus present the possibility for considering the full breadth and depth of bifurcation.

The Chapter is presented in two sections. First, part 2.1 is devoted to an examination of the history or genealogy of human rights within development policy. This provides the narrative *context* for considering how the external narrative has intersected and/or deviated from that which has developed internally. Second, part 2.2 considers in more detail the three main aspects of human rights in this field. These are (a) the definition and scope of human rights applied (b) the method of scrutiny adopted and (c) the enforcement mechanisms both negative in the sense of sanction and positive in the sense of practical initiatives². In so doing the basis for comparing the approach with that applied internally, and thus determining the scope of bifurcation, can be laid.³

² For a consideration of the term “practical initiatives” in the context of development see, Demetrios James Marantis, ‘Human Rights, Democracy, and Development: the European Community Model’ (1994) 7 *Harv. HRJ* pp1-32 at pp12-16.

³ Chapter 4 undertakes the comparison to determine the scope of bifurcation.

2.1 A History of Human Rights in Development Policy

For some commentators human rights only assumed a role of any significance in the Community's development policy after the fall of the Iron Curtain.⁴ The story suggests that once the Cold War began to lose its determining influence on all elements of external relations the Community, along with the west in general, uncovered a hitherto largely hidden moral position. No longer were its foreign policies constrained by the contingencies that were instrumental when it came to protecting western interests against the threat of Soviet domination. In the 'brave new world' that was proclaimed after 1989, human rights could emerge from the shadows to be "freed from ideological conflicts and become a common standard of achievement for humanity."⁵

For my purposes, however, it is important to consider the whole evolution of development policy. Only then will it be possible to consider how the human rights narrative emerged in the field and enable the genesis of bifurcation to be revealed. Consequently, even though there may have been a seismic shift since 1989 (and I concentrate on the resulting initiatives accordingly) the antecedent discourse and practice operated by the Community should not be ignored. In particular, the historical relationship between Europe and the South has been bound up by a colonial past that continues to frame much of the thinking behind the Community's development policy.

⁴ See, for instance, B. Simma, J Beatrix Aschenbrenner and C. Schulte, 'Human Rights and Development Co-operation' in Philip Alston *et al* (eds) *The EU and Human Rights* (Oxford University Press, Oxford 1999) pp571-626 where scant attention was paid to the story of human rights in matters relating to development prior to 1991.

⁵ Katarina Tomaševski, *Development Aid and Human Rights Revisited* (Pinter, London 1993) p7.

2.1.1 The Denial of Colonialism and Human Rights: Development Policy 1950s-1960s

The story of development policy in the Community has its origins in the post War world of the 1940s and 1950s. At a time when the old regimes of Europe no longer had the resources or will to operate as colonial rulers, and movements for independence had acquired considerable momentum, new relationships had to be formed between the North and the South. The notion of “development” took shape in the political and economic uncertainties that followed World War II. Promoted most effectively by the USA in an effort to break the colonial mould whilst maintaining western influence and liberal-capitalist systems in preference to communist revolution, the concept quickly gained international currency.⁶ It was President Truman who first gave it official form. During his Inaugural Address of 1949 he identified “peace, plenty and freedom” as the triad of aims underpinning the approach. More specifically, he claimed that

“democracy alone can supply the vitalising force to stir the peoples of the world into triumphant action, not only against their human oppressors but also against....hunger, misery and despair.”⁷

The principles of self-determination and democracy were therefore redolent within the concept howsoever the USA may then have applied the doctrine in practice.

Nevertheless, the Community did not unquestioningly adopt Truman’s conceptualisation of development in its founding Treaties. Rather, it was France and

⁶ For a history of this movement see Gilbert Rist *The History of Development* (Zed Books, London 1997).

⁷ Quoted in Rist, n6 above, p71.

her interests that dictated how the Community's relations with colonies and ex-colonies would be governed. The French Government made known that provision had to be made for its dependencies during the negotiations for the Treaty of Rome. It could not countenance a position whereby its overseas territories were left outside the customs union. The resulting disadvantage to areas still considered to be part of France would be wholly unacceptable. Equally, France did not wish to see its ex-Empire discarded so prematurely. There was a keen political desire to retain the 'familial' relations with its colonies and ex-colonies despite the clear anti-colonial movements that were taking hold throughout the world.⁸

Even though Germany had no interest in allowing the new Community to be saddled with the vestiges of colonialism, having been stripped of such interests after WWI, a compromise was reached whereby France would be satisfied that its concerns could be addressed. It was determined that a system of "association" should be instituted within the new Community's structure, one that drew on the language of "development" if not its meaning expressed in the Truman definition, and one that created something of an arm's length relationship between the Community and the colonies of the Member States.

The Preamble of the Treaty of Rome established the Community's general aim as

"to confirm the solidarity which binds Europe and the overseas countries and.....to ensure the development of their prosperity, in accordance with the Charter of the United Nations".

⁸ See Marjorie Lister, *The European Community and the Developing World* (Avebury, Aldershot 1988) pp1-18.

The reference to the UN Charter should have indicated an acceptance of the Charter's promotion of higher standards of living and "economic and social progress and development" *and* "universal respect for, and observance of, human rights and fundamental freedoms".⁹ It did at least acknowledge the global discourse attributed to "development" as recognised through the United Nations but the relevant provisions in Part IV of the Treaty failed to amplify the connection. Rather, the economic aspects of "association" provided the focus thus avoiding any direct suggestion of a wider ethical dimension that might incorporate a human rights element.

Article 3(k) EEC first set the general purpose of association with the "overseas countries and territories"¹⁰ as being "to increase trade and to promote *jointly* economic and social development" (emphasis added). Article 131 specified that association was "to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole." It was to "further the interests and prosperity of the inhabitants...in order to lead them to the economic, social and cultural development to which they aspire." Together these provisions ensured that the original colonial thinking would not disappear. The mutual benefit available through "economic relations" was accompanied by the refusal to embrace any radical sub-text of self-determination and independence. The absence of a political development as opposed to economic and social development ensured the de-colonisation discourse would

⁹ See Articles 55(a) and (c) Charter of the United Nations 1945.

¹⁰ The countries and territories were listed in Annex IV EC Treaty.

remain outside the Community's immediate concern. This position was emphasised by the provisions that governed the association practice.

Part IV EEC as a whole focused on the economic nature of the relationship. Article 132 EEC provided that the Member States would "apply to their trade with the countries and territories the same treatment as they accord each other" under the Treaty.¹¹ The relationship would be formed through law by means of a legally constituted association agreement. The only possible reference to human rights was extremely tenuous. Article 135 suggested the potential for concluding agreements enabling the free movement of workers from the countries and territories within the Community and *vice versa*. A right of establishment was also promoted.¹² But these provisions did not provide the basis upon which a human rights narrative in the association relationship could be founded. There was no political will to provide the people of the associated states with rights in the Community and there was no apparent intention to address rights issues in the colonies and ex-colonies themselves. Rather, there was only concern for the economic aspects of the "special relations" that were now to be fostered between the Community and the associated states.

The absence of a human rights or political dimension was in keeping with the general rhetoric employed within the Community at this time. Human rights were not evident as subjects of concern within the Treaty of Rome or the early practices of the Community.¹³ Member States were not intent on questioning each other's record

¹¹ Article 183 (ex Article 132) EC Treaty.

¹² Article 183 (5) (ex Article 132(5)) EC Treaty.

¹³ See Chapter 5 for a more detailed account of the history of human rights *within* the Community.

and were unlikely to differ in their approach when it came to the Overseas Territories. However, a primary distinction that separates the internal condition from development policy had an important bearing on the evolution of human rights in each domain.

Internally there was a concern to resolve the relations of conflict that had previously subsisted between the Member States. The Community expressly recognised the past violence and specifically assumed the role of redressing the conflict.¹⁴ Member States combined in a project designed to end “bloody conflicts” and work together to achieve liberty and prosperity. Human rights may not have been specifically mentioned but the understanding that the peoples of Europe should be the recipients of benefits and respect was a key element. At least that is the inference from the language of the Treaty of Rome.

Externally, in the realm of development policy, as it was to become known, the Community was faced with dealing with the historical relations between the individual Member States, particularly France and their colonies. Those relations were also based on conflict, conflict with an external “other” and a conflict wholly generated by Europe’s determination to impose its will on the “South” for Europe’s benefit. Colonialism was structured on a violence that fundamentally abused human rights as advocated by the west. But in contrast to the internal condition, nothing in the Community’s structure of association, in its rhetoric or in its actions suggested any attempt to resolve the nature of the colonial relationship. Instead, the approach

¹⁴ See in particular the Schuman Declaration 1950 and the succeeding European Coal and Steel Community Treaty 1951.

adopted was based on a central ambiguity. On the one hand there was no intention to construct the Community as a successor to its colonial Member States. Colonialism had no part in the post-war world and there was no political will for the Community to assume the problems of decolonisation. On the other, there was no intention to present the Community as a “champion” of the colonised. That would entail a direct confrontation with Member States still significantly engaged in the colonial enterprise. Nevertheless, it did make economic sense to maintain a relationship with the colonies and ex-colonies and to continue to benefit from the colonial connections that had been formed over the previous centuries.

Consequently, to deal with the ambiguity the idea of “association” enacted an institutional culture of denial and deflection rather than one programmed to heal past violence. Colonialism indeed would have no textual presence. No mention would be made of the term. There would instead be “special relations”¹⁵ and “development” the emphasis being on the economic. Political dimensions would be ignored, at least rhetorically, and the historical link between the Community and the colonial activities of its Member States would be expressed carefully and in such a way as to avoid criticism of both the past and present behaviour of Member States.

A prime example of the deflection at work appeared in the Commission’s 1964 review of the ‘Background to association with the African States and Madagascar’.¹⁶ In referring to the period before the formation of the EEC, it observed that, “[t]hrough a process of historical evolution these territories had become, *as it were*,

¹⁵ Article 182 (ex Article 131) EC Treaty.

¹⁶ EC Bull 3-1964 p21.

overseas extensions of the Member States' economies" [emphasis added].¹⁷ In the Commission's words

"there has been a gradual shift from the empirical pattern of association, a legacy of the past, to a far more conscious policy of association linked to the concept of development aid."¹⁸

The tone inferred that the Community was faced with a situation and a relationship with the South that had arisen almost by chance. By failing to recognise the purposive actions of the European states in their colonial endeavours and intimating that such endeavours no longer persisted, the Community had embarked on a process that denied the abusive nature of the exploitative relationship that still subsisted. It deflected criticism away from its Member States' records. Equally, by adopting a language of law and suggesting that the relationship with the South was consensual through the institution of a contractual scheme of association the Community could legitimise the relationship and resist criticisms of neo-colonialism. But in taking this course the Community ironically became implicated in the colonial methods of its Member States. Indeed, the very process by which the association policy was drawn up, with little if any reference to the states and territories concerned, indicated the lack of movement away from old colonial methods of dealing with the South.¹⁹ The dependent territories were simply *incorporated* into the association structure. The Implementing Convention relating to the Association *imposed* a relationship that would last for five years and gave no scope for the beneficiaries to question any of its provisions.²⁰ Even independence would not release any ex-colony. Such

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ See Lister, n8 above, p18.

²⁰ Annex A EEC Treaty.

dictatorial approaches did little to suggest a shift from colonialist thinking. They were also accompanied by a general discourse that denied colonialism's heritage.

That this would ensure that human rights would have little if any role to play in the new policy was not necessarily unwelcome in the South. "Development" was considered an internal affair albeit one that warranted assistance from the North. The Asian-African Bandung Conference held in 1955, for instance, kept separate its conception of human rights from that of "economic development".²¹

The Community had no difficulty embracing this practice. As the original association agreement came to be renewed, at a time when most of the recipient states had achieved independence, the Community was happy to describe the continuing relationship with the "developing countries" as one of "equality and reciprocity".²² These principles were founded

"in the institutions and machinery which we have created because these are the expression of political equality among our states and of our mutual recognition of each other's sovereignty."²³

The legal formation of association was therefore portrayed as the basis of the legitimacy of the Community's activities in this area. Non-interference was a key element, echoing the current orthodoxy promoted by and within the United Nations²⁴ as well as by the newly independent developing states. But whilst this had the effect of the "new Europe" distancing itself from past colonial structures, if not practices, it

²¹ Rist, n6 above, p83.

²² EC Bull 9/10-1963 p13.

²³ *Ibid.*

²⁴ See, for instance, Article 2(7) Charter of the United Nations and UNGA Resolution 2625(XXV).

also served to confirm that the members of the Community only had a general moral obligation to assist the peoples of the developing world. Officially, the Community held that the “chief responsibility for economic and social development continues to be with the populations concerned and with their governments.”²⁵

The move away from colonialism ensured that emerging nations in the South were prepared to co-operate with the Community on a mutually beneficial basis provided always that the practice of non-interference continued. The growing discourse in the UN, which sought to provide the South with the power to “challenge the Northern countries’ control of international resources”²⁶ and led to the creation of the UN Conference on Trade and Development (UNCTAD) in 1964, added to the sense of authority now assumed by the South. Thus when the association agreement was renewed the President of the Federal Republic of Cameroon, M. Ahidjo was sufficiently empowered to comment that the aid provided to date, “had been all the more valuable and appreciated because it has never had any kind of political strings.”²⁷

The Yaoundé Convention signed in 1963, again for a period of five years, between the Community and the eighteen Francophone African states, ensured that the human rights aspects to development, such as they were remained unarticulated. Instead, the objectives for the Convention were the “economic, social and cultural progress” of all the parties, the diversification of the economies and industrialisation of the

²⁵ EC Bull 2-1960 p10.

²⁶ Olufemi Babarinde, ‘The European Union’s Relations with the South: A Commitment to Development’ in Carolyn Rhodes (ed.) *The European Union in the World Community* (Lynne Rienner, London 1998) pp127-146 at p142.

²⁷ EC Bull 9/10-1963 p8.

associated states, and the extension of inter-African co-operation and trade.²⁸ In short aid and trade.

The initial construction and implementation of the policy of association set important conditions for the evolution of human rights concerns in the field of development. Through the confluence of the Community's wariness in encouraging independence movements or criticising the past practices of its Member States, and the newly independent states' refusal to accept any scrutiny of its internal political and human rights affairs, human rights from a civil and political perspective were simply ignored. It was in all parties' interests to concentrate on the economics of the relationship, a relationship supposedly founded on law rather than colonialism.

This is not to say that human rights had no presence in development policy as it evolved during the 1960s. Rather I suggest the narrative was constrained in a way that was subtly distinct from the internal experience. The legal moves to ensure that the Community could deflect internal opposition to its institution of supremacy through adopting a human rights narrative, essentially focused on civil and political rights,²⁹ were not relevant to the external position. A different role for human rights emerged in development policy. As Simma *et al* observe human rights issues materialized in relation to "humanitarian relief"³⁰ during this early period. There were traces of rights of an economic, social and cultural nature flowing from the attention paid to the "social" aspects of development referred to in the Treaty. The operation of the European Development Fund, created by Article 132(3) EEC, which

²⁸ Lister n8 above p39.

²⁹ For a review of the story of this development see Chapter 5.

³⁰ Simma *et al*, n4 above, p574.

focused its attention on the giving of aid rather than stimulating trade, was said by the Commission in 1960 to be within an “atmosphere of freedom and healthy competition”.³¹ The funding of projects of a social character was a particular aim. Projects would be “to improve the public health and educational equipment of the country concerned and the social services and housing conditions of the local inhabitants.”³² Admittedly, such matters were not expressed in rights terms but they did reflect social elements of the Universal Declaration of Human Rights.³³ That the projects needed to “correspond to some economic development”³⁴ in the Commission’s view merely obscured the potential rights dimension. Walter Hallstein, the President of the Commission, in 1963 presaged the possible link when he advocated that development was concerned with establishing “living conditions conducive to the unfolding of human dignity”, a term that was later to become centrally implicated in the realisation of human rights in development. It was only in the 1970s that the rights dimension began to obtain any meaningful presence.

2.1.2 Seeking an External Identity: Human Rights and Development Policy 1970s-1980s

Identity and Development

In the period leading up to the imminent accession of the UK, there emerged a determination by the Community to project itself to the external as well as to its own

³¹ EC Bull 2-1960 p10.

³² *Ibid.* p12.

³³ See, *inter alia*, Articles 25 and 26 Universal Declaration of Human Rights 1948.

³⁴ EC Bull 2-1960 p13.

constituents. The manufacture of a European Identity, which had its roots in a discourse developed in the early 1970s, was the concept promulgated as a means by which the joint projection could be effected. It is my contention (discussed in Chapter 6) that the essential conditions for the bifurcation of human rights were set in train at this juncture. How then did the practice and rhetoric of development policy contribute to the bifurcation?

At the Paris Conference of the Heads of State and Government in 1972 the problem of “underdevelopment” was highlighted as one field in which Europe’s “voice” should be “heard in world affairs”.³⁵ The Community was determined to “increase aid and technical assistance to the least favoured people”.³⁶ Development policy was one crucial area therefore where the Community could define its external unity and identity.

The following year, in the seminal Copenhagen Declaration on “the European Identity”, the connection was made explicit.³⁷ Development was noted as a vital component of the Community’s relations with the rest of the world. Consequently, those elements of the European Identity expressed as fundamental to its definition (namely, the defence of the “principles of democracy, of the rule of law, of social justice...and of respect for human rights”³⁸) should have applied to development policy. But no direct textual link was made to this effect at the time.

³⁵ See the text of this declaration in Press and Information Office of the Government of the Federal Republic of Germany, *Texts Relating to the European Political Co-operation* (Bonn 1974) pp26-39.

³⁶ *Ibid.* at p27.

³⁷ See EC Bull 12-1973 pp118-122.

³⁸ *Ibid.* p119.

The lack of explicit incorporation of human rights issues in the development context thus established a central ambiguity. Were human rights concerns relevant to development policy or not? The texts did little to resolve the issue. The Commission's Memorandum on development co-operation of 1971 made no direct mention of human rights. It did, however, contain an oblique reference to "the pursuit of better conditions of life and of fulfilment for mankind."³⁹ It pronounced that development policy was not to be restricted to the economic field and should include social improvements "in the standard of education and health." In truth this did not deviate substantially from the approach already taken by the Community in the practice of its development assistance projects. Consequently, human rights matters remained confined to interpretations of social welfare initiatives.

The accession of the UK in 1973 and the consequent inclusion of the Commonwealth countries within the Community's development policy offered the opportunity for a radical re-shaping of the Yaoundé Convention system.⁴⁰ When the Convention came to be renewed for the second time in 1975 negotiations between the Community and what were now termed the African, Caribbean and Pacific (ACP) states, were framed with a "more balanced economic order" in mind.⁴¹ But this did not precipitate a change in approach as regards human rights despite the concurrent identity rhetoric. Political neutrality remained an aim for Community and ACP states alike and this precluded any rights discourse impinging on the arrangements. Rather, Lomé I was concerned with preferential access to Community

³⁹ Commission Memorandum on a Community Policy for Development Co-operation Summary, EC Bull Suppl. 5-1971 p18.

⁴⁰ Yaoundé I was renewed by Yaoundé II in 1969 with little amendment.

⁴¹ Lomé Convention 1975 Preamble *The Courier* No. 31 Brussels March 1975.

markets, technical and industrial co-operation and economic assistance to foster balanced development.⁴²

However, Lomé I did succeed in providing institutional structures and a new discourse that would affect the eventual involvement of human rights. First, it confirmed that the basis for development policy was contractual. The relationship was legally bound, at least in theory, by the arrangements negotiated between the parties. This would mean that any inclusion of human rights factors would have to be *agreed*. Second, Lomé I established a Council of Ministers that was supposed to “concentrate on fundamental political issues” as well as a Consultative Assembly and a Committee of Ambassadors. This provided the institutional structure within which human rights would have to be raised formally. Lomé I therefore determined that the parameters for formal involvement of human rights in development policy would be fairly tightly constrained. Community initiatives outside the system would lack legitimacy.

Nevertheless, the absence of human rights in development policy was finally challenged in the mid-1970s after it became apparent that gross human rights abuses were taking place under the very nose of the Community’s development activities. In particular, the events that occurred in Uganda under the Idi Amin regime and in Equatorial Guinea, made a mockery of the Community’s discursive moves to be seen as ‘guardian’ and promoter of human rights.⁴³ Even so the only response the

⁴² See Babarinde n26 above.

⁴³ Marantis, n2 above, p6.

Community could give was self-consciously “reserved and pragmatic.”⁴⁴ Some aid was cut but “discretely” as Lister notes and with “relatively little commotion.”⁴⁵

The sensitive approach to human rights abuse continued despite the Commission’s attempt to introduce a human rights element into the Lomé II Convention of 1979. A Commission memorandum drew attention to the, “importance of *human rights* in the eyes of the European public, whose support is vital for the continuance and enhancement of a real co-operation policy”⁴⁶ but the argument that the new Convention should introduce a human rights component attracted severe opposition. Unsurprisingly the lack of interference that was so warmly appreciated in the early days remained a crucial point of principle for the ACP states. The President of the Council of ACP Ministers, speaking on behalf of the ACP group, stated that although “human rights were a matter of concern for both the ACP states and the Community Member States” it was not felt that “these questions had anything to do with an economic and trade co-operation agreement.”⁴⁷ The position was bolstered by the observation that the Treaty of Rome itself contained no reference to human rights.⁴⁸

The logic of the opposition to the Commission’s initiative (and the fact that the balance of power in negotiating positions remained fairly even at this time⁴⁹) ensured that direct mention of human rights issues were prevented from acquiring any

⁴⁴ *The Courier* July-August 1979, No. 56 p.viii as quoted in Lister, n8 above, p197.

⁴⁵ Lister, n8 above, p.197.

⁴⁶ EC Bull 2-1978 p19.

⁴⁷ Report of the Opening Session of negotiations for Lomé II held in Brussels on 24.7.1978, EC Bull 7/8-1978 p17.

⁴⁸ The fact that the Community had begun to develop an appreciation of the need to respect human rights within and by the Community was ignored.

⁴⁹ See Marantis, n2 above.

meaningful presence in the new Lomé II text. Michael Addo attempts to suggest that certain aspects of the Convention touched human rights “in a broader context” but it is difficult to accept the argument that a prohibition of discrimination in investment, linked with the human right to “property (of aliens)” suggests that Lomé II contained any meaningful advancement of human rights *per se*.⁵⁰ It is too tenuous to maintain that such provision within the Convention was evidence of a hidden human rights programme *despite* the blatant and vociferous objection to such a link by the ACP states.⁵¹ In comparison to the Community’s internal discourse, which had seen the establishment of respect for human rights as a founding principle, development policy remained unfettered by human rights considerations.

Lomé III

It was not until the Lomé convention arrangements came to be renewed in the early 1980s that any alteration to the central bifurcation evident from development policy was formally addressed. Even then Lomé III, renegotiated in 1982 and signed in 1984, continued to use the language that suggested a distinct approach from the appreciation of human rights that was simultaneously gaining ground as a founding principle *within* the Community.

In the Convention’s Preamble, for instance, the parties reaffirmed their

⁵⁰ See M. Addo ‘Some Issues in European Community Aid Policy and Human Rights’ (1988) 1 *Legal Issues of European Integration* pp71-77.

⁵¹ It is interesting to note however that attached to the Convention was a statement that looked towards the “observance and protection of the civil rights of ACP citizens...resident in the Community.” See EC Bull 1-1979 p60.

“adherence to the principles of the [UN Charter] and their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”

This was vague enough to avoid opposition by the ACP states but indicative perhaps of the approach intended for human rights in the Community’s relationship. Article 4 then provided the guiding clause generating an instructive but non-binding Joint Declaration that was annexed to the Convention and provided a statement of interpretation rather than a framework for action.

The declaration indicated the parties’ understanding of the human rights element. Crucially, it focused on “human dignity as an inalienable right and as constituting an essential objective for the attainment of the legitimate aspirations of individuals *and of peoples*” (emphasis added).⁵² It proclaimed that the ACP-EEC co-operation “must help eliminate the obstacles preventing individuals and peoples from actually enjoying their economic, social and cultural rights”.⁵³ It then chose to specify the obligation to “fight for the elimination of all forms of discrimination” and to “work for the eradication of apartheid.”⁵⁴

The failure to consider civil and political rights directly in Lomé III continued to run counter to the clear preference established by the Community internally, specifically with regard to its attachment to the European Convention on Human Rights (ECHR).⁵⁵ Admittedly, the notion of “human dignity” could suggest the need to

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Again see Chapter 5 for consideration of the parallel story within the Community.

protect certain civil and political rights but it by no means necessarily encompassed them all. Indeed, the resolution on human rights adopted by the ACP-EEC Joint Committee in Bujumbura in 1985 following the signing of the Convention placed the concept in terms of development rather than merely rights. It concluded that,

“mankind, male and female, must be the essential beneficiary of development policy, and must be able to find satisfaction and well-being in his [*sic!*] every-day life without fear of aggression, unwarranted arrest or detention or any other political menace or coercion and maintains that *man cannot live with dignity under the current world economic system.*”⁵⁶

Despite the mention of certain forms of intolerable civil rights abuses, the concept of ‘dignity’ appeared to have more to do with the search for global economic justice than addressing any particular human rights concerns.

Equally, the reference to the aspirations of “peoples” indicated an appreciation of “Third Generation Rights” that were beginning to find expression in a more radical human rights discourse. For instance, international moves to acknowledge and promote a “right to development” were gaining recognition throughout the early to mid 1970s.⁵⁷ The UN Declaration on Social Progress and Development in 1969, for instance, had maintained that, “social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of rights and social justice.”⁵⁸ The “recognition and effective implementation of civil and political rights as well as economic, social and cultural rights without any

⁵⁶ ACP-EEC Joint Committee Resolution on Human Rights at Bujumbura, (1985) paragraph C.

⁵⁷ See, generally, on the progress of the ‘right to development’, Roland Rich, ‘Right to Development: A Right of Peoples?’ in James Crawford (ed.) *The Rights of Peoples* (Clarendon Press, Oxford 1988) pp39-67 and Philip Alston, ‘Revitalising United Nations Work on Human Rights and Development’ (1991) 18 *Melb. U.L.Rev.* 216

⁵⁸ Article 2 Declaration on Social Progress and Development, UNGA Resolution 2542 (XXIV) 1969.

discrimination” was a priority consideration.⁵⁹ The formula was repeated in succeeding UN productions thereby entrenching the notion of the indivisibility of rights within development.⁶⁰

The discourse on rights adopted in the Community’s development policy in Lomé III therefore demonstrated a willingness by the Community to consider a broad range of rights concepts not just those limited to the European sphere. It certainly did not embrace an unqualified approach to such concepts as illustrated by the failure to clarify the nature of the rights being promoted or protected. But it at least provided evidence of the Community’s intention to consider new discourses externally. It also, according to Addo, recognised the importance of “the ability and the need to use Community aid to promote human rights in the ACP states.”⁶¹ This was one of its defining characteristics, he suggests, a “noteworthy innovation”.⁶²

Although, civil and political human rights continued to be ignored as a governing factor there was a willingness to address some notable human rights “situations” through public condemnation (apartheid South Africa being the chief target⁶³) and to embrace rhetorically international human rights norms.⁶⁴ Apart from this, action on

⁵⁹ *Ibid.*

⁶⁰ This process culminated in the Declaration on the Right to Development UNGA Res. 41/128 (1986).

⁶¹ Addo, n50 above, p84

⁶² Marantis, n2 above, p7.

⁶³ See, for instance, ACP-Joint Assembly Resolution on Human Rights adopted 26.9.1985, which called for the Member States of ACP-EEC to “break off all economic, financial and military relations with South Africa”. Similar condemnatory outputs from the ACP-EEC institutions regarding South Africa continued regularly until transition at the beginning of the 1990s.

⁶⁴ See n56 above Paragraph D, which refers to the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the African Charter of Human and Peoples’ Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paragraph E also noted the obligation of the Lomé III signatories “to ensure the preservation and improvement of human rights”.

human rights remained rooted in the economic and social dimensions (particularly the former). The resolution on human rights produced by the ACP-EEC Joint Committee in January 1985 in particular specified that greater economic resources should be,

“devoted to resolving the problems which undermine the possibility for the peoples of Africa, the Caribbean and the Pacific to enjoy their fundamental human rights *as defined by Article 25 of the Universal Declaration of Human Rights*” [emphasis added].⁶⁵

Article 25 focuses upon the right for everyone to a “standard of living adequate for [their] health and well-being”. Similarly, in the ACP-EEC Joint Assembly’s 1986 resolution on “People-Centred Development” the emphasis was on welfare not a general improvement of human rights *tout court*. Thus the Community’s practice under Lomé III continued to take a peculiar narrative path.

Lomé IV

With the political upheavals of the late 1980s and the consequent alteration of the global political landscape the Community’s development policy entered a new phase. The fall of the Iron Curtain prompted the Community to redefine its priorities. Countries emerging from Soviet control needed to be encouraged in their evolution into fully democratic free-market regimes. Assistance was shifted from the South to the East. At the same time, the dramatic “victory” for liberal capitalist systems convinced many that a new ethical order had emerged, one that should ensure that

⁶⁵ *Ibid.* Article 3(ii).

the South in particular could no longer expect to be exempt from human rights and democratic standards. Lomé IV, signed in 1989, thus emphasised a development that entailed “respect for and promotion of *all* human rights”[emphasis added].⁶⁶ These were described as being “indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.”⁶⁷ The language had finally embraced the civil and political dimension without equivocation.

As with Lomé III, however, Lomé IV’s adoption of an extended rhetoric was still bounded, as Marantis notes, by the “weak institutional network” of the ACP-EEC framework.⁶⁸ Effective action on human rights concerns remained a distant prospect within the contractual arrangements chiefly because the long-standing methods of doing business had no history of addressing such issues. By the same token, development policy remained focused upon the economic and social elements of a “basic needs” perspective, one that was given added relevance by the increasingly hopeless position in which the South found itself despite decades of development.

Nevertheless, the new international dynamics encouraged the Community to look beyond its agreements, even to ignore them. Pivotal demonstrations of intent appeared in rapid succession in response to the dramatic events around the world including the overthrow of so many human rights abusive regimes.⁶⁹ The European

⁶⁶ Article 5 Lomé IV.

⁶⁷ *Ibid.*

⁶⁸ Marantis, n2 above, p9.

⁶⁹ Such events were by no means restricted to those that occurred in Eastern and Central Europe. The Peoples’ Revolution in the Philippines during 1986, for instance, and the transition that took place in South Africa in 1989-90 served as examples of social movements that removed seemingly intractable regimes and replaced them with putative human rights respecting governments.

Council at Luxembourg in 1991 recognised the “considerable progress” made in the world and began to build upon the Commission’s linkage of human rights, democracy and development.⁷⁰ It reiterated the principle of indivisibility of rights and affirmed that the “promotion of economic, social and cultural rights, as of civil and political rights...is of fundamental importance for the full realisation of human dignity.”⁷¹ The link between human rights and human dignity was thus firmly established. The Council then drew together,

“democracy, pluralism, respect for human rights, institutions working within a constitutional framework, and responsible governments appointed following periodic, fair elections, as well as the recognition of the legitimate importance of the individual in society...[as]...prerequisites of sustained social and economic development.”⁷²

The Commission had already issued a communication that made explicit the connection between respect for and promotion of human rights and democratic processes in developing countries.⁷³ In essence, this was the rhetoric of “good governance”. Already formulated by the World Bank in 1989 and given credence on the European stage by the French and British Governments, it was now incorporated wholesale into the language of development. The door was opened for the Community to adopt specific strategies to accompany the rhetoric.

⁷⁰ See the Luxembourg European Council Declaration on Human Rights EC Bull 6-1991 p17, which made reference to the Commission’s Communication to the Council on human rights, democracy and development co-operation, EC Bull 3-1991 point 1.3.41.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Communication from the Commission to the Council on human rights, democracy and development co-operation, EC Bull 3-1991 p.64.

The Resolution of 28th November 1991

The Council and Member States' Joint Resolution of the 28th November 1991 ("the 28th November Resolution") was vital in further defining the Community's purported new approach.⁷⁴ It set in train institutional responses to the question of human rights in development policy that suggested a more consistent and forceful strategy.⁷⁵ In particular, it gave a "high priority to a positive approach" to stimulate respect for human rights. Increased assistance for those states that demonstrated "substantive positive changes" in the condition of human rights and democracy was advocated. Nonetheless, this would not prevent the Community from taking appropriate action against those states guilty of "grave and persistent human violations" or "serious interruption of democratic processes." In that event the Community was provided with the authority to adopt a number of graded responses.

First, confidential *démarches* to apply pressure on the offending state could be employed. Second, alterations in the "content or channels" potentially re-directing development funds to non-governmental organisations could be made thus ensuring the maintenance of aid even in the face of violations. And third, suspension of co-operation (and aid) could be used as a last resort.

⁷⁴ Resolution of the Council and of the Member States, EC Bull 11-1991 pp122-123.

⁷⁵ It would be true to say, however, that the Council did not go as far as the European Parliament would have liked. That institution made various recommendations in its Resolution on Human Rights, Democracy and Development [1991] OJ C 326/259. It suggested that "development aid is necessarily dependent upon human rights being respected" (para 2) that "respect for democracy and human rights is a matter of concern to all countries...and to the European Community in particular where the situation with regard to third country nationals is constantly worsening" an admission that finds little support from the Council in *its* Resolution.

The Resolution did *not*, however, privilege respect for human rights. Rather, human rights were expressed as elements of a greater whole, a package of principles that was not necessarily undermined merely by a regime's failure to adhere to one component. Human rights were "part of a larger set of requirements in order to achieve balanced and sustainable development". They included

"sensible economic and social policies, democratic decision-making, adequate governmental transparency and financial accountability, creation of market-friendly environment for development, measures to combat corruption, as well as respect for the rule of law, human rights, and freedom of the press and expression."⁷⁶

None of the stated requirements, a non-exhaustive list, were accorded any priority. Human rights may have attracted considerable attention as already indicated but other issues loomed just as large in the Council's vision. In particular, military spending was a target. The Council noted that

"[e]xcessive military spending not only reduces the funds available for other purposes, but [are] violations of international law, as well as often being meant and used for purposes of internal repression and denial of universally recognized human rights."⁷⁷

The Resolution suggested that the Community and the Member States would consider concrete measures to "encourage developing countries to reduce their military expenditure" including increasing or decreasing "support" where appropriate and re-directing emphasis towards economic and social development projects "with particular emphasis on the education and health sectors."

⁷⁶ N74 above.

⁷⁷ *Ibid.*

The implication of these pronouncements was that human rights matters were not seen as separable from other interests. They were linked demonstrably to issues of political concern to the Community.

The whole scheme of action promoted by the Resolution was indeed a radical departure from previous human rights practices in development policy. However, it was also a radically different approach to that which applied internally. Not only did the Community provide itself with the competence to interfere in the developing world's affairs in relation to human rights, it also coupled such matters conceptually with other issues such as military spending. No such competence or linkage was countenanced with regard to Member States.

2.1.3 The Post-Cold War Period

The Legal Dimension

The Maastricht Treaty completed in 1992 ensured that the new global era was accompanied by a constitutional recognition that human rights should possess a significant presence in development policy. Article 177 (2) (ex Article 130(u)(2)) EC Treaty determined that the respect for human rights and fundamental freedoms (amongst other requirements) now became an official policy objective.

In *Portugal v. Commission* the European Court of Justice (ECJ) was asked to consider the whole legitimacy of Community activity that tried to give effect to this

constitutional amendment. The Portuguese government had objected to the inclusion of a human rights clause in the co-operation agreement entered into with India. In response Advocate General La Pergola first suggested that

“It is clear that [the objectives laid down in Article 130(u)(1)] reflect a complex vision of development, the product of interaction between its economic, social and political aspects, which are taken into account by the most recent cooperation agreements.”⁷⁸

Within that vision, human rights and democracy occupied a central role, although treated separately through Article 177(2) (ex Article 130u(2)) rather than (1). Nonetheless, here was a Treaty provision that explicitly incorporated a human rights dimension into a policy field. Incidentally no internal policy received similar treatment. The provisions for cooperation in the fields of justice and home affairs, which were non-justiciable in any event, only required that “matters of common interest” would be dealt with by the Member States “in compliance with” the ECHR and the Convention relating to the Status of Refugees.⁷⁹

The ECJ followed the advice of AG La Pergola and confirmed the Community’s authority to enact human rights initiatives under the Treaty provisions. It found that the Community was entitled to introduce such requirements and thus gave legal sanction to the fundamental nature of human rights in development policy.⁸⁰

In reaching its conclusion, the Court noted that it was common ground that fundamental rights formed an integral part of the Community’s legal order. Portugal

⁷⁸ *Portugal v. Commission* Case C 268/94 [1996] ECR I-6184.

⁷⁹ Article J TEU.

⁸⁰ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* 2nd edition (Oxford University Press Oxford 1998) p336.

had argued that the Community was still not competent to adopt human rights measures “either internally or externally”⁸¹ but the ECJ disagreed as far as the latter was concerned. It concluded that Article 177(2) (ex Article 130u(2))

“demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles.”⁸²

It then accepted the Advocate General’s submission that the discursive practices of the Community, through its “various declarations and documents”, had already confirmed the importance of human rights in its dealings.

The Court thus determined that the Community was indeed authorised to include human rights provisions, which entitled suspension or termination in the event of violation of human rights, within any development cooperation agreement.

The Court’s decision and reasoning represented a direct legal confirmation of the bifurcation of rights narrative in the Community. Internally, the Community’s competence to act on human rights issues remained severely restricted. It was certainly not dependent on accumulated textual productions as intimated might be influential for the external condition. The ECJ’s *Opinion 2/94* on the legal position of the Community entering into the ECHR had already confirmed the limited nature of the capacity that the Community possessed internally.⁸³ In comparison, the external human rights narrative appeared largely unfettered by issues of competence.

⁸¹ See n78 para. 23 p.6189.

⁸² *Ibid.* para. 24 p.6217.

⁸³ *Opinion 2/94* [1996] ECR I-1759.

The connection between the two streams may have rested on the founding principle of respect for human rights, but the message appeared to be that a much wider scope for undertaking human rights initiatives was legally available to the Community in the domain of development policy.

The Re-Negotiation of Lomé and the Cotonou Agreement

At the same time as the Court was considering the legal position of human rights in the Community's development policy, the other institutions were taxed with the issue of renewing the Lomé Convention. It was extended on an interim basis in 1995 whilst incorporating a new system of enforcement. Article 366a introduced a means by which a breach of one of the essential elements in Article 5 could lead to consultations and eventually the suspension of the agreement in relation to the abuser. However, the new political environment, both internationally with the emergence of democratic regimes in Eastern and Central Europe, and within the Community through the increased drive towards union, prompted a complete review of the relationship with the ACP states.

The Commission's Green Paper of 1996 was the first major document to address the issue.⁸⁴ Unsurprisingly economics continued to dominate the rhetoric. Even the notion of an external identity was described as being achieved through *inter alia* "an effective and differentiated development policy, and a multilateral trade policy

⁸⁴ European Commission, Green Paper on relations between the European Union and the ACP countries on the eve of the 21st Century – Challenges and options for a new partnership [1996] COM(96)570.

designed to open up markets in accordance with negotiated common rules.”⁸⁵ But the Commission was nevertheless intent on strengthening the “political dimension” of the agreement. How the two aspects were drawn together and how human rights were proposed to be involved provides an insight into the continuing bifurcation.

On a general level, the Commission was quick to identify the “promotion of a kind of world development that is more compatible with European political and social values”⁸⁶ as a guiding principle for the Community’s policy. The adoption of a form of development that failed to guarantee “social progress, respect for human rights and above all fundamental social rights” was described as “incompatible with European political and social values”.⁸⁷ It did not shy away, therefore, from treating the principle of external non-interference as well and truly buried.

The Commission was also intent on ensuring that development policy, and human rights within it, were not treated in isolation. The aims of the policy “ultimately complement the Union’s political and economic objectives,” the Commission stated.⁸⁸ Respect for human rights and “fundamental liberties” (as elements of the political aspects of development) together with the intended “social benefits (better living conditions, preventing the disintegration of the social fabric) and its environmental concerns” that development should bring, were not to be ends in themselves. They were even expressed as meeting “some of the security concerns of the EU (risk of armed conflict, spread of nuclear weapons, terrorism, *migration*)”

⁸⁵ *Ibid.* Foreword p1.

⁸⁶ *Ibid.* Main Topics for Discussion piii.

⁸⁷ *Ibid.* Chapter IV p37.

⁸⁸ *Ibid.* p4.

[emphasis added].⁸⁹ As the Commission went on, “[i]t comes down to ensuring consistency between the objectives pursued within the European Union and the influence that it can bring to bear on the form of development in certain regions of the world.”⁹⁰ Ultimately, the Community’s security would be enhanced by the stability of developing nations, a stability that was assessed in terms of “sustainable economic and social development, democracy and human rights, establishment of viable political structures and a capacity to manage change without resorting to violence.”⁹¹

The attempt by the Commission to draw the internal interests of the Community together with development policy suggests that there was a conscious determination to eradicate the effects of distinction between the two spheres. However, the Commission’s narrative demonstrated the opposite. Human rights were treated as only one of several concerns when dealing with the South. Other economic and political interests continued to dictate Community policy suggesting that the promotion of human rights was often contingent. For instance, the Commission later recognised that “geopolitics, trade and global environmental problems” affected the Community’s development policy choices⁹² and that the Community pursued “objectives and interests...dictated by political, economic and trade interests that are shared by all or by a majority of Member States.”⁹³ This resulted in a self-confessed prioritisation for “stability and development of neighbouring countries and to aid for

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.* p40.

⁹² Communication from the Commission to the Council and the European Parliament [2000] COM(2000)212 final.

⁹³ *Ibid.*

countries in crisis in the regions nearest to the EU.”⁹⁴ Consequently, any suggestion that human rights either held a position of pre-eminence in development relations or could even be considered as a fundamental guiding principle in the field was suspect. Instead the long-standing critique of the Community’s neo-colonialist practice, through the relationship with the ACP states, was confirmed rather than radically altered. As Marjorie Lister pointed out in 1988, the Lomé Conventions were neo-colonial in character because, *inter alia*, they sought to “further European political and economic goals” not to establish a new justice in relations with the South.⁹⁵ The institutional approach in 1996 showed no change.

These policy issues were reflected in the renewed ACP Convention that was completed in 2000. The Cotonou Agreement, replacing Lomé IV, was supposed to respond to demands for a strengthening of political dialogue between the Community and the ACP states. However, little in truth was changed from established practice. The requirement for a regular assessment of developments relating to “the respect for human rights, democratic principles, the rule of law and good governance”⁹⁶ may well have instituted the possibility for additional scrutiny but placed within the format of the Community-ACP structures it is difficult to consider that this was an innovation worthy of the name.

Article 9 of the Cotonou Agreement made it abundantly clear that human rights *were* an essential element of the Agreement albeit seemingly inseparable from

⁹⁴ *Ibid.*

⁹⁵ Lister n8 p215.

⁹⁶ Partnership Agreement between ACP States and the EC and Member States, Cotonou [2000] OJL 317/3 Preamble.

“democracy based on the rule of law and transparent and accountable governance”.

Paragraph 3 Article 9 made the link explicit.

“In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development.”

Throughout, the economic preferences of the Community, namely “the principles of the market economy, supported by transparent competition rules”,⁹⁷ were identified as necessary components for the attainment of the Agreement’s objectives.⁹⁸ Consequently, the principle of respect for human rights continued to be addressed as a component part of a whole. The drafting ensured that there were no boundaries within the contractual setting of the agreement. It follows that the Community authorised itself to address human rights concerns in all aspects of its development relations.

But did the Community attain a new plane with the Cotonou Agreement? Admittedly, the requirements of the Community were expressed in more accessible language and clearer provisions outlining possible action in the event of breaches of the essential elements as regards human rights, democratic principles and the rule of law emerged.⁹⁹ But the ethos of complicity that saw human rights as one element of a complex picture in development still owed more to the projection of a European ideal rather than a commitment to human rights as an independent and absolute moral necessity. By treating human rights in this fashion, as one component of a

⁹⁷ *Ibid.* Article 10(2).

⁹⁸ The objectives are, “poverty reduction and ultimately its eradication; sustainable development; and progressive integration of the ACP states into the world economy.” *Ibid.* Article 19(1).

⁹⁹ *Ibid.* Article 96.

complex political whole (a political whole that represents the Community's preferred model for the South's social and political construction), the potential for decisions made *without* reference to human rights arises. Indeed, the text is a rendition of contingency as far as human rights is concerned that fully recognises the exigencies of the Community's external policies. Indeed, the comments of the Hon. Ms. Billie Miller, President-in-office of the ACP Council of Ministers at the opening of negotiations in September 1998 suggest a certain degree of impatience with the Community's assumption that human rights should be of central concern in what was essentially a matter of economics. She stated that "[d]emocracy, the rule of law and respect for human rights" were part of "our national civic ethic" and that if they were "prerequisites of development...we should be among the richest and in need of no assistance." Human rights therefore might "constitute attributes of development, and as such they are vital to sustained development" but "they will never be a substitute for it – or for our attention to the economic essentials."¹⁰⁰ Such a critique emphasises the continuing conflict of interests and discourses that have been adopted by the Community and the ACP states.

However, in the next section I examine in more detail the main elements of human rights in development policy. This will form the basis for a comparison with the internal condition undertaken in Chapter 4.

¹⁰⁰ See Press Release: Brussels 30.09.1998 nr. 2169/98(presse 329).

2.2 Key Aspects of Human Rights in Development Policy

Three main aspects of rights concern me here. First, the definition of rights employed. Second, the methods of scrutiny adopted. Third, the enforcement measures applied. Each is dealt with below although in recognition of their close relationship in the development context, the methods of scrutiny and enforcement are considered in tandem.

2.2.1 Definition and Scope

The genealogy of human rights in development policy suggests that their definition has always been fluid. Even though the term “human rights” appeared as early as 1973 with the Declaration of European Identity¹⁰¹ its meaning and scope was not subject to further clarification. Rather any definition was left vague. International human rights discourse may have given some indication of definition but this was hardly an area of universal agreement at the time. The Community’s early development practice suggested an emphasis on economic and social rights, particularly in relation to a “basic needs” doctrine, but that did not necessarily preclude concern for civil and political rights, which certainly emerged after the mid-1970s.

The sources of law relied upon since then have been vast. The Universal Declaration of Human Rights and the UN Charter provided the base conditions for original

¹⁰¹ See n37 above.

activity and the Commission has built on this grounding. In 1994 it stated that “Community action to defend and promote human rights is taken in accordance with the United Nations Charter and the universal principles and priorities adopted by the international community at various world conferences.”¹⁰² In the Council’s regulation 975/1999, authorising the Community’s human rights activities in development, a more complete picture was provided,

“Community action to promote human rights and democratic principles is rooted in the general principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”¹⁰³

The Regulation went on to be specific about other applicable instruments maintaining that

“Human rights within the meaning of this Regulation should be considered to encompass respect for international humanitarian law, also taking into account the 1949 Geneva Conventions and the 1977 Additional Protocol thereto, the 1951 Geneva Convention relating to the Status of Refugees, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and other acts of international treaty or customary law.”¹⁰⁴

The last phrase enables other sources to be relied upon. In this spirit the ACP-EEC Joint Assembly has also referred to the African Charter of Human and Peoples’

¹⁰² Commission, Report on the Implementation of Measures Intended to Promote Observance of Human Rights and Democratic Principles [1994] COM(95) 191 final, p2.

¹⁰³ Council Regulation 975/1999 Preamble para. (6) [1999] OJL 120/1.

¹⁰⁴ *Ibid.*) Preamble para (8).

Rights¹⁰⁵ as has the Commission in its consideration of the definition of human rights in the development context.¹⁰⁶

The broad spectrum of rights instruments used to underscore the Community's practice in development policy has been criticised as creating a sense of uncertainty and vagueness about the standards that the Community is purportedly trying to promote.¹⁰⁷ Whether this may or may not be an issue when it comes to determining those rights to be enforced through sanctions it does indicate that the Community is willing to consider other conceptions and expressions of rights that it does not necessarily adopt internally. In particular, it embraces notions of collective rights. Thus the protection of minority rights, and of "indigenous peoples, their rights and cultures" has been specifically identified as an objective of the Community's action in development.¹⁰⁸ A recent Commission staff working paper examining the programming for human rights and democracy in third countries for 2001, also points to the need "to protect minorities and indigenous peoples."¹⁰⁹ East Africa and South America have both benefited from projects designed to intervene in such matters.¹¹⁰

¹⁰⁵ See, n63 and ACP-EEC Joint Committee Resolution on Human Rights 31 January 1985.

¹⁰⁶ See, Commission Communication to the Council and the Parliament, 'Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP states' COM(98)146 p4.

¹⁰⁷ Diego Nogueras and Luis Martinez, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) *Columbia Journal of European Law* pp307-336 at p333.

¹⁰⁸ Commission proposal for a Council Regulation on the Development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms [1997] OJC 282/16.

¹⁰⁹ Commission, Priorities and Guidelines for the Implementation of the 2001 European Initiative for Democracy and Human Rights SEC(2001) 891 p2.

¹¹⁰ *Ibid.* p9.

The breadth of approach to the potential definition of rights has more recently been placed within a formulaic framework that purports to govern the Community's stance. Three guiding principles of definition have been identified. First, that of *universality*, which implies that no provision of a national, cultural or religious nature, can override the Universal Declaration of Human Rights. In other words, all rights expressed in that document are applicable in all contexts. Second, that of *indivisibility*, which maintains that civil and political rights shall be treated as of no greater importance than economic, social and cultural rights. Priority should not be given to one or the other. And third, that of *interdependence* between human rights, democracy and development, in which structure "man" is identified "as a holder of human rights and the beneficiary of the development process."¹¹¹ The principles of universality and indivisibility in particular have been re-iterated almost as a matter of course and enable the Community to address the full spectrum of civil, political, economic, social and cultural rights. However, the principle of interdependence also suggests that the Community has accepted the claims for other collective conceptions of rights to be promoted specifically the right to development.

The right to development has been an officially recognised concept since the UN Declaration on the Right to Development in 1986.¹¹² Article 1 denotes that the right is

"an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."

¹¹¹ See Communication from the Commission to the Council and the European Parliament, *The European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond* COM(95)567 final.

¹¹² UNGA Resolution 41/128 (1986) Annexing the Declaration on the Right to Development.

The Community has embraced this definition and even recognised that the purpose behind the concept is to meet “equitably the developmental and environmental needs of the present and future generations.”¹¹³ Whilst the Community may still like to stress the individual human being as the beneficiary of the process, there is an implicit acceptance that collective rights are to be promoted through this discourse. Groups such as minorities, indigenous peoples, children, women, are all identified as worthy of receiving specific assistance.

In developing the theme of interdependence the Community has also drawn in other concepts such as “good governance”. Good governance has been defined by the Commission as “the transparent and accountable management of all a country’s resources for its equitable and sustainable economic and social development.”¹¹⁴ It is a concept that “remains implicit in a political and institutional environment respecting human rights, democratic principles and the rule of law.”¹¹⁵ Integration of these issues is considered essential therefore to provoke an acceptable programme of development in the Community’s eyes. Similarly, rights are drawn in with “equitable growth, social services, environment, gender issues, capacity and institutional building, [and] private sector development”.¹¹⁶

The inter-relationship between human rights and these other concepts has encouraged the Community’s human rights work to be involved throughout its aid programme. As the Council has recently stated, “human rights and democratic

¹¹³ Council, EU Annual Report on Human Rights [1999] Doc. No. 11380/99.

¹¹⁴ Commission n106 above p8.

¹¹⁵ *Ibid.*

¹¹⁶ See n92 above p7.

principles are regarded as horizontal aspects, which must be integrated into all development programmes.”¹¹⁷ The presumption, at least in the text, can be made therefore that the policy of development is centrally affected by human rights considerations of a wide nature. The Community has recognised such general rights claims and provided itself with the authority to intervene on those matters. The definition of rights in this context is therefore extremely flexible. It provides great scope for the Community’s involvement in a multitude of interests that have rights at their core.

2.2.2 Scrutiny and Enforcement

As the history related in this Chapter revealed, the means by which the Community scrutinises and enforces human rights standards through its development policy have undergone an extraordinary change over the last ten years. From a position whereby rights abuses were barely the subject of condemnation let alone enforcement in the 1970s, a sophisticated policy has evolved that draws together diplomatic pressure, positive measures and sanctions to promote and protect human rights. Since 1991, this range of action has been utilised with varying degrees of success and enthusiasm.

¹¹⁷ Council Review of the Common Position on human rights, democratic principles, the rule of law and good governance in Africa 25.6.2001 [2001].

Diplomatic Pressure

The system of *démarches* available first through the European Political Cooperation and latterly through the Common Foreign and Security Policy (CFSP) has always encroached on the area of development relations.¹¹⁸ This has been inevitable given the number of developing states accused of human rights abuses over the years. However, under development policy alone diplomatic initiatives are restricted to fairly formal structures of political dialogue.¹¹⁹

The means by which discussions on human rights would be held were first formalised by Article 366a Lomé IV as amended in Mauritius in 1995. “Consultations” could occur in the event of any Party having failed to “fulfil an obligation in respect of one of the essential elements referred to in Article 5” as a first step towards suspension.

The Cotonou Agreement attempted to clarify the procedure of dialogue. Article 8 states the basis upon which that dialogue should take place. The focus is described as “political issues of mutual concern” and specifically identifies in this context “the arms trade, excessive military expenditure, drugs and organised crime, or ethnic, religious or racial discrimination”. Respect for human rights is left as an element of “regular assessment”. Article 8(6) states that the dialogue shall be flexible and “formal or informal according to need, and conducted within and outside the

¹¹⁸ For a review of this area of human rights activity see Andrew Clapham ‘Where is the EU’s Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?’ in Philip Alston *et al* (eds.), n4 above, pp636-641.

¹¹⁹ The place of *démarches* and political pressure applied within the CFSP is not considered directly in this thesis. However, see Andrew Clapham, n118 above, for a review of measures applied externally under this policy area.

institutional framework, in the appropriate format, and at the appropriate level including regional, sub-regional or national level.” Hardly the institution of a transparent and comprehensive structure but it does recognise the importance of maintaining contact on human rights issues within a political context.

The Article 8 procedure seems to have been instituted with some vigour by the Community. Recent actions against Haiti, Cote d’Ivoire, Zimbabwe and Fiji are all evidence of political dialogue being applied.¹²⁰ It is also the recognised precursor to any further issues of scrutiny or enforcement. Article 96, which deals with the procedures in the event of a breach of respect for human rights that amounts to a contravention of the essential element clause of the agreement, will only come into play if the dialogue fails to resolve the position. The exception will be if there is a situation of “special urgency”.

Positive Measures and Scrutiny

Ever since the November 28th 1991 Resolution, positive measures have been considered an essential element of development human rights policies. Marantis sees them as complementary to negative measures and the means by which the “structural obstacles to sustained and equitable development” can be overcome.¹²¹ Arguments have been rehearsed regularly as to their advantages when compared to negative

¹²⁰ Council Decisions (2001/131/EC) (2001/510/EC) (2002/148/EC) and (2001/334/EC) respectively.

¹²¹ Marantis, n2 above, p14.

measures.¹²² Unsurprisingly perhaps, they have been seen as an important method by which the human rights aspects of development policy can be better pursued.

A wide range of initiatives has been instituted. Initially, the process of offering support to such measures was confused and confusing particularly in relation to the financing and choice of projects. But in 1994 resources were grouped together under one budgetary heading entitled the 'European Initiative for Democracy and the Protection of Human Rights' (EIDHR) (budget chapter B7-70). Developing countries occupied a specific budgetary sub-section¹²³ and during 1998 the Council reported that a total of 45 projects were supported with the application of 19.7 million Euro.¹²⁴ Nevertheless, other headings also covered states in the developing world, such as those relating to human rights and democracy in Southern Africa (B7-7021), the Special Programme for democracy and good governance in Nigeria (B7-7022) and human rights and democracy in Asian countries (B7-707) amongst others.¹²⁵

Even this reorganisation proved unsatisfactory. Criticisms were levelled at continuing problems of transparency, and doubt over the legal authority for the Community to take positive action.¹²⁶ This led to the passing of a regulation to

¹²² See Marantis, n2 above, and Simma, n4 above, respectively.

¹²³ Heading number B7-702: see Annex 3 Commission, Report on the Implementation of Measures Intended to Promote Observance of Human Rights and Democratic Principles (for 1994) COM(95) 191 final.

¹²⁴ Council, n113 above paragraph 4.3.1.

¹²⁵ Interestingly, only the heading for "subsidies for certain activities of organisations pursuing objectives in support of human rights" under the EIDHR could be interpreted as enabling funds to be provided for human rights projects taking place *within* the Community.

¹²⁶ See *UK v. Commission* Case C-106/96 [1998] ECR I-2729.

resolve the position. Council Regulation 975/1999 determined that in development policy action could include;

“the implementation of measures in support of democratisation, the strengthening of the rule of law and the development of a pluralist and democratic civil society and in confidence-building measures aimed at preventing conflicts, supporting peace initiatives and addressing the issue of impunity.”¹²⁷

Article 2 of the Regulation specifically authorised action in the promotion and protection of the rights referred to in the Universal Declaration of Human Rights. It then proceeded to set out the areas and means that could be legitimately undertaken by the Commission.

At the same time, the Commission also responded to criticism from the European Parliament concerning its positive measures by undertaking to adopt a more transparent reporting mechanism.¹²⁸ The result was a comprehensive survey of action under the EIDHR for the years 1996-1999.¹²⁹ For the first time considerable effort was taken to ensure “transparency and accountability in the deployment of Community funds.”¹³⁰ Individual projects illustrating general policy directions were described and many procedural as well as policy aspects were addressed. The analysis was indeed broad and even encompassed some engagement with academic

¹²⁷ See n103 above preamble para(11).

¹²⁸ See in particular European Parliament Resolution A4-0381/97 and attached report by Parliament Vice-President Imbeni on the report from the Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995).

¹²⁹ See, Commission, Report on the implementation of measures intended to promote observance of human rights and democratic principles in external relations for 1996-1999, COM/2000/0726 final.

¹³⁰ *Ibid.*

debate.¹³¹ The review was therefore significant in monitoring the Community's own practices.

Equally, it is clear that the procedure now adopted for assessing human rights conditions and instituting programmes in the external are rigorous. Three stages are involved:

- (1) a country's record of ratification of "international instruments with a view to establishing a standard profile" is considered;
- (2) the "current human rights situation....encompassing any bilateral or regional dialogue" is assessed; and
- (3) a "multi-annual programme for each country" is outlined identifying, "the priority measures to be taken into account".¹³²

The measures available to the Community and particularly the Commission are also broad. Regulation 975/1999 sets out in its preamble the matters that can be embraced. These include:

- The promotion and protection of the human rights of those "suffering from poverty or disadvantage, which will contribute to reduction of poverty and social exclusion"
- Support for "minorities, ethnic groups and indigenous peoples"
- Support for "local, national, regional or international institutions, including NGOs" involved in human rights protection

¹³¹ Specifically, the Commission was concerned with Cassese, A. *et al* "Leading by Example: a Human Rights Agenda for the Year 2000" (European University Institute 1998) and Philip Alston's edited collection of reports, see Alston *et al* (eds.), n4 above.

¹³² See n129 above paragraph 3(g).

- Support for “education, training and consciousness raising”
- Support for “action to monitor human rights”.

The Commission’s review further identifies as “key areas” for action:

“Institutional and administrative reforms connected with democratisation and the rule of law including....support for regional systems to protect and monitor human rights...Human rights education...Strengthening civil society...including an emphasis on free and independent media, action against the exploitation and abuse of women, and the rights of ethnic, religious and cultural minorities.”¹³³

The Council has separately set out the basis for encouraging the “on-going democratisation process in Africa” by concentrating on the protection of civil, political and social, economic and cultural rights and “guarantees of freedom of expression, information, association and political organisation”.¹³⁴

The projects instituted under the above guidelines range from supporting the rights of the handicapped in Madagascar (Project No.99/0350) to assisting the monitoring of prison conditions in Egypt (Project No.98/Mas24).¹³⁵ The Commission has thus confirmed its willingness to become involved in the day-to-day detail of human rights promotion work. The sheer scale of such enterprises leaves the internal human rights activities (beyond concerns over citizenship rights and social rights associated with the economic aspects of the Treaties) far behind in their ambition.

¹³³ See n129 above paragraph 2.1.

¹³⁴ Council Common Position on human rights, democratic principles, the rule of law and good governance in Africa (1998) OJ L 158/1.

¹³⁵ See n129 above paragraphs 1.2.3 and 1.4.1 respectively.

The analysis above suggests that the Community has instituted a process whereby the external measures and the means by which those measures are undertaken have reached a sophisticated plain. The fact that the development initiatives have been heavily criticised by the Court of Auditors in relation to a failure in definition of country strategies, a lack of a clear set of project selection criteria and shortcomings in programme management, does nothing to alter the institutional narrative that has now been created.¹³⁶ Indeed, it amplifies the institutional concern to adopt and apply a consistent and effective human rights strategy in its development activities.

Negative Measures/Sanctions

Sanctions are not limited to development policy.¹³⁷ They may be applied in all the Community's foreign affairs by reason of Article 300(2) (*ex* Article 228) EC Treaty. Where the Member States decide upon a common position or joint action under the CFSP to "interrupt, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures." These include all "negative" operations.¹³⁸ Nevertheless, it is within development policy that the full range materialises.

¹³⁶ See Special Report No. 12/2000 on the management by the Commission of European Union support for the development of human rights and democracy in third countries, together with the Commission's replies (2000) OJ C230.

¹³⁷ See, I. Macleod, I.D. Hendry and Stephen Hyett *The External Relations of the European Communities* (OUP Oxford 1996) pp352-366.

¹³⁸ The sanctions issued against Haiti in 1993 and 1994 provide an indication of the type of measures that might be contemplated. There Council Regulation 1608/93 (OJL155/2) placed an embargo on petroleum products and under the ECSC trade in goods relevant to that particular Treaty was restricted ([1993] OJ L139/8)..

The scope of measures that may be taken against a developing state arise in part because of the condition of dependence that suffuses the relationship with the Community. The provision of aid as well as trade benefits ensures that such states are inevitably in a position of vulnerability in respect of any negative measures. The suspension or interruption of aid or trade can have immediate and significant effects on an under-developed economy.

The Community has appreciated the vulnerability and has introduced a wide range of measures by which it might be exploited where human rights abuses have been involved. Consequently, in addition to those measures available under Article 300(2) (ex Article 228) TEC the presence of human rights 'essential elements' clauses in third country agreements may be used to suspend or terminate the benefits provided under those agreements.¹³⁹ Equally, trade preferences, under the General System of Preferences, have introduced a scheme of conditionality with particular reference to international labour standards.¹⁴⁰ The resultant possibility for action by the Community has thus been devised on a wide scale.¹⁴¹

In the specific area of relations with the ACP states, the authority for any action now occurs under the Cotonou Agreement. This has built upon a steadily increasing body of precedent that has emerged from the Community since the 28th November 1991 Resolution. Sanctions were then made available for the Community to react to serious interruptions in democratic processes or to "grave and persistent" human

¹³⁹ For a comprehensive consideration of such clauses see for instance, E. Riedel and M. Will, 'Human Rights Clauses in External Agreements' in Alston *et al* (eds.), n4 above, pp723-754.

¹⁴⁰ See Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights' in Alston *et al*, n4 above, pp699-722.

¹⁴¹ See Tomaševski in particular who has analysed the implications and effects of these policy initiatives, n5 above.

rights violations.¹⁴² Although clearly envisaged as a last resort, it was nevertheless determined that such a course of action should continue to be available despite the preference for positive measures. This was recognised within Article 366a Lomé IV as revised in 1995 and subsequently followed at Cotonou.

Under Article 96 Cotonou enforcement measures assume a key position within the agreement's structure. Article 96(2) states that if political dialogue fails to deal with a situation of human rights all relevant information can be placed before the Council of Ministers for a "thorough examination...with a view to seeking a solution acceptable to the Parties." If no solution is forthcoming *or* the situation is a "case of special urgency" "appropriate measures may be taken" by the complainant Party. Such measures must be "taken in accordance with international law" and must be "proportional to the violation." Suspension of the agreement may be considered but only as a last resort. Thus for instance, in 2002 Zimbabwe had budgetary support and development projects suspended.¹⁴³ Cote d'Ivoire also suffered the suspension of direct budget aid in 2001.

The Commission has also made known that as part of its development planning it will take into account "performance in the area of human rights (including economic, social and cultural rights)...when deciding country allocations" under assistance programmes.¹⁴⁴ This imposes a heavy burden upon the developing states. Even though they might not breach civil and political standards, and even though Article 96 may not be engaged, they may still be subject to sanctions.

¹⁴² See n74 above.

¹⁴³ Council Decision (2002/148/EC).

¹⁴⁴ Communication from the Commission to the Council and the Parliament, 'The EU's Role in Promoting Human Rights and Democratisation in Third Countries' [2001] COM(2001) 252 final.

2.3 Conclusion

The narrative of rights in development policy indicates a path towards a forceful and varied approach to human rights promotion and enforcement. From a silent base, rights have slowly assumed a crucial role that continues to be subject to refinement. The terminology of development now incorporates collective and individual understandings of human rights. The definition of those rights includes an appreciation of their universal, indivisible and interdependent nature. A wide range of positive measures has been adopted to encourage the promotion of rights. And a detailed system of scrutiny and enforcement has been instituted that affects developing states at every level.

The policy constructed may be subject to criticism for hiding inconsistencies but there is nevertheless a coherence in the willingness of the Community to become involved in ever more detail in defining human rights and ensuring their respect. The distinction between this approach and the internal policy of the Community will determine the scope of bifurcation that I contend has arisen. The comparison is carried out in Chapter 4.

CHAPTER 3

HUMAN RIGHTS AND ACCESSION TO THE COMMUNITY

In this Chapter I examine the institutional narrative of human rights in the Community's enlargement policy. First, I examine the historical development of human rights as an issue in assessing countries seeking entry to the Community. The emphasis is placed on those recent designs for enlargement to incorporate several Central and Eastern European (CEE) countries together with Malta, Cyprus and Turkey. Second, I consider those key aspects of human rights, namely rights definition, rights scrutiny, and rights enforcement, in respect of which a comparison with the Community's internal human rights policy may be undertaken and the scope of bifurcation assessed.

3.1 A History of Human Rights in Accession Policy

3.1.1 Full and Selective Entry and the period of Implied Conditionality

From the Community's inception, the possibility of enlargement to encompass other states beyond the initial six was both contemplated and expected. The EEC Treaty

reflected this understanding. Article 237 envisioned *any* “European state” applying to join the Community, thus embodying the founding members’ belief in the desirability of an extended European family.¹ As with any exclusionary organisation, however, such a desire was not unconditional. Any state applicant would, of necessity, have to accord with the Community’s aims or, rather, the principles or values that delineated its “Project” and upon which the Community was purportedly built.

Although the nature of the Project was always the subject of constitutional development and debate, the Preamble to the EEC Treaty did at least reflect some of the key understandings that might identify the conditions for membership. In particular, the original Contracting Parties resolved “to preserve and strengthen peace and liberty” and called upon, “the other peoples of Europe who *share their ideal* to join in their efforts” (emphasis added).² Identification and adherence to the values inherent in the Project, values that included the pursuit of “liberty”, could therefore have been imputed as prerequisites for full entry.

Consequently, any putative member of the Community would have had to demonstrate acceptance of these values or, at any rate, not display antipathy towards them, if it were to warrant approval for any entry application.³ This was reinforced by the fact that any state seeking accession requires unanimous approval by all the existing Member States acting in the Council. It would be difficult to conclude that

¹ The original Article 237 EC Treaty stated, “Any European State may apply to become a member of the Community.” The Treaty of Amsterdam repealed this Article. Membership then became relevant in relation to joining the European Union, a matter that was covered by Article 49 (ex Article O) TEU.

² Preamble to the EC Treaty (emphasis added).

³ See Article 49 (ex Article O) TEU. Article 237 of the EEC Treaty contained a similar requirement.

the approach represented anything more than a nascent conditionality if only loosely based on human rights. But once the European Court of Justice (ECJ) and the other Community institutions had established that respect for human rights was a part of the general principles of European law (from 1969 onwards⁴) the discourse of rights began to infiltrate the very projections of the idea and ideals of the Project. The key requirements (albeit still implicit ones) for entry to the Community were thus made more distinct. This was evident in the formulation of a notion of “European identity”.

Prompted, perhaps not coincidentally, by the imminent accession to the Community by the United Kingdom, Ireland and Denmark, the Luxembourg Report of 1970 made a direct connection between identity and rights. It declared that a, “united Europe must be founded upon the common heritage of respect for the liberty and the rights of men, and must assemble democratic States having freely elected parliaments.”⁵ The 1973 Copenhagen Declaration on The European Identity followed suit specifying that, “[t]he construction of a United Europe, which the Nine Member Countries of the Community are undertaking, is open to other European nations who share the same ideals and objectives.”⁶ The ideals were given clearer expression in the Declaration and have been the subject of repetition ever since. In particular, the European Council’s statement issued in Copenhagen in April 1978 reinforced the notion of qualification for entry to the Community. The Heads of State and Government not only, “expressed their determination to respect fundamental rights in

⁴ The story of the development of respect for human rights as a founding principle of the Community and its role in the bifurcation of human rights is considered in Chapter 5.

⁵ First Report of the Foreign Ministers to the Heads of State and Government of the European Community’s Member States of 27 October 1970, paragraph 4. For a full text of this Report, see Press and Information Office of the Government of the Federal Republic of Germany *Texts Relating to the European Political Co-operation* 1974 pp18-25.

⁶ Document on the European Identity paragraph 4, EC Bull 12-1973 pp118-122.

pursuing the aims of the Communities” but also declared that, “respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership.”⁷ The implication that any prospective entrant would also have had to abide by such an understanding prior to entry was a strong one and next to impossible to refute. Placed in the context of the Joint Declaration on Human Rights of 1977⁸ and the other developments in the Community’s discourse of rights up to that time, the implication becomes all the more tenable.

Nevertheless, despite the implied conditionality in operation, there was little reluctance to allow ‘*selective entry*’ for some of those European states that did not appear to satisfy the basic conditions of ‘*full*’ entry.⁹ By ‘selective entry’ I mean a practice of the Community that allowed access by non-Member States to the economic and diplomatic spheres and operations of the Community without the benefits of full membership. Thus, the use of Trade and Cooperation and Association agreements, authorised by Articles 300 (ex Article 228) and 310 (ex Article 238) EC Treaty, demonstrated a willingness throughout the 1960s and 1970s to accord certain benefits of closer economic and political ties to countries despite their poor human rights records. Indeed, underpinning some of the association agreements was at least a suggestion of a promise that Membership might eventually follow. It was only with the introduction of a ‘human rights clause’ in 1989 that such associations became

⁷ Declaration on Democracy issued by the European Council on 8 April 1978 in Copenhagen, EC Bull 3-1978 p6.

⁸ See Joint Declaration by the European Parliament, the Council and the Commission on Human Rights [1977] OJC 103/1.

⁹ In this respect, I use the term ‘selective entry’ to echo the notion of ‘selective Exit’ employed by Joseph Weiler in his article ‘The Transformation of Europe’ (1991) *The Yale Law Journal* Vol. 100 pp2403-2483. For Weiler, ‘Exit’ suggested the ability of Member States to withdraw from the Community whereas ‘selective Exit’ indicated a practice of selective application of the Community’s *acquis communautaire* by Member States.

subject to scrutiny on the basis of human rights considerations. Given the evolution of international human rights law it seems remarkable that it took so long for such a development to surface in the external arrangements of the Community.

However, with regard to the relationship of Spain and Portugal with the Community during the dictatorial regimes of Franco and Caetano respectively, human rights violations and the lack of democracy in these countries did not unduly hinder the formation of preferential trade agreements and continuing political dialogue with the Community. The agreement with Spain took effect in 1970 and that with Portugal in 1973¹⁰ at a time when there were no discernible signs of the then current regimes undertaking any meaningful transformation. Admittedly, the nature of these relations could have been justified in accordance with the Community's express desire to "strive to promote harmonious and constructive relations"¹¹ with third countries (as required under the emergent European Political Co-operation) but the partial engagement with those factors, which were so clearly expressed as being central to the creation of an external European Identity (in terms of represented values), indicated the presence of a fundamental distinction. Internally, it would have been inconceivable, given the rhetoric emerging from the Community on the subject of human rights, that the then operative regimes in Spain and Portugal could have been incorporated within the Community. Externally, however, even though the rhetoric of political co-operation was suffused with understandings concerning values and human rights, the political reality was that Spain and Portugal were inextricably

¹⁰ See Neill Nugent, *The Government and Politics of the European Union* (Macmillan London 1994) p32.

¹¹ See n6 above, paragraph 9.

linked with the common heritage to which the formative European Identity supposedly gave effect. As a consequence even though these countries were controlled by regimes that significantly negated the values underlying such heritage, they continued to be the subject of dealings that recognised their putative membership or 'European' status.

An effective human rights policy as regards a selective entry for the Iberian countries was thus not apparent during the 1960s and early 1970s. Any efforts to deal with human rights concerns were rendered invisible or, at best the subject of implication. Certainly, any implied human rights conditionality for full entry did not generally extend to selective entry at this time.¹² That area of external relations remained in the realm of a European political practice that seemed to pay scant attention to human rights.

I do *not* suggest, however, that the approach to external relations as regards selective entry was then peculiar to the Community in terms of international human rights promotion. The established international law doctrine was of non-interference in the domestic affairs of sovereign states (supported by Articles 2(4) and 2(7) of the UN Charter¹³). Thus any type of conditionality which sought to change the nature and

¹² The exception was the freezing of the Greek Association Agreement during the regime of the Colonels. Otherwise, Trade and Cooperation and Association agreements did not involve human rights considerations until the European Parliament sought to apply a human rights conditionality on these formal relationships with the Community. For further consideration of this issue and the role of the Parliament see Barbara Brandtner and Allan Rosas 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' *European Journal of International Law* (1998) Vol.9 No.3 pp468-490.

¹³ Article 2(4) reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Article 2(7) reads, in part, "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state".

character of a particular regime through direct economic or political means would have been difficult to sustain and would have opened itself to being declared illegitimate politically and legally.

The approach of non-interference remained a characteristic of international relations throughout the post World War II period until at least the mid-1970s if not beyond to the end of the Cold War. Given credence by international instruments such as the UN General Assembly's 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States, which declared that, "[n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State", the legal position against non-interference was extremely robust.¹⁴ Consequently, there existed a powerful doctrine, which may well have impacted upon the Community's then attitude to human rights in its external affairs.¹⁵ Indeed, the Community's activities represented adherence to the norm.

Whether or not the principle of non-interference initiated or was only reflected in the Community's distinction between the role of human rights concerns in selective as opposed to full entry, its influence cannot be ignored. However, it is not my argument that the doctrine generated the distinction. At most, it was a contributory factor, a legal influence that began to lose its credibility after the end of the Cold War

¹⁴ UNGA Resolution 2625 (XXV) 24 October 1970.

¹⁵ For a consideration of this doctrine see Nigel Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework' in Nigel Rodley (ed) *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (Brassey's, London 1992) pp14-42.

if not sometime before.¹⁶ Certainly the approach of the European Parliament (EP) has been to consider human rights concerns outside the exclusive preserve of any state since at least the early 1980s.¹⁷

Nevertheless, the instances of full entry achieved by Greece, then Spain and Portugal, saw no visible Community stance taken with regard to past violations and their possible repetition. The return of democracy seemed to be a sufficient guarantee. In the light of there then being no system whereby the new (or even longer standing) members of the Community could be the subject of direct action should the abuse of human rights on a large scale re-occur, these events of accession were either extraordinary acts of good faith or illustrations of the belief that those countries' essential 'Europeanness' and devotion to the European model of values would preclude such a development.

The absence of an explicit concern with human rights in the accession of the chosen states only began to change once the collapse of Communist rule in Eastern and Central Europe occurred. Then, the concept of enlargement was altered radically amidst an avalanche of initiatives designed to ensure that the transformation of such ex-Soviet dominated countries was entrenched. The promise of entry to the Community became an incentive to maintain the move towards market economies

¹⁶ For a review of this sea-change see Lori Damrosch, 'Politics Across Borders: Non-Intervention and Non-Forcible Influence Over Domestic Affairs' (1989) *AJIL* Vol. 83, and C. Ellerman, 'Command of Sovereignty Gives Way to Concern for Humanity' (1993) *Vanderbilt Journal of Transnational Law* Vol. 26 No. 2 p341).

¹⁷ See, for instance, the EP's annual reports on human rights in the world that first appeared in 1983. For a review of the EP's role in this regard see Reinhard Rack and Stefan Laussegger, 'The Role of the European Parliament: Past and Future' in Philip Alston *et al* (eds.) *The EU and Human Rights* (Oxford University Press, Oxford 1999) pp801-837.

and social systems that had abandoned soviet communist ideology. And it was at this juncture that human rights made a more direct appearance.

3.1.2 European Enlargement; the Introduction of Explicit Conditionality

The Condition of the New Europe

The Community instituted a dramatic change in accession policy after the fall of the Iron Curtain at least in so far as the emergent 'democracies' in Central and Eastern Europe (CEE) were concerned. Once it became clear that soviet dominance was at an end, the Community resolved to give effect to its rhetorical self-representation as *the* site for European development. The Agenda 2000 programme later applied a particular interpretation, or commemoration, of the recent past.

“The end of the Cold War and the break-up of the Soviet Union opened up new horizons of international cooperation, and propelled the Union into a key role for promoting change and stability across Europe.”¹⁸

The impression that the Community was at last fulfilling its self-professed destiny whilst adhering to its core values, resonated throughout the subsequent initiatives that were inspired by the seismic shift in power. Immediate demonstrations of intent were provided through the significant financial assistance for economic transformation made available through the PHARE and the TACIS programmes to

¹⁸ Agenda 2000 'For a Stronger and Wider Union' EC Bull Supp 5-1997 p11.

the countries of eastern and central Europe and the New Independent States respectively.¹⁹

Amidst the euphoria induced by the end of the Cold War, the Community then rushed to develop a strategy that would establish it as the pre-eminent political as well as economic power base in the region, a model indeed for the 'New Europe'.²⁰ The sentiments expressed at the 1989 Strasbourg European Council captured the moment.

“The Community’s dynamism and influence make it the European entity to which the countries of Central and Eastern Europe now refer, seeking to establish close links. The Community has taken and will take the necessary decision to strengthen its cooperation with peoples aspiring to freedom, democracy and progress and with States which intend their founding principles to be democracy, pluralism and the rule of law.”²¹

An evident burgeoning desire to encourage the movement away from socialist ideology towards a liberal-capitalist model as promoted by the Community was not the only consequence of these sentiments. A resolve to embrace the emerging democracies into the Community’s sphere of influence had also taken root thus enabling Europe to fulfil its project and potential whilst ensuring its security was not compromised. But, as the Strasbourg Council suggested, “the changes and transitions which are necessary must not take place to the detriment of the stability of Europe.”²² The ‘European model’ that supposedly underpinned the Community would help

¹⁹ These programmes were instituted by Council Regulation [1989] No.3906/89 OJ L375.

²⁰ For a brief analysis of this period see Alan Mayhew, ‘EU Policy Toward Central Europe’ in Carolyn Rhodes (ed.) *The European Union in the World Community* (Lynne Reiner, London 1998) pp105-125.

²¹ Strasbourg European Council EC Bull 12-1989 p12.

²² *Ibid.* p14.

define it as the “cornerstone of a new European architecture and....a mooring for a future European equilibrium.”²³

It was in this context that human rights featured as an essential element both of the Community and the European model that it upheld. At a special meeting in Dublin in 1990, the Council declared that,

“This process of change brings ever closer a Europe which, having overcome the unnatural divisions imposed on it by ideology and confrontation, stands united in its commitment to democracy, pluralism, the rule of law, full respect for human rights, and the principles of the market economy.”²⁴

This was a defining moment for the project. Indeed, developments in the East were used as political argument counselling greater efforts towards union within the existing EC structure. President Mitterand, in a speech to the European Parliament in 1989, suggested that internal constitutional developments would not only equip the Community with “greater resources” but also enable the Community to “exert a greater attraction on the rest of Europe.”²⁵ Here then lay the opportunity to establish a truly ‘European’ Community²⁶ one that would bring together those peoples with whom were shared “a common heritage and culture.”²⁷ Within that conception, human rights occupied, at least rhetorically, a vital role developing as a key element in the conditions attached first to the relations of ‘association’ with the ex-communist states and then those of potential ‘accession’.

²³ *Ibid.* p15.

²⁴ Special Meeting of the European Council, Dublin 28.4.1990 EC Bull 4-1990 p7.

²⁵ EC Bull 10-1989 p117.

²⁶ European in the sense that geographically the Community would stretch to its traditional perhaps racially (or racist) inspired limits.

²⁷ See n24 above.

The 'Europe Agreements' and the Move Toward Enlargement

Initially, the relationship with the CEE states was understandably fluid. The dramatic institutional changes that were taking place in these countries at great speed inspired equally swift political responses by the Community. It was thus perhaps inevitable that policy would develop fitfully at first. Prior to 1989 the Community had already begun negotiating Trade and Co-operation agreements with eastern European states largely on the strength of Mikhail Gorbachev's move to induce economic and political reform in the Soviet Union. The changing circumstances called for these initiatives to undergo development. In particular, human rights matters, which did not figure to any significant extent in the early (or so called 'first generation') agreements, became more apparent as negotiations with the new regimes progressed between 1989 and 1990.²⁸

Nevertheless, the approach remained an *ad hoc* one, contingent on the identity of the state concerned and subject to negotiation. Charles Haughey, the then President of the Council, said in 1990 that the adopted approach was to be "flexible" and "tailored to respond to the political and economic situation in each country."²⁹ In this spirit, human rights concerns became of some influence³⁰ but on the whole the

²⁸ For a review of the development of the agreements with CEE states during this period see Toby King, 'The European Community and Human Rights in Eastern Europe' (1996) *L.I.E.I* Vol. 2 pp93-125.

²⁹ Address to the European Parliament on the outcome of the Special European Council in Dublin 28.4.1990, EC Bull 5-1990 p140.

³⁰ See for instance the reference made in the Trade and Economic Cooperation Agreement between the EEC and Poland to the implementation of the provisions and principles of the Final Act of the Conference on Security and Co-operation in Europe (CSCE) and the Helsinki Final Act which incorporated the need to improve commitment to human rights by its signatories, [1989] O.J. L339. See also the suspension of negotiations for a Trade and Cooperation agreement with Bulgaria on the

rationale behind the cooperation agreements was the fostering of economic and political regimes committed to the adoption of a liberal-democratic, free market system.

In the first half of 1990 the Commission announced the general basis upon which these agreements were to evolve. They would *not*, “include the objective of eventual accession to the Community”,³¹ but would represent, “an incentive to Eastern European states to implement political and economic reforms”.³² They would also protect the Community’s own interests.³³ Even so, there was still an evident desire to alter qualitatively the relations with the CEE states.

It was in this context that the Commission introduced conditions for the resultant ‘selective entry’ available to such states.³⁴ The conditions were “the introduction of the rule of law, the respect for human rights, the establishment of a multi-party system with corresponding free and fair elections and finally, the introduction of a market economy.”³⁵ The agreements that emerged applied slightly varying terminology and included different forms of clauses to enable the Community to suspend their operation in response to human rights violations. However, together

basis of “concern about infringements of the rights of the Turkish minority” within that state as referred to by King, n28 above, p101.

³¹ Europe Information Service; European Report April 12 1990 External Relations No.1578 8

³² *Ibid.*

³³ See King n28 above, p103. Incentives took the form of financial assistance particularly through TACIS and PHARE, see n19 above.

³⁴ The expression of these principles eventually found their way into the various agreements and arrangements concluded with non-CEE states as well. See Eibe Riedel and Martin Will, ‘Human Rights Clauses in External Agreements of the EC’ in Alston *et al*, n18 above, pp723-754. See also Marise Cremona, ‘Human Rights and Democracy Clauses in the EC’s Trade Agreements’ in Nicholas Emiliou and David O’Keefe (eds.) *The European Union and World Trade Law* (John Wiley & Sons, Chichester 1996) pp62-77.

³⁵ See n21 above.

they represented the first step of note on a path to enlargement.³⁶ This was evident from the way in which the agreements quickly became described as “*Europe Agreements*”, a change in nomenclature that was by no means without symbolic importance. A distinction had been created whereby the Community’s intentions to discriminate between those associations that held little if any prospect of conversion to membership and those that were favoured to succeed in the transition, were made politically clear. The CEE states (along with certain other identified candidates such as Cyprus and Malta) were quickly encompassed within the latter category.

The ‘Europe’ epithet breathed new life into the mythic construction of a common heritage and common destiny, a theme present in the rhetoric applied to the CEE states. Once the communist aberration had been abandoned it was now possible to uncover the formative and ‘true’ sense of community that lay underneath.³⁷ The values expressed as binding the Member States were ascribed historically to those peoples ‘released’ from the communist experiment and, as such, the countries they inhabited could be embraced by the Community as legitimate members of the European project and incorporated as a valid extension to the European narrative.

The re-titling of the Agreements was thus both recognition of a fundamental alteration in the political contours of the continent *and* re-affirmation of the qualities of the Community that set it apart as a project of enduring importance. Consequently, the Community was able to substantiate its authentication as a site of governance for

³⁶ Later Europe Agreements explicitly referred to the institution of a “framework for gradual integration” into the Community. See for example the Europe agreement establishing an association between the Community and Lithuania, [1998] O.J. L51, 20.2.98.

³⁷ Whether that sense of community extended to the case of Turkey is open to question.

its existing and potential constituents as well as to legitimate its practices through binding the newly emerged regimes to the system of values that gave the project its definition.³⁸

The Commission outlined the potential scope of these values in 1990. It recommended that the Europe agreements would *only* take effect, “once certain basic conditions are fulfilled with regard to the rule of law and human rights, the setting-up of multi-party systems, the organization of free and democratic elections and economic liberalization.”³⁹ Even so, any clarity in definition of human rights in this context remained elusive. Vague references to “common values” appeared in the preambles to the Europe agreements themselves⁴⁰ and there was a marked absence of any concrete measures to promote human rights *per se* or even to set out the scope of rights to be considered. This left the Community with the freedom to play out negotiations as it saw fit prior to any completion of a particular Europe agreement. Even when those agreements came to be signed rights were neither itemised nor promoted with any degree of specificity.

However, as political developments decreed that the Europe agreements could not be seen as ends in themselves, the move to negotiate for full entry by the CEE states brought human rights issues more to the fore.

³⁸ The themes of “authentication” and “legitimacy” are discussed in Chapter 5 where the role of human rights in the development of the Community is considered.

³⁹ Commission communication to the Council EC Bull 7/8-1990 p93.

⁴⁰ See for example the Europe agreements establishing associations between the Community and Poland ([1993] O.J. L348, 31.12.1993), the Czech Republic ([1994] OJ L360, 31.12.1994) and Lithuania ([1998] O.J. L51, 20.2.1998) which illustrate the consistency of language applied in this respect.

From Association to Accession: Towards Full Entry

By 1993, the Commission began to be explicit in suggesting that the Europe agreements were a prelude to more ambitious goals. In its communication with the Council in 1993 the Commission concluded that it was

“vitally important for the Community to give a clear, unambiguous signal of its intention to forge closer political links with these countries [i.e. the CEE states] in a perspective of future membership.”⁴¹

The possibility of accession was at last countenanced as the objective of the relationships. Even so, the determination to identify specific states as potential members was still subject to constraints, a consequence of a certain wariness given the political and, more especially, the economic instability apparent in the East.⁴² In the same communication the Commission recommended that, “the European Council should confirm, in a clear political message, its commitment to membership of the European Union for the associated countries of central and eastern Europe *when they are able to satisfy the conditions required.*”⁴³ The conditions were

“each country’s capacity to assume the ‘acquis communautaire’ and the competitive pressures of membership, its ability to guarantee democracy, human rights, respect for minorities and the rule of law, and the existence of a functioning market economy, as well as the [Community’s] own capacity to absorb new members.”⁴⁴

⁴¹ Commission communication ‘Towards a Closer Association with the Countries of Central and Eastern Europe’: EC Bull 4-1993.

⁴² See Hanns-D. Jacobsen, ‘The European Union’s Eastward Enlargement’ (1997) *E.I.o.P.* Vol. 1 No. 14 at <http://eiop.or.at/eiop/texte/1997-014a.htm> for a review of this point.

⁴³ See n41 above, [emphasis added].

⁴⁴ *Ibid.*

The Copenhagen Council in April 1993 built on the formula by confirming that membership was open to the now 'associated' states. Membership required each applicant to achieve

“stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”⁴⁵

Here then was the formulation of the Copenhagen Criteria that has been the benchmark in accession negotiations ever since. From a human rights perspective, the criteria were particularly significant. The direct expression of a rights conditionality to be applied to the applicant states demonstrated a substantially more transparent policy for full entry to the Community, one that mirrored the application of the relatively new concept of 'good governance' in the field of development cooperation. Indeed, the Community's Copenhagen Criteria for membership fully embraced the good governance approach adopted by the World Bank and the international donor community of which the Community occupied a major role.⁴⁶

The EC Treaty followed suit with its Article 130(u)(2), which stated

“Community policy in this area [development co-operation] shall contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms.”

⁴⁵ Conclusions of the Presidency at the Copenhagen Council 1993, EC Bull 6-1993 p13.

⁴⁶ See World Bank Policy Paper, *Governance and Development* (1992).

It also established the base from which the scrutiny of an applicant's human rights position could be put into effect. Indeed, the European Council at Copenhagen instituted procedures by which such scrutiny and limited intervention could take place. These took the form of dialogue (rather than investigation) with an emphasis on "meetings of an advisory nature" undertaken in parallel with the Europe Agreements.⁴⁷ The tone was therefore one of cooperation and assistance rather than forceful interference.

Successive Intergovernmental Conferences (IGCs) built upon the above foundation by considering the practical aspects of the proposed enlargement process. At Essen in December 1994 a pre-accession strategy was formulated that encouraged further efforts in the cross-border cooperation that had been instituted by the Europe Agreements and various related programmes.⁴⁸ In the following year, the Madrid European Council indicated that negotiations with the potential candidates for admission to the Community should commence within six months of the 1996 IGC. At the Florence European Council in 1996 a timetable for negotiations was established.

It was at this point that the Council also re-emphasised that the Commission should compile opinions and subsequent periodic reports on each of the applicant states paying particular attention to progress made towards complying with the Copenhagen accession criteria. Although negotiations for entry would continue to be undertaken through constructive dialogue the Community would only proceed once

⁴⁷ Copenhagen Council 1993, Conclusions of the Presidency Annex II EC Bull 6-1993 p18.

⁴⁸ See, again, the PHARE and TACIS programmes n19 above.

an in-depth, and on-going scrutiny of the political, and therefore human rights, considerations of the Criteria had been carried out.

The effect of this policy was to place human rights issues at the forefront of the accession process. However, the nature of the definition of rights and the methods of scrutiny and enforcement actually applied now need to be examined.

3.2 The Key Aspects of Human Rights in Accession Policy

As in development policy there is often little to distinguish between measures of scrutiny and measures of enforcement. The very fact that a state is monitored with regard to its human rights can act as a method of enforcement in itself. Consequently, these two aspects of human rights policy and practice in the enlargement process are considered together. The question of the definition of rights will then be addressed in the light of the measures identified.

3.2.1 Measures of Scrutiny and Enforcement

The point of commencement for this investigation lies with the 1997 'Agenda 2000.'⁴⁹ This document represented the Commission's response to the Council's call to institute a process of continuing scrutiny of candidates for membership. In this

⁴⁹ See n18 above.

influential document the Commission outlined, “in a single framework the broad perspectives for the development of the Union and its policies beyond the turn of the century.”⁵⁰ It noted the underlying principles that shaped the Community’s approach to applicant states and suggested that enlargement would, “promote the idea of European integration” and “strengthen the European model.”⁵¹ More particularly, the Agenda considered the political elements of the Copenhagen Criteria in tandem with the delivery of initial Opinions relating to ten applicants.⁵² It created three thematic fields of enquiry, namely (a) democracy and the rule of law, (b) human rights and (c) respect for minorities. The Commission’s commitment to human rights as central to the political conditions to be scrutinised was therefore re-affirmed.

Having established the general scope of investigation, Agenda 2000 then confirmed the basis upon which that investigation would proceed. The Opinions attached to the Agenda both amplified the level of scrutiny and the methodology employed. The Commission approached each applicant state with a view to conducting a, “systematic examination of the main ways in which public authorities are organised and operate, and the steps they have taken to protect fundamental rights.”⁵³ The sources of information used were specified as:

- answers given to an initial questionnaire sent to the applicants in April 1996
- bilateral meetings to pursue the results of the questionnaire

⁵⁰ *Ibid.* p11.

⁵¹ *Ibid.* Impact Study p1.

⁵² Those applicant states were (in alphabetical order): Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

⁵³ This formula is repeated for all the initial Opinions. See for instance the Commission Opinion on Bulgaria’s Application for Membership of the European Union, EU Bull Suppl. 13-1997 p15.

- reports purportedly provided by the relevant embassies of the Community's Member States
- assessments from international organisations including the Council of Europe and the Organisation for Security and Cooperation in Europe
- reports made available by unidentified NGOs.⁵⁴

The list was suffixed by an “etc.” which presumably indicates other sources were employed although these were not identified.⁵⁵ Nonetheless, the sources specified suggest that the scrutiny was largely a paper-based process albeit incorporating direct dialogue between the Commission and representatives of each applicant state. Member State embassies might have been called upon to carry out specific reports on human rights conditions but it is more likely that normal reporting procedures were co-opted to supplement the information which the Commission may have unearthed itself.

The Opinions registered the results of the Commission's examination on the basis of the information acquired. However, the scrutiny did not, and was never intended to, cease there. It was deemed to be an on-going process that necessitated further annual reports on each country's progress towards satisfying the Copenhagen Criteria.⁵⁶ The Council later made clear that, “the candidate countries are expected to address the

⁵⁴ The list of sources was repeated in each of the Opinions regarding the applicant states. No amendment to the method of scrutiny has been indicated in subsequent country reports.

⁵⁵ The Commission's ‘Composite Paper on Progress Made by the Candidate Countries Towards Accession 1998’ indicates that the Commission may also draw on reports issued by the European Parliament. See EU Bull-Supp 4-1998 p6.

⁵⁶ The European Luxembourg Council 1997 para.29 established the regime for the delivery of “regular reports”.

issues”⁵⁷ presented in the reports even though Agenda 2000 may have concluded that all the then ten applicant states apart from Slovakia already satisfied the political criteria. Consequently, even a finding by the Commission that the human rights related criteria had been met has not prevented pressure being applied in order to effect change and/or improvement in human rights standards. The scheme of examination represented more than an exercise in data-gathering. The enforcement of specifically mentioned rights concerns was an underlying consequence of the strategy imposed.

Human rights conditionality, regardless of formal adherence to the Copenhagen Criteria, was given added force following decisions reached at the Luxembourg Council meeting in December 1997. The evolving pre-accession strategy was to be complemented by yet another instrument, the ‘Accession Partnership.’ Originally identified in Agenda 2000 by the Commission as a means to bring the different forms of pre-accession support within a single framework, the Accession Partnerships itemised the priority areas for further work referred to in each candidate’s regular reports. The priorities were divided into short and medium term objectives and specifically included the political criteria for membership.⁵⁸ Failure to attend to these priorities, as well as satisfy the commitments under the Europe Agreements and the Copenhagen Criteria “could lead to a decision by the Council to suspend financial assistance.”⁵⁹ Presumably, it would also stall the process of accession. The initial accession partnerships also provided a summary of recommendations for action

⁵⁷ Council, EU Annual Report on Human Rights [1999] Doc. 11380/99 p5.

⁵⁸ See Commission Memo/98/21 27.3.1998.

⁵⁹ *Ibid.*

extracted from the country Opinions. Each state was obliged to address *all* the issues raised as a condition of the Partnership document.

The sequence of scrutiny, and effective enforcement, was thus established. The Opinions issued for the applicant states in 1997 were each followed by Accession Partnerships produced in March 1998. The achievement of the objectives itemised within these Partnership documents was then assessed within the next regular country reports delivered in November 1998 and October 1999. These, in turn, gave rise to renewed Accession Partnerships in November 1999 when priorities were reassessed and new objectives for each country put in place. The subsequent reports, delivered in the autumn of 2000 and 2001, determined the extent of compliance with those objectives.

How long this process of scrutiny followed by a call for action might continue is undefined. Presumably, it will depend on when the candidates are accepted as ready for accession and when the Community is ready to receive them. Given the possibility for regular renewal of the Accession Partnerships and the setting of new priorities, as well as the country reports, the process of scrutiny and intervention could conceivably continue for many years.

The scrutiny and conditionality contained within this sequence has therefore formed a forceful means by which human rights issues can be monitored and addressed and particular States 'persuaded' to act in accordance with the Community's directions if they wish to continue their application for membership. Even if a particular human rights concern is not translated into a priority in the Partnership agreement, indeed

even if the country reports continue to assert that the candidate fulfils the political criteria, that concern remains actionable. Such is the effect of the scrutiny and intervention strategy that the Community has instituted.

The above scheme has now become well established. As yet there is little sign that the process is waning. Rather, it would appear that for some countries at least (particularly Romania and Turkey) the scrutiny and enforcement will continue for some time. But how effective is it? A prolonged research programme would be required to answer this question but some tentative conclusions can be drawn from one example.

The case of Turkey perhaps presents the best indication of the impact of the accession process on human rights matters. Originally Turkey was an outcast from the European sphere. In 1989 the Commission concluded “it would not be useful” to open negotiations for accession at that time.⁶⁰ Economic and political issues were cited as relevant to the decision including the detrimental treatment of minorities. However, the Luxembourg European Council in 1997 determined that Turkey should be included in the discussions for enlargement and as a result the Commission’s first regular Report on the Copenhagen criteria as applied to Turkey appeared in 1998. Specific causes for concern were noted in that report. Persistent cases of torture, disappearances and extra-judicial killings, the failure to assure freedom of expression, the conditions in prisons, and the limitation of the freedoms of assembly

⁶⁰ See Regular Report on Turkey’s Progress Towards Accession 1998 at http://europa.eu.int/comm/enlargement/report_11_98/pdf/en/turkey_en.pdf

and association were all highlighted.⁶¹ Economic and social rights, such as those relating to trades union, education, and the restriction of the use of certain languages (Kurdish in particular) and “major shortcomings in the treatment of minorities” were also identified.⁶² The Commission demanded that all of these problems had to be resolved.

Little had changed when the Commission produced reports in the years 1999 and 2000. In the 2000 Report additional concerns about equal opportunities, children’s rights and the denial of cultural rights of the Kurds were noted.⁶³ The conclusion was that Turkey still did not meet the Copenhagen political criteria.

The effect of this determination was to keep Turkey outside any possible enlargement process. However, the following year’s report was able to conclude that significant progress had been made that would “facilitate progress towards satisfying the Accession Partnership priorities”.⁶⁴ Various positive developments were reported, a moratorium on the use of the death penalty, the abolition of legislation restricting the use of minority languages, substantial prison reforms, reforms of the judicial system. Although Turkey still did not satisfy the Copenhagen political criteria it was given encouragement to make further progress.

⁶¹ *Ibid.* pp15-16.

⁶² *Ibid.* p21.

⁶³ Regular Report on Turkey’s Progress Towards Accession 2000 at http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/tu_en.pdf

⁶⁴ Regular Report on Turkey’s Progress Towards Accession 2001 at http://europa.eu.int/comm/enlargement/report2001/tu_en.pdf

Whether the positive developments in the human rights situation can be put down to the interference by the Community through the Accession Partnership and its regular reports is impossible to conclude. However, the existence of the economic and political incentive for Turkey to join the Community suggests that the reforms and advances in human rights issues are connected. The opening of negotiations with Turkey seems to have engendered a response by the Turkish government in areas that have been devoid of improvement for decades. Large scale reforms are underway. The reasonable assumption must be that the Community's accession strategy, its scrutiny and related enforcement through the dual process of the threat of exclusion and the promise of acceptance, has combined to apply considerable pressure on Turkey.

The level of scrutiny and possible sanction in respect of human rights matters discussed above demonstrates the development of a policy that is potentially highly interventionist. The pressures may be subtle, applied as they are through a system of dialogue and 'partnership' but they are no less forceful for all that. It would appear therefore that the Community's policy as regards the applicant states is to examine and alter the *systemic condition* of human rights in those countries. Particular aspects may provide a focus for the Community's concern but the scheme employed is nevertheless comprehensive in intent.

3.2.2 The Definition of Rights

There is no one statement of principle produced by the Community that has satisfactorily established the full extent of its human rights concerns in the enlargement negotiations. Rather one must examine the directive texts (such as the Copenhagen Criteria) and the implementation of policy through the reports and partnership documents that have emerged.

These documents indicate that three areas of rights are addressed. Minority rights, civil and political rights and economic, social and cultural rights.

Minority Rights

On the face of it, the Copenhagen condition that institutions guarantee “respect for and protection of minorities” appears wholly arbitrary in the Community context. There has been little evidence of the Community focusing previously upon this particular aspect of rights. As Barbara Brandtner and Allan Rosas have pointed out, the “emphasis on minority rights is not anchored in any long-standing EC law tradition.”⁶⁵ M.A.M. Estébanez has also observed that no “general policy with regard to minority protection within the borders of the Union” had been adopted prior to 1995.⁶⁶ Indeed, the Commission’s Report on the Action Plan against Racism (2000) admits that the field is one in which “the Union needs to establish a coherent policy,

⁶⁵ Barbara Brandtner and Allan Rosas, ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice’ (1998) *EJIL* Vol.9 No3 p21.

⁶⁶ M.A.M. Estébanez, ‘The Protection of National, or Ethnic, Religious and Linguistic Minorities’ in N. Neuwahl and A. Rosas (eds.) *The European Union and Human Rights* (Kluwer Law International, The Hague 1995) at p135.

at the level of its own Member States as well as the framework of enlargement.”⁶⁷

There is therefore an institutional recognition of a distinction in practice.

Despite the ambiguity of the Community towards minority rights as a concept, Brandtner and Rosas have nevertheless attempted to justify the reference to minorities in the accession procedure. First, they suggest that the case of *Nold*⁶⁸ determined that when looking at the sources of human rights law the ECJ could take into account “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”. This would include such provisions as Article 27 of the UN International Covenant on Civil and Political Rights, which declares that “*persons belonging to...minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*” [emphasis added].⁶⁹ Second, they also refer to Articles 13 (ex Article 6a) and 151(4) (ex Article 128(4)) TEC, which aim to combat discrimination and promote the diversity of cultures respectively. However, the Community’s approach to human rights has always focused on their individual application. Collective interests as such find little internal recognition. Consequently, both of Brandtner and Rosas’ arguments serve to highlight the distinctive nature of this element of the Copenhagen Criteria. Certainly, a more consistent approach would have been to make the elimination of all forms of discrimination a key demand. That would have possessed significantly more force and identifiable content than the reference to minorities. The

⁶⁷ Commission’s Report on the Action Plan against Racism (2000) p22.

⁶⁸ Case 4/73 *Nold v. Commission* [1974] ECR I 491-516.

⁶⁹ Estébanez makes much the same point, n66 above p158.

search for some kind of precedent in the Community's legal structure is therefore strained and fails to assist in understanding why minority rights received such specific attention as an entry requirement. Instead, I argue we must look elsewhere for an answer to the prioritisation of a distinct approach to rights that the criteria installed.

A clue may be gleaned from another part of the 1993 Copenhagen Council conclusions. In considering France's proposal for a "pact on stability in Europe" the Council found that such an initiative was, "directed towards assuring in practice the application of the principles agreed by European countries with regard to respect for borders and rights of minorities."⁷⁰ There can be little doubt that events in Europe, specifically in the former Yugoslavia, were a key influence behind the approach. Indeed, it would be possible to argue that the conflicts that erupted within the Balkans brought to life the very fears that manifested themselves soon after the collapse of Communist rule in Central and Eastern Europe. The dangers resulting from a power vacuum, from the fragmentation of states, and from the prospect of conflict that might draw in Member States, were crucial concerns at the time.⁷¹ In the case of the former Yugoslavia, the possibility of violence and oppression resulting from the emergence of independent states claiming legitimacy on the grounds of a nationalism founded in an ethnic identity was an attendant anxiety, echoing problems of the early Twentieth Century. The potential 'victims' in this case were observed as those unfortunate enough to find themselves in the 'wrong territory' when the

⁷⁰ Conclusions EC Bull 6-1993 I.15 p14

⁷¹ See James Gow and Lawrence Freedman, 'Intervention in a Fragmenting State: the Case of Yugoslavia' in Nigel Rodley (ed.) n15 above pp93-132.

borders of these states were drawn or fought over. As such they were easily identifiable, or rather classifiable, as 'minorities'.

When the fighting flared in various parts of the former Yugoslavia in 1991 the primary political concern was to end the violence. However, that conflict was interpreted as akin to internecine strife whereby minorities were subjected to horrific persecution. 'Ethnic cleansing' became the motif that symbolised the nature of the violence. Given the appreciation of the conflicts as ones emanating from the *disintegration* of a federation, a federation which attempted to draw together disparate cultures and ethnic groups, it is not difficult to understand the importance attached to establishing institutions which guaranteed democracy *and* respect and protection for minorities. It has even been suggested that the Community identified the conflict as a test of its own integration possibilities. Gow and Freedman comment that, "perhaps also it was embarrassing for the European Community to have an example close at hand of a failed experiment in federation. For those seeking closer integration within the Community, Yugoslavia was a poor advertisement, the obvious differences between the two notwithstanding."⁷² Certainly, the example of Yugoslavia may have presented an extreme version of the possibilities that followed the break-up of old Communist and Soviet structures. Nevertheless, the need to discourage such violence was a primary political aim for the Community.

In the context of entry to the Community, the need to emphasise the respect for minority rights as a pre-condition for applicant states was therefore understandable. It

⁷² See Gow and Freedman n71 above pp98-99.

was a requirement that had its roots in a policy designed to stabilise Eastern and Central Europe and thus reduce the threats that might directly affect the Community's members and the future realisation of the European project. Nevertheless, it had the effect of recognising and promoting a collective understanding of rights.

To clarify the Community's stance in this respect the Agenda looked towards a "number of texts governing the protection of national minorities" (including those adopted by the Council of Europe) as guidance for assessing the standards expected. In particular, the Framework Convention for the Protection of National Minorities 1995 was identified as safeguarding "the individual rights of persons belonging to minority groups."⁷³ Although a number of Member States themselves have yet to sign and/or ratify the Convention this has not prevented the Convention from being recommended for applicant states.⁷⁴ This of course sends contradictory messages to applicant states concerning the true value ascribed by the Community and its members to both minority rights in general and the international agreements in particular.

The subsequent application of Agenda 2000 has indicated how extensive the Community's commitment to protecting minority rights has become. In the case of Estonia, for example, the "integration of non-citizens"⁷⁵ was identified as a matter of

⁷³ See Briefing No.20 on Democracy and respect for Human Rights in the Enlargement Process of the European Union, 1.4.1998 PE 167.582 p10.

⁷⁴ As at March 2001 France had neither signed nor ratified the Convention. For details of signatories see <http://www.coe.fr/tablconv/157t.htm>. Belgium only signed on the 31st July 2001. Belgium, Greece, Luxembourg, the Netherlands and Portugal have yet to ratify.

⁷⁵ See, Commission Opinion on Estonia's Application for Membership of the European Union p71 that focuses on the situation of Russian speakers within Estonia.

concern that merited the demand for “measures to facilitate the naturalisation process” including language training and financial support.⁷⁶ In Slovakia, the Commission noted in 1999 that the Hungarian minority had gained representation in government but that a bill for the “use of minority languages in official contacts” had not been passed.⁷⁷ The Commission then stated, “it is a measure which should be adopted at the earliest opportunity.”⁷⁸ In the case of Turkey, currently failing to meet the political conditions of the Copenhagen Criteria as we have seen,⁷⁹ the position of the rights of the Kurdish minority has been a particular concern of the Community. The Commission specified the measures it preferred to see introduced. They included, “the recognition of certain forms of the Kurdish cultural identity, greater tolerance *vis-à-vis* the means of expressing this identity, to the extent that this does not play into the hands of separation or terrorism”⁸⁰ (the last phrase perhaps indicating a certain wariness in case similar sentiments expressed *in* the Community would undermine the integrity of the nation-state).

The main target of concern has, however, been the situation of the Roma. The Romanian Accession Partnership of 1999, for instance, requires “dialogue between the Government and the Roma community” to be strengthened “with a view to elaborating and implementing a strategy to improve economic and social conditions

⁷⁶ Estonia Accession Partnership 1999 DG Enlargement Documents at http://europa.eu.int/comm/enlargement/estonia/ac_part_10_99_draft/index.htm4

⁷⁷ Communication from the Commission Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries COM(1999) 256 final.

⁷⁸ *Ibid.* p13.

⁷⁹ Commission Turkey Progress Report 8.11.2000 and Council Decision of 8.3.2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey [2001] OJL 85 24/03/2001 p13.

⁸⁰ *Ibid.* p14.

of the Roma”.⁸¹ It also calls for “adequate financial support to minority programmes” as a short-term priority. Similar provisions appear in respect of many of the other candidate countries. For Bulgaria “further efforts to integrate the Roma” were demanded in the first Accession Partnership.⁸² This has been followed by the requirement that a proposed Roma Framework Programme be implemented both in the short and medium terms.⁸³ The provision of financial support at national and local levels has also been made a short-term priority for Roma assistance in the Czech Republic.⁸⁴

The attention paid to the plight of the Roma indicates the extent to which the Community is willing to intervene in the issues of minority rights. There appears to be a concerted attempt to recognise the problems and address them at every level, imposing standards and procedures on the applicants. This has rendered minority rights highly visible within the accession process and beyond. The issues raised and standards set provide precedents for all jurisdictions to follow. The collective nature of the rights involved have been reinforced and respected.

Civil and Political Rights

The definitions of civil and political rights applied in the accession process have tended to concentrate on the basic provisions contained in the European Convention

⁸¹ Romania Accession Partnership 1999 DG Enlargement Documents at http://europa.eu.int/comm/enlargement/romania/ac_part_10_99draft/index.htm 4.

⁸² Bulgarian Accession Partnership March 1998 para. 4.1.

⁸³ Bulgarian Accession Partnership November 1999 paras. 4.1 and 4.2.

⁸⁴ Czech Republic Partnership November 1999 para. 4.1.

on Human Rights. Consequently, the first regular report for Estonia issued in November 1998 raised the question of prison conditions, for instance. These, the report demanded, required “further improvement.” Although not an identified priority in the Accession Partnerships of 1998 or 1999 the issue was still the subject of enforcement through its very mention in the report.

Prison conditions are also a specific concern in the case of Turkey’s application. Regularly upbraided for its lamentable standards in this regard, Turkey has been condemned for ill treatment of detainees, overcrowding and the poor conditions of its juvenile offenders institutions.⁸⁵ Similarly, for Romania, great emphasis has understandably and consistently been placed upon the condition of children in care. The treatment of people with disabilities is also a concern. The extent of the intervention in these respects is very broad. The short-term priorities established in the Accession Partnership 1999, for achievement by 2000, include a requirement to,

“guarantee adequate budgetary provisions for the support of children in care and undertake a full reform of the child care system as well as of provisions for the treatment of children and adults with chronic diseases and handicaps.”⁸⁶

In similar vein Bulgaria has recently been encouraged to improve community care services for children.⁸⁷ The UN convention on the Rights of the Child has been specifically mentioned as the precedent in the country’s child rights provision.

⁸⁵ Turkey Progress Report 8.11.2000 p16. See http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/tu_en.pdf

⁸⁶ N81 above.

⁸⁷ Council Decision on the principles, priorities intermediate objectives and conditions contained in the Accession Partnership with Bulgaria [2002] OJL 44/1.

A whole range of other civil and political rights has been referred to across the accession process. Police misconduct, the fight against corruption, trafficking in women (in the case of Slovakia⁸⁸) and various other matters have been the subject of comment and scrutiny. Consequently, there are no discernible areas where the Community will not tread in this field of rights.

Economic, Social and Cultural Rights

Economic, social and cultural rights may not have received the prominence accorded to the other rights issues mentioned above but nonetheless they still register a significant presence in the assessment of the political criteria for each applicant. Indeed, they appear under two sections. First, in their own right within the political criteria and second as elements of the *acquis communautaire* that is supposed to be adopted by the applicants. So, in the latter case we see attention paid to health and safety, employment rights, and consumer protection issues surface as matters to be addressed by the applicants where necessary.

However, it is under the political criteria that the widest scope of rights referred to appears. Thus, cultural rights attached to language, rights of equal opportunities, rights of trades union, and rights of disabled people have all figured within the documents. The detail is perhaps less significant than the fact that these matters are subject to assessment and comment.

⁸⁸ Commission, Regular Report on the Progress Towards Accession by Slovakia 2000 at http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/sk_en.pdf

3.3 Conclusion

On the basis of the wide ranging approach to human rights issues, some elements of which have been discussed above, it can be seen that in matters of scrutiny, enforcement and definition that the Community has developed a comprehensive scheme for assessing an applicant's human rights situation. By merely mentioning a particular issue, it impresses on the applicant that attention must be paid to that area. Even though many of the states are considered to have satisfied the political criteria of Copenhagen, this will not stop governments from concluding that there is still room for improvement. And in the absence of positive action the time to accession may be further prolonged.

The interconnected and comprehensive strategy thus imposed by the Community would seem to draw together a reporting mechanism with one of enforcement. The peculiar relationship between the Community and the applicant states provides that opportunity. However, what concerns me now is to what extent this approach (and that of development discussed in the previous chapter) differs from the human rights stance taken internally. In other words, what is the scope of bifurcation that can be discerned?

CHAPTER 4

THE BIFURCATION OF HUMAN RIGHTS IN THE COMMUNITY

The previous two chapters outlined the institutional narratives of rights in two key areas of external policy. This chapter aims to compare these with the internal condition thus identifying the scope of bifurcation that I suggest has developed.

Three categories of distinction are highlighted. First, in the definition and meaning of human rights applied. Second, in the measures of scrutiny adopted. Third, in the enforcement mechanisms available. These are considered in detail together with those recent initiatives that might be said to tackle the effects of bifurcation. Finally, I examine the major arguments that have been used to explain the distinctions between the Community's internal and external practices, if not the bifurcation as a phenomenon.

4.1 Bifurcation in Definition

To talk of "human rights" as a recognised and established body of principles and concepts would be fallacious. The subject has been and remains contentious. The

contents and meanings of the term are fluid and open to debate. Such has been the character of the international discourse for the past fifty years or more. Consequently, the fact that “human rights” appears as a subject of policy and action by the Community in both the internal and external spheres does not mean that a uniform understanding is applied. Rather, it is in the discontinuities of definition evident from the Community’s practices that the scope of bifurcation can first be ascertained.

The discussion, however, may at least commence from a point of continuity. The Community has now adopted a rhetoric that suggests it may adhere to a consistent interpretation of human rights principles. These were identified in the context of external relations as primarily the acceptance of the universality and indivisibility of rights.¹ Human rights are thus assumed to have a discernible content that will be applied regardless of sphere of activity.

Internally, the language of universality and indivisibility remains absent from the Treaties but there would nonetheless appear to be a consensus that it forms the bedrock of *all* Community human rights policies. The Council’s 1999 Annual Report on Human Rights, for instance, stressed adherence to the universality and indivisibility of human rights and their integration with “peace and security, economic development and social equity”. The following year’s report also restated these principles, taking as its cue the universality concept promulgated at the World Conference on Human Rights in Vienna in 1993. It reported that the Community

¹ See Commission, ‘The European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond’ EC Bull Supp. 3-1995 p29.

“recognises the diversity of the world” but “regardless of different cultures, social background, state of development, or geographical region, human rights are inalienable rights of every person.”² Similarly, the Commission has referred to the EU Charter of Fundamental Rights as evidence of the Community’s overall commitment to the principles of universality and indivisibility.³ The Charter itself refers to the Community as “founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”⁴ One might surmise therefore that the human rights promoted externally would be of the same order and definition as those acted upon within the Community.

Whether or not this is in fact the case can be resolved by comparing two aspects. First, the sources of law relied upon to define human rights and second, the concepts of rights accepted and promoted.

4.1.1 Sources of Law

We have already seen in the analysis of development policy that the sources relied upon to define the meaning of human rights were extremely wide. The international instruments used as inspirations were largely products of the United Nations system although broader perspectives were also entertained. The application of the rights to development, the preference given to economic and social rights and the linkage of rights with other concepts such as “good governance” and security have been

² Council, EU Annual Report on Human Rights [2000] Doc. No.11542/00 p8.

³ Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the EU 20.11.2000 COM/2000/0644 final.

⁴ EU Charter of Fundamental Rights (2000) OJC 364/08.

hallmarks of the language adopted by the Community. Civil and political rights have also featured prominently and still form the basis for instigating negative measures of enforcement. Positive measures are not so constrained and thus from the General System of Preferences to development aid a whole raft of human rights are promoted.

In accession policy we have seen slightly more restricted sources applied. The European Convention on Human Rights (ECHR) has formed the basis for discussion but other instruments such as the Framework Convention for the Protection of National Minorities 1995 have been given prominence. Nevertheless, both civil and political rights and economic, social and cultural rights have also been the subject of scrutiny.

Internally, the sources of law that define rights that are the subject of Community action are somewhat different. The EU Charter of Fundamental Rights provides the latest expression of the Community's internal understanding. It claims to represent "for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU".⁵ The preface states that "the rights as they result, in particular, from the constitutional traditions and international obligations *common* to the Member States" [emphasis added] are reaffirmed.⁶ It then lists a number of precedents

"the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the

⁵ Preface to the Charter of Fundamental Rights of the European Union (2000) OJ C 364/01.

⁶ *Ibid.* p8.

Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.”

The reference to “international obligations” therefore does not directly relate to a corpus of human rights texts applied by the global community. Rather, the obligations are only those “common” to the Member States. Any international human rights instrument that does not find favour with one Member State by implication is excluded as a valid precedent for interpretation.

The European Court of Justice (ECJ) has in fact established a robust line of case law to substantiate the limitation. Since *Nold* it has held that

“International treaties for the protection of human rights *on which the Member States have collaborated or of which they are signatories*, can supply guidelines which should be followed within the framework of Community law” [emphasis added].⁷

The inference is that unanimity of collaboration or signature by the Member States is an absolute requirement for any international human rights treaty to form a source of law within the Community. Certainly, if the ECJ were faced with an international instrument that was adamantly opposed by one or more Member States, it would be hard to envisage that it would be treated as a viable precedent. One could imagine, for instance, a situation whereby moves to acknowledge a right to abortion would be fiercely resisted by countries such as Eire. In such a case, as *SPUC v. Grogan* might suggest, the ECJ could find it extremely problematic to enforce a right that was not universally recognised.⁸ Consequently, although as Leonard Besselink submits, no

⁷ *Nold v. Commission* Case 4/73 [1974] ECR 491. See also *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759 para. 33.

⁸ *SPUC v. Grogan* Case 159/90 [1991] ECR I-4685.

“obvious problems” have developed through Member States being parties to different treaties, difficulties might still arise.⁹

In this respect it should be remembered that the *Nold* criteria was established with the ECHR very much in mind. That was the international instrument that held the attention of the ECJ at the time. The intention was not, therefore, to open the gates to the burgeoning library of human rights texts. It is perhaps unsurprising therefore that the ECJ’s reference to other international instruments has been extremely limited.¹⁰

The possibility exists therefore that externally the Community may adopt an approach to human rights that is founded on instruments to which its developing partners have not ascribed. In other words, the Community determines unilaterally those standards it wishes to make the basis for the scrutiny and enforcement of rights in a third country. Even though there is an element of negotiation in both development and accession policies through the drafting of agreements, it would be naïve to suppose that the Community did not determine the standards that would apply.

By contrast, world or even regional standards may be suppressed internally where one or more Member State has decided to oppose (or at least not support) the expression of such rights. Indeed, the fact that in accession policy reference may be made to the Framework Convention when a number of Member States have yet to sign and/or ratify the same suggests that the Community can even make an external

⁹ See Leonard F.M. Besselink, ‘Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) *CMLRev* pp629-680.at p652.

¹⁰ *Ibid.*

requirement where there is no internal consensus. The latest example is in the 2001 Report on Turkey's application in which the candidates failure to sign the Framework Convention is noted with implicit disapproval.¹¹ This at a time when France similarly has failed to sign. The result is the emplacement of a skewed approach to international human rights that could constitute a division in current or future human rights evolution.

On a similar note, the Preamble of the EU Charter refers to "common values" and the Community's "spiritual and moral heritage" as inspiring the Charter's construction. When talking of the "preservation and development of these common values" respect is paid to "the diversity of cultures and traditions of the *peoples of Europe* as well as the *national identities* of the Member States" (emphasis added). Although articles of the Charter relate to equality and the right not to be discriminated against,¹² the language adopted in the preamble indicates a preference for promoting cultures and traditions that emanate *from* Europe not elsewhere. Despite their protection from abuse or discrimination, Europe's "others" are effectively excluded within the very core of the Community's human rights creative and promotional rhetoric. The failure of the Charter to be all embracing from the outset therefore suggests an interior interpretation of human rights that is "located" not "universal".

In this respect, the Charter follows the general parameters set down by the TEU and the ECJ. Article 6 (ex Article F) TEU determines that the Community shall respect

¹¹ See Regular Report on Turkey's Progress Towards Accession available at http://europa.eu.int/comm/enlargement/report2001/tu_en.pdf p29.

¹² See for instance Article 21 on 'Non-Discrimination', n4 above, p13.

fundamental rights as guaranteed by the ECHR “and as they result from the constitutional traditions common to the Member States” and “the national identities of its Member States”. As already indicated this will include international instruments but the parameters for interpretation are set. European texts are to govern European behaviour. There is no extension of the principle to the identities and principles that might have developed outside Europe even though a substantial proportion of Europe’s inhabitants originated from other regions. What place then can Islamic cultures and traditions, for instance, have within the rhetorical landscape that the Community’s constitutional texts describe?¹³

In view of all the above it would seem ironic then that the Commission should have decided to promote the EU Charter as a set of guiding principles for its external relations. In 2001 Chris Patten, Commissioner responsible for External Relations stated that the Charter is “an important element in the European Union’s efforts to ensure coherence between the internal and external human rights policy.”¹⁴ But the means by which the Charter will achieve this objective are far from clear. If it is intended to identify those human rights that will be the concern of the Community in its development policy, for instance, then it singularly fails to emulate the definition of rights as putatively applied in that area. Specifically, the Charter contains no reference to collective rights, which is a particular interest in both development and accession policies.

¹³ Silvio Berlusconi gave an indication of the type of rhetoric that might surface after the attacks on the World Trade Centre in New York on September 11 2001. He reportedly spoke of the “supremacy” and “superiority” of western civilisation and called on Europe to recognise its “common Christian roots”. See, *The Guardian* 27.9.2001.

¹⁴ Speech by the Rt. Hon Chris Patten, European Parliament – Plenary Session, Strasbourg, 4 July 2001, accessed at http://europa.eu.int/comm/external_relations/news/patten/sp04_07_01.htm on 18/9/2001.

This brings us to the second element of bifurcation regarding definition.

4.1.2 Conceptions of Human Rights

Human rights have been analysed as possessing historically three generations.¹⁵ The first has been considered as the civil and political rights that characterised the French and American revolutions. The second, are those economic, social and cultural rights that were putatively represented in the Russian revolution. The third, notions of collective or “peoples’ rights” that have been the subject of increasing global discourse since the middle of the 1960s. Both of the first two “generations” find expression by the Community internally *and* externally. Although there may be some debate as to the extent of application by the Community in each sphere, and the emphasis that is placed on them, there is nonetheless a willingness to recognise their claims for respect regardless of policy area. Thus since at least the end of the Cold War both civil and political rights *and* economic, social and cultural rights have found acceptance both internally and in the two external policies I have examined.¹⁶ However, the situation is different for notions of collective rights. Indeed it is with regard to the appreciation of the third generation that the bifurcation in definition becomes most evident.

¹⁵ See, Roland Rich, ‘The Right to Development: A Right of Peoples?’ in James Crawford (ed.) *The Rights of Peoples* (Clarendon Press, Oxford 1988) pp39-54.

¹⁶ Chapters 2 and 3 illustrate the broad range of rights pursued externally. For a brief review of the breadth of rights covered internally see Christiane Duparc, *The European Community and Human Rights* (Commission, Brussels 1993) pp14-18.

Specifically, the analysis of development and accession policies revealed that the Community was intent on promoting the rights of minorities and the right to development (and rights *in* development). These collective or group rights have been central to the Community's discourse and practice in the two external domains covered. But can the same be said for the internal condition?

Minority Rights

Little has occurred over the Community's history to suggest it is willing to promote minority rights interests as ardently within its internal sphere as it does externally. As was explained in Chapter 3, condemnation or official sanction in relation to problems of the integration of and discrimination against minorities within the Member States has been largely absent at Community level. Only the European Parliament has paid any great attention to the issue. There has been silence and inaction with regard to, for example, Germany and its treatment of Turkish migrant workers,¹⁷ to the situation in Greece in relation to the institutional discrimination applied to the Turkish minority,¹⁸ and as regards Belgium and its widespread failure to deal with racism at all levels. In the latter case, the European Commission against Racism and Intolerance reported in 2000 that "problems of racism and intolerance still exist in Belgium" and that the "widespread exploitation of racism in politics by

¹⁷ See, Human Rights Watch, *"Foreigners Out" Xenophobia & Right-Wing Violence in Germany* (1992) and *"Germany for Germans" Xenophobia and Racist Violence in Germany* (1995). For further discussion on this and related topics, see also, Michael Spencer, *States of Injustice: A Guide to Human Rights and Civil Liberties in the European Union* (Pluto Press London 1995). See also the European Parliaments Committee on Civil Liberties and Internal Affairs Report on respect for human rights in the European Union in 1994 [1996] A4-223/96.

¹⁸ See Human Rights Watch, *The Macedonians of Greece* (1994) which examines the situation of ethnic Macedonians in northern Greece and, Human Rights Watch, *The Turks of Western Thrace* (1999) which condemns the Greek government's attitude to the Turkish minority in the region.

extreme right-wing political parties” and “racism and intolerance on the part of some law enforcement officials” were of particular concern.¹⁹

Despite attempts to address the issues of racism and xenophobia through various initiatives the central problems reported have not been addressed by the Community directly or specifically. The Vienna Monitoring Centre on Racism and Xenophobia,²⁰ for example, instituted in 1997, only has as its primary aim, “study, data collection and problem analysis” not the recognition and enforcement of any collective rights that might be asserted.²¹

The contrast with the Community’s approach particularly in accession policy is acute when we examine the situation of the Roma. As Chapter 3 details, the plight of the Roma throughout Eastern and Central Europe occupies considerable attention in the accession process. A difficult example of institutional discrimination that transcends national boundaries is recognised by the Community and serious attempts have been made to encourage, if not enforce, change. The treatment of the Roma within the Community is of no less a cause for concern. The Roma possess a significant presence in some of the Member States. The European Parliament’s Committee on Civil Liberties and Internal Affairs in 1994 has acknowledged both the size of the Roma minority in the Community and the extent of the racism and discrimination that they suffer.²² It continues to draw attention to the problem.²³ Organisations such

¹⁹ See ECRI Second Report on Belgium adopted 18 June 1999, CRI(2000)2, Executive Summary.

²⁰ Council Regulation 1035/97 [1997] O.J. L151/1.

²¹ Conor A. Gearty, ‘The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe’ in Philip Alston *et al* (eds.) *The EU and Human Rights* (Oxford University Press, Oxford 1999) pp325-358.

²² See, Report on the situation of the Gypsies in the Community A3-0124/94 quoted in Spencer, n17 above p139.

²³ Report on countering racism and xenophobia in the European Union A5-0049/2000 Preamble para. T 9.

as the European Roma Rights Centre (ERRC), have also highlighted significant discrimination within Member States, in particular Austria, fiercely condemned for introducing legal and administrative measures that gave rise to “systemic exclusion of Roma”.²⁴ Italy too has been criticised in reports by the UN Committee on the Elimination of Racial Discrimination (CERD) in 1999 and by the ERRC in 2000. The ERRC report, for instance, concludes

“The will to expel Roma from Italy has grown....Aggressive and abusive raids by police and other authorities have continued apace. Italian politicians have publicly offered hate and been rewarded by public support.”²⁵

The report further points to a cloak of silence over the country’s record stating

“Response by other European countries has been close to non-existent; while Europe has shunned Austria since the xenophobic Freedom Party entered the Austrian government, there has been little to no response to the rise of racial hate in Italy.”²⁶

Despite such revelations and recognition no legally binding framework for direct institutional intervention in the affairs of the Member States on minority rights has been constructed in the name of the Community. Some support for Roma is provided through initiatives in education and culture²⁷ but little has been done to combat the serious issue of institutional discrimination and racism within the Community referred to above. The position of both the Commission and the Council has been clear by replies given to two European Parliamentary questions.

²⁴ ERRC *Divide and Deport: Roma and Sinti in Austria* (1996) at <http://errc.org/publications/reports/austria.pdf> p5.

²⁵ ERRC *Campland: Racial Segregation of Roma in Italy* Country Report Series No.9 October 2000 at <http://errc.org/publications/reports/italy.pdf> p93.

²⁶ *Ibid.*

²⁷ See, for example, Resolution of the Council and the Ministers of Education, meeting within the Council, of 22 May 1989 on school provision for gypsy and travellers children [1989] OJ C153/3.

First, Jan Wiersma in 1999 enquired as to the Commission's knowledge of the plight of the Roma in the applicant states and also asked whether the Commission had any facts about problems relating to Roma resident within the Member States.²⁸ Mr Verheugen on behalf of the Commission replied first that the "Commission closely monitors the initiatives by the applicant states to improve the Roma situation." Second, he stated simply that the "situation of Roma minorities in the Member States is monitored by the Council of Europe." In contrast to the approach to applicant states, the Community is not concerned internally with monitoring the treatment of the Roma. That is left to the Council of Europe, of which significantly all the applicant states are now members.

Second, in 1997 Eva Kjer Hansen asked the Council whether it was "reasonable that the Union requires more from the future Member States from Eastern Europe, when it comes to the protection of minority rights, when the Union has made no legislative effort in that field for the minority groups within the Union".²⁹ She also asked whether the Council planned "any legislative measures for the protection of minority groups in the Union." The Council responded

"The specific question to which the Honourable Member refers does not fall within Community competence. However, the Council recalls that Article F(2) of the Treaty on European Union states that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

²⁸ Written Question E-2815/99 by Jan Wiersma (PSE) to the Commission (18th January 2000) OJC 280E, 03/10/2000 p137.

²⁹ Written question No E-1621/97 by Eva Kjer Hansen (ELDR) to the Council (14 May 1997) [1998] OJC 82/13.

The use of issues of competence to avoid dealing with the problem and the deflection of responsibility on to other organisations is in direct contrast to the external approach. The accession process in particular could easily adopt the same line given that all applicants are members of the Council of Europe. But the Community chooses to embrace fully the need to address matters of racism and discrimination against the Roma in the applicant states.

The legal position of minority rights is equally ambiguous in the ECJ. Indeed, the notion of group rights does not figure within its reasoning. When deciding its understanding of those rights that must be respected as “an integral part of the general principles of law” of the Community,³⁰ it has confined itself almost entirely to those individual rights protected by the ECHR. Even when faced with a possible group right in the shape of a people’s language in *Groener v. Minister for Education* it avoided the discourse of rights altogether. Instead it concluded that the “EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State” whilst adding the proviso that “the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers.”³¹ Consequently, it did not frame the issue in terms of rights at all.

But perhaps more significantly the most blatant failure to address the question of minority rights can be construed from the EU Charter of Fundamental Rights.³² No

³⁰ Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR II 1125-1155. For a review of this history see Chapter 5.

³¹ Case 379/87 *Groener v. Minister for Education* [1989] ECR 3967.

³² EU Charter n4 above.

mention is made of minorities in that text, a fact that may be tempered by anti-discrimination rhetoric but which nevertheless misses the very point assumed by the Community in its relations with third countries in general and applicant states in particular. Group rights require recognition and promotion to ensure that institutionalised and widespread discrimination and racism is to be countered. Internally the Charter indicates a total absence of minority rights as a separate rights construct. Indeed, it has been criticised by the Assembly of the Council of Europe for that reason, which stated

“the Assembly also regrets that the draft Charter makes no express reference to the rights of persons belonging to ethnic, religious or linguistic minorities or indeed to the right to local and regional self-government – rights which are protected by Council of Europe instruments such as the Framework Convention for the Protection of National Minorities and the European Charter of Local Self-Government.”³³

The Charter therefore directly countermands the Commission’s own suggestion in 2001 that the Charter should “promote coherence between the EU’s internal and external approaches” on minority rights.³⁴ It is indicative of a Community approach that externally is keen to promote those rights on a collective basis and internally is reluctant to even discuss them in such a fashion. The very concept of rights in this context is therefore subject to a fundamental distinction.

³³ Report of the Parliamentary Assembly of the Council of Europe Resolution 1128(2000) p3.

³⁴ Communication from the Commission to the Council and the European Parliament, ‘The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries COM(2001) 252 final p3.

Development Rights and the Right to Development

The Community's promotion of the right to development has already been discussed in Chapter 2. Suffice to say that although the Community has maintained a stance that emphasises a right to development that "embraces the notion that every individual has the right to take part in the development process"³⁵ it also supports collective interests within the concept. It may not endorse more radical approaches but its promotion of the rights of persons with disabilities, minorities and indigenous peoples, as well as the initiatives that are designed to alleviate poverty, all acknowledge as much.³⁶ The Community's practice through its general aid programme over the years has also supported economic, social and cultural rights in preference to (at least monetarily) civil and political rights. Consequently, development policy has now become centrally entwined with human rights principles that purportedly govern the Community's practice. This has been enforced by Article 177(2) (ex Article 130u) TEC, which confirms that Community development policy "shall contribute to the general objective of...respecting human rights and fundamental freedoms."

Of equal significance is the Community's related advocacy of the principle of "good governance". The Commission has described this as "implicit in a political and institutional environment respecting human rights, democratic principles and the rule of law."³⁷ Again respect for human rights appears as an indispensable component.

³⁵ Overview of the 57th Session of the UN Commission on Human Rights 19 March-27 April 2001 p69, at http://europa.eu.int/comm/external_relations/human_rights/doc/uncom57.pdf

³⁶ *Ibid.*

³⁷ Commission Communication to the Council and Parliament, 'Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP states' COM(98)146 p8.

Human rights have also been incorporated into the review of developing countries' public governmental management. Thus, the Commission suggests that

“equity and the primacy of law in the management and allocation of resources call for an independent and accessible judicial system that guarantees all citizens basic access to resources by *recognising their right to act against inequalities* [emphasis added].”³⁸

It continues to demand that “government and civil society must be able to implement an equitable development model and guarantee the judicious use of all resources in the public interest.”³⁹

Internally, although the discourse of a *right* to development does not appear, the concept of development does possess an important presence within the Community's regional policy. It does not, however, embody any understanding of human rights. Joanne Scott reveals that “Community law in relation to regional development operations incorporates a narrow vision of ‘development’ and one which is closely linked to economic growth.”⁴⁰ The Community's concern is quantitative rather than qualitative development. Issues of economic growth are paramount and are not interrupted by any concerns about human rights of an individual or collective nature. This can be differentiated from the short-term requirements placed on Turkey by the 2000 Accession Partnership.⁴¹ As an element of the priorities in respect of the political criteria, Turkey is required to “develop a comprehensive approach to reduce regional disparities, and in particular to improve the situation in the south-east, with

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Joanne Scott, *Development Dilemmas in the European Community; Rethinking Regional Development Policy* (Open University Press, Buckingham 1995) p49.

⁴¹ Incorporated in Council Decision 2001/235/EC OJL 85/13.

a view to enhancing economic, social and cultural opportunities for all citizens.” The notion of development constructed around rights is reflected in the political rather than economic criteria within which this demand is placed.

The dissimilarity with the external dimension is further apparent when assessing the conditionality applied in determining the extent of development funds that may be provided by the Community. Internally, the provision of aid under the Structural Funds⁴² to achieve economic and social cohesion is dependent on Member States satisfying certain economic criteria. No requirements may be made on the basis of human rights considerations of whatever hue. By contrast, funds provided to states seeking accession are subject to both economic *and* political criteria, which as we have seen include human rights as a crucial factor.⁴³

This distinction undermines both the concept of development *and* of rights. By placing rights at the centre (if only rhetorically) of an externally applied policy at the same time as ignoring them in the internal context suggests that rights do not assume equal importance in the two spheres. Even if an assumption were made that all relevant rights were respected in the Member States there is no reason why their importance in development could not be reiterated. However, the internal narrative of development steadfastly denies any rights element, which runs wholly counter to the rhetoric of the right to development that the Community is so keen to promote. Consequently, the adherence to a common understanding about established rights and rights still undergoing formation is made impossible. The Community’s

⁴² See Articles 158-162 (ex Articles 130a-130e) TEC.

⁴³ For a comprehensive review of the issue see Joanne Scott, ‘Regional Policy: An Evolutionary Perspective’ in Paul Craig and Gráinne de Búrca (eds.) *The Evolution of EU Law* (Oxford University Press, Oxford 1999) pp625-652.

approach is entirely relativist thus fundamentally contradicting its own adopted universalist principles.

Such an analysis may be extended to other areas of rights. Gráinne de Búrca, for instance, makes the point that certain rights issues, such as cultural rights

“which have gained importance within general human rights discourse have not acquired that status or been discussed in those terms in Community legal vocabulary and instruments, even where those issues fall within Community competence.”⁴⁴

The bifurcation evident from the approach to development nonetheless is sufficient to illustrate the potential extent of the Community’s approach.

Having considered both the sources of law applied and two examples of rights practice, the argument may be made that the concept of universalism is an ambiguous construction in the Community’s hands. It is constantly subject to a basic distinction in application. Internal rights are not affected by the same considerations and approaches as the external. The Community’s choices as to which human rights it promotes, scrutinises and enforces in each sphere are thus subject to different understandings and criteria. It draws dissimilar boundaries for action and interference that belie the very meaning of the universal. In particular there is a willingness externally to embrace a collective conception of rights that finds little expression internally. Individuals are the holders of rights within the Community

⁴⁴ Gráinne de Búrca, ‘The Language of Rights and European Integration’ in Jo Shaw and Gillian More (eds.) *New Legal Dynamics of European Union* (Clarendon Press, Oxford 1995) p38.

legal order not groups or peoples. *Van Gend en Loos*⁴⁵ has been a guiding principle in that regard, determining that Community law “not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.” The internal discourse of rights has thus followed that rubric. The scope of bifurcation in definition described above has emanated from this central distinction.

4.2 Bifurcation in Scrutiny

The analysis of development and accession policies revealed a structure of scrutiny that possesses considerable breadth. Processes have evolved that are intrusive and extensive. By drawing on various international sources of information as well as its own contacts the Community has been able to institute a system that of necessity needs to be expansive. If it were not, the very procedure for determining whether applicant states fulfil the criteria for entry or developing states are worthy of receiving aid would become suspect. Even though Philip Alston and Joseph Weiler suggest that there is an “absence of any systematic approach to monitoring and reporting”⁴⁶ in the Community’s external relations, the evidence from accession and development policy is that the practice adopted is sweeping in nature.

⁴⁵ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR I p55.

⁴⁶ Philip Alston and J.H.H. Weiler, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights’ in Alston *et al* (eds.) n21 above p13.

By contrast it was noted in 1999 by a *Comité des Sages* in a report entitled ‘A Human Rights Agenda for the European Union for the Year 2000’ that the Community “currently lacks any systematic approach to the collection of information on human rights” within the Community.⁴⁷ On the face of it there would therefore appear to be a significant distinction between the external and internal practices in this respect.

To examine the extent of this element of bifurcation the internal condition must be considered in a little more detail. To do so another distinction, between scrutiny of the Community institutions themselves and scrutiny of the Member States by the Community needs to be made.

4.2.1 Scrutiny of Community Actions

Despite decades of debate the Community as a political entity has never become a member of an international human rights regime. The ECJ’s *Opinion 2/94*⁴⁸ ensured that from a legal standpoint accession to the ECHR, for instance, could not be undertaken without Treaty amendment. The Member States would have to agree unanimously to such a step, something they have steadfastly refused to do so far. As a result, the Community and its institutions are not subject to external scrutiny by organisations with the power or authority to review decisions and practices in human rights terms.

⁴⁷ See Alston et al (eds.) n21 above Annex 922.

⁴⁸ *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759.

Historically this has been a source of concern for both commentators and national constitutional courts alike. The Community's development of the principle that "fundamental rights form an integral part of the general principles" of Community law assuaged some of the criticisms.⁴⁹ The European Court of Justice has thus been empowered to review the acts of Community institutions to ensure they are compatible with the standards discussed in section 4.1 above. However, it does not have the power to monitor.

The European Ombudsman however *is* specifically authorised to oversee Community acts under Article 195 (ex Article 138e) EC Treaty. This is normally on behalf of individual complainants who are citizens of the Community or legally resident within it. Even so the Council has recognised that the Ombudsman's role is "to examine alleged cases of maladministration in the actions of the Community institutions or bodies [and] to undertake investigations on his own initiative" that might "relate to questions of human rights, particularly freedom of expression and non-discrimination."⁵⁰ In practice the Ombudsman's investigative role is piecemeal and prompted by specific information and complaints received against the Community's institutions. In no sense can it claim to provide comprehensive or regular coverage of human rights issues.

⁴⁹ The story of this development and its importance for bifurcation is explored in detail in Chapter 5.

⁵⁰ Council, n2 above. See also Article 9 Decision of the European Ombudsman adopting implementing provisions [1997] at <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm>.

The European Parliament has recognised the lacunae in scrutiny that exists and has attempted to rectify the position. Its Committee on Citizens' Freedoms and Rights, Justice and Home Affairs noted that

“it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee to ensure (in cooperation with the national parliaments and the parliaments of the applicant countries) that both *the EU institutions* and the Member States uphold the rights set out in the various sections of the [EU Charter on Fundamental Rights] [emphasis added].”⁵¹

Article 7(1) (ex Article F.1) TEU as amended by the Treaty of Nice (yet to be ratified) now gives the Parliament the discretion to determine “that there is a clear risk of a serious breach by a Member State” of respect for human rights as contained in Article 6 (1) (ex Article F) TEU. The institutions are not mentioned in this provision. It is therefore questionable authority for examining the institutions’ human rights record.

Nevertheless, the Parliament has taken it upon itself to undertake a process of monitoring the Community using the EU Charter of Fundamental Rights as its guide. Although this is an innovative move it fails to match the processes available in external policies in two ways.

First, by now focusing on the provisions of the Charter it does not provide the means for examining the Community’s work in rights outside that instrument. Group rights as we have seen are thus largely excluded as relevant issues for scrutiny.

⁵¹ Committee on Citizens' Freedoms and Rights, Justice and Home Affairs Report on the Situation as Regards Fundamental Rights in the EU (2000) [2001] A5-0223/2001.

Second, the Parliament is almost entirely reliant upon other sources for its information. Individual communications, reports from NGOs and publicly available information from international organisations such as the Council of Europe provide the material for assessment. It does not have the facilities to undertake a continuous assessment of human rights issues. The Rapporteur for the year 2000 Thierry Cornillet is pained to admit “the lack of resources available”.⁵² He points out that there

“is no dedicated service within the European Parliament dealing with fundamental rights in the Union capable of helping the rapporteur either to gather useful source material for verification during the year or to draw up the report itself.”⁵³

Such an admission is fundamental to the efficacy that might otherwise be ascribed to the Parliament’s monitoring role. It is also indicative of the bifurcation in this area of scrutiny. The position is no better with regard to human rights in the Member States.

4.2.2 Scrutiny of Member States by the Community

From a political point of view it has been the approach of the Community that “the protection and promotion of human rights is primarily a matter for the Member States of the Union, in accordance with their own judicial systems.”⁵⁴ Equally, the ECJ has made clear “no Treaty provision confers on the Community institutions any general power to enact rules on human rights”.⁵⁵ Member States have given no

⁵² *Ibid.* p24.

⁵³ *Ibid.*

⁵⁴ Council, n2 above p11.

⁵⁵ *Opinion 2/94* n115 above, para. 27.

indication that they would appreciate a change in this approach. Rather the Community has generally relied upon the argument that, being signatories to the European Convention on Human Rights (ECHR) and numerous international human rights instruments and procedures, Member States are already subject to a rigorous system of scrutiny by outside agencies.

Despite these arguments and restrictions, the Community has recognised the need to adopt some kind of approach that would bring its internal activities into line with the external. It has therefore touted a number of processes as instituting a monitoring scheme. Three are particularly relevant.

European Parliament Reports

First, as I have already mentioned, the European Parliament has embraced the role of monitor for both institutions *and* Member States alike. Since 1993 it has produced general reviews on the situation within the Member States as well as the Community institutions.⁵⁶ However, whether or not the Parliament has been constrained by lack of resources (as intimated above) reports of difficulties in Member States are invariably covered sketchily if specified in any detail at all. Even the information produced by the assigned rapporteur is couched in such vague terms that the notion of scrutiny is difficult to discern from the process.

⁵⁶ See for instance Annual Reports on respect for human rights in the European Union 1993 (Doc. A4-124/94), 1994 (Doc. A4-0223/96), 1995 (Doc. A4-0112/97). See, generally, R. Rack and S. Lauegger, "The Role of the European Parliament: Past and Future", Alston *et al* (eds.) n21 above pp801-837.

The latest reports have attempted to place more pressure on Member States to live up to the similar values espoused externally and there is explicit recognition that

“if the promotion of human rights outside the Union is to be credible, we must begin by examining the human rights situation at home. Numerous reports remind us that there is not always complete congruence between the ideals as they are printed in international Conventions and national Constitutions vis-à-vis the situation experienced by citizens and residents in Member States.”⁵⁷

Nonetheless, the vagueness of the reports continues to undermine the Parliament’s intentions. Similarly, the fact that the Parliament operates independently of the Commission and Council weakens the effect of its actions. Externally, the whole weight of the Community is behind its practice. Politically and economically it is imbued with a severe authority. Scrutiny by the Parliament simply does not possess that capacity. The Parliament recognises as much. It has called for an integrated and dialogical approach to monitoring that is already applied in development and accession policies.⁵⁸ Little perceivable headway has been made, however, to realise the Parliament’s demands. Its scrutiny thus continues to be fundamentally deficient in comparison with the external processes examined.

⁵⁷ Committee on Citizens' Freedoms and Rights, Justice and Home Affairs Annual Report on respect for Human Rights in the European Union (1998-1999) [2000] A5-0050/2000 p20.

⁵⁸ See n51 pp24-25.

The Council's Annual Reports

Second, the Council has instituted Annual Reports on Human Rights, the first of which was delivered in October 1999. The expressed aim was to “enhance the transparency of the Union’s human rights policies.”⁵⁹ But the report then went on, almost perversely, to state that it “concentrates on the EU’s external relations.”⁶⁰ The only concession to the charge of inconsistency was to acknowledge that, “the picture would be incomplete without at least making a reference to EU action related to developments in the EU area.”⁶¹ The one area subjected to internal scrutiny was that of racism.

Such a startling decision to focus almost entirely upon external human rights activities only served to enhance the condition of bifurcation. The attention paid to racism fell into the category of cliché in that it was the exception that proved the rule. Rather than tackling one element of bifurcation as an illustration of overall intention the report became an exercise in reiterating that scrutiny on human rights was reserved almost exclusively for those *outside* the Community.

The 1999 Report was criticised at the first European Human Rights Forum of November/December 1999 for its failure to consider the internal dimension.⁶² As a result the 2000 European Union Annual Report on Human Rights amended its

⁵⁹ EU Annual Report on Human Rights [1999] Doc. No. 11380/1/99 p1.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Human Rights Discussion Forum 30 November – 1 December 1999, p29, ironically available on the Community's web site under external relations – see http://europa.eu.int/comm/external_relations/human_rights/conf/forum1/report.pdf

approach.⁶³ It included a “substantial section devoted to human rights within the European Union.”⁶⁴ It even conceded that the “European Union is aware that it must begin by applying to itself the principles for which it stands.”⁶⁵ A belated admission it has to be said and not entirely without a sense of begrudging acceptance but the possibility presented itself that the Community was finally responding to the conditions of bifurcation in measures of scrutiny.

A brief examination of the 2000 Report and its treatment of the internal and external policies, however, suggests that a sense of irony hangs over the exercise. The Report *again* makes clear in its introduction that “its contents are primarily focused on the external activities of the European Union and its role on the international stage”.⁶⁶ Internal human rights matters are reviewed only on a thematic basis, racism once again taking the lead, with individual Member States *not once* receiving any critical mention. In contrast, external matters are peppered with references to actions taken against third countries. Common positions adopted under the Common Foreign and Security Policy, the issuance of *démarches* and declarations, the institution of political dialogue, and the activation of human rights clauses in various external trade and co-operation agreements, all specify those countries subjected to criticism for their human rights failures.

On the face of it, therefore, the 2000 Report contributes to the entrenchment rather than the dispersal of the conditions of bifurcation. When the report restates the legal bases for the Community’s human rights policies it reiterates the universality of

⁶³ Council, n2 above.

⁶⁴ *Ibid.* p5.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

rights and confirms that “the principle of respect for national sovereignty should not be used by governments to absolve them from their obligations to respect human rights and fundamental freedoms.”⁶⁷ It then proceeds to set out the legal authority for Community action in relation to human rights. Article 2 TEU is quoted confirming that one of the objectives is to “strengthen the protection of the rights and interests of the nationals of its Member States”. Article 6(1) and (2) TEU are mentioned as establishing the founding principle of respect for human rights and committing the Community to respect “fundamental rights”. Article 7 TEU, it is said, lays down “a procedure to monitor respect for human rights and fundamental freedoms by Member States”.⁶⁸ And Article 13 EC Treaty is referred to as specifically enabling the Community to “take appropriate action to combat discrimination”.

And yet the final proviso stated by the report that has the effect of negating much of all the precedents cited, provides the official explanation for the difference in internal/external approaches. It states

“Nonetheless, the protection and promotion of human rights is primarily a matter for the Member States of the Union, in accordance with their own judicial systems.”

“Nonetheless”. “Primarily”. These words could easily be missed or discounted and yet they signify so much. In the context of the bifurcation thesis they summarise the sense of contingency applied in practice with regard to the respect and promotion of “universal” human rights. They infer that despite all the eloquent descriptions of the Community’s need to be involved in human rights matters ultimately its actions have

⁶⁷ *Ibid.* p8.

⁶⁸ *Ibid.* p9.

no place with regard to its Member States. In effect they confirm the abrogation of the Community's responsibility (a responsibility acknowledged in international law terms as the report confirms⁶⁹) with regard to its own constituent states. They also make quite plain that even where the Community may be involved internally its role is always a subsidiary one. The sentence establishes in effect that even the European Court of Justice is *not* the site for determining questions of human rights. That is reserved for the Member States' own judicial systems.

In making these statements, therefore, the Community effectively identifies the conditions and dimensions of bifurcation rather than addresses them. For externally, the provisos outlined have much less application. Indeed, it is a constituting principle of foreign affairs that the Member States and the Community will act in concert, rather than allow the Member States to hold the "primary" position. More importantly, as Chapters 2 and 3 have shown, the Community has *assumed* a leading role in significant areas of external human rights policies. Practice therefore has determined that the notion of primary actors occupies little time for the Community in the external human rights realm.

The 2001 Report does nothing to alter the situation. Instead, being the third of its kind, it appears to be taking on a consistent, institutional form. Its layout now appears to be settled and the arguments presented unchanged. It remains steadfastly focused on "the EU's external relations and on its role on the international stage."⁷⁰

⁶⁹ *Ibid.* The report states that the "EU is committed to continuing to work in the UN and within the European framework to improve the implementation of the principles enshrined in human rights instruments, notably the Universal Declaration of Human Rights and the core human rights covenants and conventions."

⁷⁰ Council, EU Annual Report on Human Rights [2001] Doc. No. 12163/01p5.

Internal “themes” are considered with racism again being first on the list but no mention is made of individual Member States in these respects. The only change is the reference to a policy of “mainstreaming” human rights into all aspects of policy, whether internal or external, a meaningless, objectionable, institutional term that speaks of management not principle, of bureaucratic niceties not fundamental changes in approach. Without the requisite definitions and coherent institutional conditions for scrutiny that can shape and direct the application of human rights throughout all manifestations of Community and Member State activity the idea of “mainstreaming” remains vapid and insulting to the intelligence of all concerned observers.

The European Monitoring Centre for Racism and Xenophobia

As seen above, the issue of racism has taxed the Community for some time. It has been identified as a key area of concern internally as well as externally. Finally at the European Council in Florence in June 1996 a European Monitoring Centre for Racism and Xenophobia (EUMC) was accepted in principle as a necessary first step to provide a process of scrutiny *within* the Community on the issue. The following year a Council Regulation was adopted for the establishment of such a centre.⁷¹ It was charged with monitoring the “development of racism, xenophobia and anti-Semitism in the European Union”, with providing “up-to-date information to EU institutions, the Member States and political representatives, and to prompt them to

⁷¹ Council Regulation [1997] No.1035/97.

take concrete political action.”⁷² The resulting organisation has been presented as a possible template for similar action in other rights fields.⁷³

The basic premise of the EUMC was to monitor the condition of racism and xenophobia in the Member States and to provide information on the subject. It has instituted a European Racism and Xenophobia Information Network (RAXEN), has established a web site, has organised conferences on specific themes related to racism, has begun to commission research on the subject, has constructed a documentation centre, and has commenced the process of publishing annual reports on its findings.

On first view, therefore, it would appear that the external processes of scrutiny have been surpassed in this one important area. Indeed, the EUMC’s first annual report has given an indication of the organisation’s promise. It provides a survey of the manifestations of racism and xenophobia in the Community, analyses the sociological and political and economic context, and reviews the action taken to combat the problems by Member States and the Community alike.

However, a deeper analysis of the work of the EUMC and the methods it employs suggests that it is flawed as a precedent for addressing divergent standards of scrutiny. It may even be argued that the EUMC bolsters the continuing existence and influence of bifurcated human rights policies. It represents part of the problem as well as potentially part of the solution.

⁷² EUMC ‘Giving Europe A Soul: Setting up the European Monitoring Centre on Racism and Xenophobia’ Annual Report Part I (1998) p14.

⁷³ See in particular Philip Alston and J.H.H. Weiler, n46 above in which they refer to the EUMC as a valuable precedent for creating a general human rights monitoring agency pp55-59.

The first issue of note relates to its official terms of reference. The Council Regulation bringing the EUMC into being reveals that the primary objective of the Centre is

“to provide the Community and its Member States, more especially within the fields referred to in Article 3(3), with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence.”⁷⁴

Article 3(3) states

“The information and data to be collected and processed, the scientific research, surveys and studies to be conducted or encouraged shall be concerned with the extent, development, causes and effects of the phenomena of racism and xenophobia, particularly in the following fields:

- (a) free movement of persons within the Community;
- (b) information and television broadcasts and the other media and means of communication;
- (c) education, vocational training and youth;
- (d) social policy including employment;
- (e) free movement of goods;
- (f) culture.”

However, the scheme introduced does nothing to suggest that the EUMC’s work will possess any force within the Community system. There is no mechanism for the Community institutions to pay any regard to the findings of the Centre, to consider its recommendations, to institute dialogue with or action against any Member State under Articles 6 or 7 TEU, or to evaluate or alter any subsisting laws or policies that

⁷⁴ Council Regulation No.1035/97 Article 2.

are criticised on discriminatory or racist grounds. The Centre is thus devoid of a framework within which its work might have a practical impact. It is entirely dependent on the Community and/or the Member States both taking note of its findings *and* acting upon any recommendations should the Centre be bold enough to make any. Because of these shortcomings the European Parliament has respectfully requested that the Centre should have

“as its focus the investigation of discrimination as defined in Article 13 TEC deriving from national and European laws, policies and practices, and the drawing up of proposals designed to amend or abolish the latter for use by EU and national institutions; a duty under Article 2(b) and 2(e) of its founding regulation to monitor, evaluate and report regularly on developments concerning racism, xenophobia and anti-Semitism in all Member States and candidate countries, to draw specific attention to any related breach of the commitment to respect human and fundamental rights in Article 6 TEU and to advise on action under Article 7.”⁷⁵

Neither the Council nor the Commission have as yet responded to this request. The potential impact of the Centre thus remains largely unfulfilled.

Even within its limited role there is evidence that the EUMC is further constrained. With regard to its investigatory functions the Centre is only charged with the acquisition of data. It is not empowered to take any action. Indeed, it has been given only a diplomatic role that requires a sensitive approach to the Member States. The result has so far been one of delicate manoeuvring whereby information about racism and discrimination is handled almost obliquely. Thus, in its first annual report, the EUMC confirmed that the information it provided by way of an overview of racism

⁷⁵ European Parliament Report on countering racism and xenophobia in the European Union final A5-0049/2000 para.8 p14.

and xenophobia in the Member States was “neither comprehensive nor complete.”⁷⁶ Given the limited ambition of the Centre’s initial activities this is none too surprising. But the means by which it acquired the data that *has* been revealed undermines even the limited nature of the Centre’s preliminary aims. Five types of sources are identified by the EUMC as being used to prepare its reports:

1. personal contributions provided by the members of the Management Board of the Centre
2. official documents produced by national public bodies
3. country reports by the UN Committee for the Elimination of Racial Discrimination
4. country reports filed by the European Commission against Racism and Intolerance; and
5. documents produced by specialist NGOs and press coverage.⁷⁷

The indication from this list is that the Centre is entirely engaged in a co-ordinating role. It does not *intrude* on Member States. Other than the faintly amateurish notion of “personal contributions” it relies on publicly available information. In its second report in 1999, which uses the same sources, the Centre even acknowledges that

“at present there is a lack of uniformity and common definitions in the Member States for the purposes of data collection on the subjects of racism, racial violence or even racial/ethnic minorities. The way the acts of racism and discrimination are monitored and registered varies considerably from one Member State to another...The EUMC therefore lacks the complete set of tools to measure and monitor racism effectively at a European level.”⁷⁸

⁷⁶ EUMC ‘Looking Reality in the Face; the Situation regarding Racism and Xenophobia in the European Community’ Annual Report Part II (1998) p6.

⁷⁷ *Ibid.*

⁷⁸ EUMC Annual Report (1999) Summary p2 located at <http://www.eumc.eu.int/publications/ar99/AR99S-EN.pdf>

The implication is twofold. First, the Centre is heavily reliant on the Member States' reporting to ascertain the scope of the issues under consideration. And second, its powers are severely restricted at the most basic level, that of definition.

Together, therefore, the lack of an institutional mechanism for the Centre's work to be embraced and acted upon by the Community *and* the restrictive nature of its investigation practice suggests that, although a positive development, the Centre does not in its present form represent a working precedent for Community schemes to address the bifurcation in scrutiny. It remains to be seen whether the Centre will advance its influence and redraw its terms of reference to become an agent for change.

The various initiatives described above therefore do not alter the systemic condition of bifurcation in methods of scrutiny. The problems are acknowledged but they remain in place.

4.3 Bifurcation in Enforcement

The argument against the involvement of the Community in the internal human rights affairs of its Member States focuses mainly on questions of competence and

jurisdiction. Direct involvement in such internal matters might be “an invitation to a wholesale destruction of the jurisdictional boundaries between the Community and its Member States.”⁷⁹ However, the Council itself is not shy in explicitly recognising the “relativity of the principle of non-interference”.⁸⁰ At Luxembourg, in 1991, it maintained that, “different ways of expressing concern about violations of rights, as well as requests designed to secure those rights, cannot be considered as interference in the internal affairs of a State”.⁸¹ The imposition of various forms of human rights conditionality, including that applied in the pre-accession strategy, has thus received formal and legal approval. The apparent contradiction between the arguments raised at the internal level and the practices at the external could not be clearer.

We have already witnessed in the scope of rights addressed and the scrutiny methods adopted that the approach to external states differs markedly from that applied internally. The possible enforcement of rights by the Community in respect of its Member States is of equal relevance. The failure, for instance, to acknowledge that collective rights (in the form of minority rights) are applicable within the Community will clearly have an impact on the legal and political ability or desire to enforce those rights.

Nonetheless, there are issues relating to enforcement internally that need to be analysed if the full extent of bifurcation is to be determined. We have already seen that in the accession process, for instance, the system of enforcement is made

⁷⁹ Alston and Weiler, n46 above p23.

⁸⁰ Commission Communication to the Council and the European Parliament, *The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond*, COM(95) 567, p10.

⁸¹ Declaration on Human Rights, Luxembourg European Council 1991, quoted *ibid.* p10.

explicit.⁸² The Accession Partnerships impose a conditionality for entry and assistance on the basis of improvement and continuing respect for specific and general human rights issues. The threat has ensured that applicant states have changed practices and adhered to the human rights demands of the Community. If only at the level of rhetoric and law applicants have responded to the Community's calls.⁸³ Those states that have failed to respond sufficiently, specifically Romania and Turkey, have remained firmly on the periphery, cast as regimes unworthy of entry. In development policy also there has been a clear statement of possible graded measures that may be applied.⁸⁴ From positive measures to sanctions a wide range of possible action may be taken. Of particular note is the Commission's acknowledgement that a state's human rights performance "*including economic, social and cultural rights*" [my emphasis] will be taken into account when deciding the quantity of funds to be made available under the development co-operation programmes.⁸⁵

What comparable internal measures does the Community possess? Prior to the Treaty of Amsterdam the position was fairly plain. The internal condition of human rights was generally outside the jurisdiction of the Community. Only where actions by Member States were undertaken within the scope of Community law would the ECJ intervene. *Wachauf* first held that the possible intervention of the ECJ was in relation to Member States in the implementation of a Community provision.⁸⁶ *ERT*

⁸² See, Agenda 2000 'For a Stronger and Wider Union' EC Bull Supp 5-1997.

⁸³ For a short review of the impact on rhetoric of applicant states see, Iver B. Neumann, 'European Identity, EU Expansion, and the Integration/Exclusion Nexus' (1998) *Alternatives* 23 397-416.

⁸⁴ See Resolution of the Council and of the Member States, EC Bull 11-1991 pp122-123.

⁸⁵ Communication from the Commission to the Council and the European Parliament, 'The EU's Role in Promoting Human Rights and Democratisation in Third Countries' COM(2001)252 final p12.

⁸⁶ *Wachauf* [1989] ECR 2609.

extended this to include circumstances when Member States derogated from a Community measure.⁸⁷

That this extended principle has been subject to some amplification by the ECJ has not seriously undermined the expressed restriction on intervention reiterated by the EU Charter of Fundamental Rights. Article 51 ensures that the provisions of the Charter are addressed to Member States “only when they are implementing Union law.” A fundamental restriction on enforcement action is thus inherent within the Community’s legal structure. The fact that there “are many, many areas where [Member States] face Community generated negative constraints or must respect positive prescriptions” as optimistically noted⁸⁸ does not change the fact that the ECJ remains only vaguely involved in human rights cases. As Armin von Bogandý mentions, “there seems to be a mismatch between the range and depth of the EU activities and the tiny number of human rights cases involving EU intrusion brought”.⁸⁹ Judicial enforcement is therefore highly restricted in practice. Indeed, as A. G. Toth notes in highlighting the possibility that the standard required for human rights protection by an applicant state is greater than that demanded to remain a member once admitted,

“if the status quo continues the Court of Justice will not be in a position...to ensure compliance with...a whole range of vitally important human rights issues (e.g. oppression of ethnic and other minorities) simply because they fall outside the scope of Community/Union competence”.⁹⁰

⁸⁷ *ERT* [1991] ECR I-2925.

⁸⁸ Giorgio Sacerdoti, ‘The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe’ (2002) *Columbia Journal of European Law* pp37-52 at p48.

⁸⁹ Armin von Bogandý, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) *CMLRev* 37 pp1307-1338 at p1321.

⁹⁰ A. G. Toth, ‘The European Union and Human Rights: the Way Forward’ (1997) *CMLRev* 34 pp491-529 at p529.

The Treaty of Amsterdam might be said to have tried to alter the tendency to maintain the jurisdictional divide. The introduction of Article 7 (ex Article F.1) TEU seems to indicate a response for an enforcement mechanism that might correspond to that employed externally. As Manfred Nowak observes, the requirements for suspension set out, “are, of course, even more stringent” than the accession criteria we have already encountered.⁹¹ Koen Lenaerts further suggests that it is “not very probable that the sanction mechanism as it now stands will easily be applied”.⁹² This was established indeed with the strange case of Austria in 1999/2000.

The matter has been well covered by Heather Freeman and only the basic facts need to be revisited for my argument.⁹³ In the aftermath of the assumption of power by the Freedom Party following the Austrian 1999 elections the Community was supposedly faced with the position of a potentially unsavoury regime taking control of one of its Member States’ government. As an institution it possessed no authority to take any action. Article 7 TEU had not been breached. There may have been a prospect of the Freedom Party matching alleged racist rhetoric with practical initiatives but there was no evidence of a “serious and persistent breach” of human rights having taken place. It was therefore left for the fourteen remaining Member States to institute their own sanctions. Official contacts were suspended, Austrian candidates seeking election in international organisations would not be supported

⁹¹ Manfred Nowak, ‘Human Rights Conditionality in the EU’ in Alston *et al* n21 above p694

⁹² Koen Lenaerts, ‘Fundamental Rights in the European Union’ (2000) *E.L.Rev.* Vol. 25 No.6 pp587-588.

⁹³ Heather Berit Freeman, ‘Austria: the 1999 Parliamentary Elections and the European Union Members’ Sanctions’ (2002) *Boston College International and Comparative Law Review* pp109-124.

and Austria's ambassadors in the Member States' capitals would have their status reduced.⁹⁴

The "sanctions" introduced had little impact. The Austrian government made various solemn statements of principle regarding respect for human rights and slowly Austria was welcomed back into the Community fold. The Community was, however, vexed by the apparent impotence of its institutions when faced with such a situation. A report was commissioned. The recommendation that emerged focused on an amendment to Article 7.⁹⁵ Preventive and monitoring procedures were necessary so that such an event "would be dealt with within the EU from the very start."⁹⁶ The Community took up the suggestion and a revised Article 7 was agreed in the Treaty of Nice. Although this has yet to be ratified the European Parliament is already acting as though it is in force.

Article 7 now provides that the Commission, Council or Parliament may determine that there is a clear risk of a serious breach of human rights and can make "appropriate recommendations" to the state concerned. The Council may then, acting by a qualified majority, decide to suspend certain rights available under the Treaty. The Council must, however, take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. There is no mention of a systematic and continuing monitoring process. Nor is it clear what a serious breach may amount to.

⁹⁴ *Ibid.* p118.

⁹⁵ Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, 8th September 2000 at <http://www.eumc.at/general/report-A/report-en.pdf>

⁹⁶ *Ibid.* p34.

Consequently, even as revised Article 7 is by any interpretation vastly more limited in scope and application than those measures adopted for putative Members in the pre-accession process or states receiving development assistance. The range of political and economic sanctions available to the Community to enforce human rights externally compared with that available internally is extensive. Politically, the publication of the results of the Commission's scrutiny process of the applicants and its "consultation" with states under the Cotonou Agreement is a well-tested form of enforcement in itself. For instance, in respect of Haiti, Cote d'Ivoire and lately Zimbabwe, the Community's demands for talks and its public identification of current rights problems have all been measures of enforcement in themselves.⁹⁷ The ability to 'name and shame' has been significant in international human rights practice since the UN developed its various reporting systems. In Europe the reporting process adopted under the European Convention on the Prevention of Torture is considered a key enforcement strategy.⁹⁸ But the Community has not adopted a strategy internally to match these measures. The European Parliament's attempts to fill the void do not compare favourably with the external approach. They are neutered by the fact that they are not supported by the powers of enforcement or persuasion available to the Commission externally. Institutional dialogue, economic assistance (or its withdrawal) and ultimately the threat of exclusion are reserved for external states producing a highly persuasive package that can operate to change human rights conditions.

⁹⁷ See, Council Decisions (2001/131/EC) (2001/510/EC) and (2002/148/EC) respectively.

⁹⁸ For a recent review of the Convention's activities see, Jim Murdoch, 'The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Activities in 2000' (2001) 26 Supp *E.L. Rev.*

This is the key point. The conjunction of strategies open to the Community is simply unparalleled internally. The highly unlikely event of interference in the affairs of Member States on human rights issues except in the most extreme situations only serves to emphasise the distinction. One only has to look at the absence of any involvement in the practices of the UK in Northern Ireland in the 1970s, for instance, or the current racist tendencies in Italy to which I have referred to see that interference has always been and presently remains outside the Community's concern.

4.4 Common Arguments for Distinction

Having described the extent of the bifurcation my concern now is to assess how and why the phenomenon has developed into such a form. Before doing so, current standard explanations for there being a *distinction* between the Community's internal and external human rights practices rather than a bifurcation as such should be acknowledged. Three principal arguments are apparent from commentators and the Community itself. They may be summarised as follows.

First, there is the argument of competence. As we have witnessed from the Council and the Commission there is an understanding that internally the Community does not possess as a general rule the competence to interfere in the affairs of its Member States on matters of human rights. Although the ECJ may be authorised to examine actions by Member States in the light of the need to respect human rights this can

only be in the sphere of Community law. Such is the clear conclusion of the Council (as we have seen in the EU Annual Reports), the Commission, and the ECJ. Article 51 of the EU Charter is further confirmation. The revised Article 7 TEU, the Human Rights Forum and the, perhaps, rogue behaviour of the Parliament are limited exceptions to this rule. Externally, competence is not so restricted in practice. It is clear from development and accession policies that the Community as a separate entity is deeply involved in the promotion and enforcement of human rights matters. The authority to be so involved has been confirmed by the ECJ.⁹⁹ There are no jurisdictional restrictions on activity. Consequently, the distinction between the internal and external policies is a product of the jurisdictional divide that has been laid down by the Treaties and Community law. Joseph Weiler and Sybilla Fries may suggest this divide could be eroded through a different legal interpretation but essentially they still acknowledge the current argument of competence that holds sway.¹⁰⁰

Second, there is the argument that the Community's interference in the human rights affairs of its Member States beyond that which is possible under the existing competence has been restricted so as to preserve the integrity of the ECHR system. Given the iconic status of the Convention achieved over the past half century there is small wonder that jurists in particular would not want to see the effective replacement of an independent system by the Community.¹⁰¹ Indeed, the Convention system offers a degree of external scrutiny of Member States that might be

⁹⁹ *Portugal v. Commission* Case C 268/94 [1996] ECR I-6184.

¹⁰⁰ Joseph Weiler and Sybilla Fries, 'A Human Rights Policy for the European Community and Union: the Question of Competences' in Alston *et al.* (eds.) n21 above pp147-165.

¹⁰¹ See for instance, Francis Jacobs, *The European Convention on Human Rights* 2nd edition (Clarendon Press, Oxford 1996).

prejudiced if the Community, with its political and economic concerns, attempted to take over this role. Thus internally, the ECHR and the Council of Europe procedures remain the correct location for at least protecting human rights within Europe. Externally, such sentiments are unnecessary. For developing states, for instance, the ECHR is irrelevant although that is not the case for potentially acceding states.

Third, there is the political argument. This might take various forms. Any assumption of an intrusive human rights policy internally by the Community is opposed on the grounds that it smacks of centralisation. Such a move may be unpalatable for Member States and/or opponents of the Community project as a whole. Equally, there are political sensitivities involved in human rights that suggest that Member States' governments are unwilling to subject themselves to scrutiny let alone enforcement for potential rights violations. The resulting poor publicity may have electoral consequences. Such human rights problems are therefore best deflected to the European Court of Human Rights, which is notoriously slow in reaching decisions and lacks any forceful method for asserting its judgments. It may be argued furthermore that Member States do not accept the principle of multiple scrutiny in any event. The ECHR system, the Community law aspects and the international treaty system emanating from the UN provide sufficient coverage to ensure human rights are monitored effectively and thus protected. Interference by another body, the Community, would not only entail more report writing and investigation but it would be the Member States who would have to foot the bill. Finally, a consistent scheme of scrutiny and enforcement against Member States may also promote a distancing from the Community at a time when unity is the goal.

Conflict over human rights issues might be a divisive factor therefore removing them from the political scene could be justifiable.

Externally, different political sensibilities apply. The argument suggests that the public's demand for respect for human rights around the world necessitates active measures that should be applied in the most effective way. The Community's collective economic and political clout, together with its self-professed moral stance, determines that it not only should but *must* be involved in human rights affairs particularly as regards those states with which it has the closest contact. In all forms of this argument there is a presumption that on the whole the Member States have systems that respect human rights and provide effective methods for dealing with any violations. In that sense they possess an advanced quality that is not always mirrored externally.

All of these arguments combine to give reasons for the general distinction between the Community's policies and activities internally and externally. However, it is my contention that they do not satisfactorily explain the development of the nature and scope of bifurcation I have described. The competence argument does not explain why the Community and the Member States have not established the necessary authority to act internally. The moves to amend Article 7 TEU and the actions of the ECJ and the European Parliament indicate an institutional acceptance that the Community should have the requisite powers. But there remains an institutional reluctance to establish the Community as a human rights organisation in all fields. Consequently, the issue of competence is only a product of a political choice that has

been exercised so as to avoid an effective human rights system. It therefore does not explain bifurcation alone.

The legal argument concerning the ECHR is also weak. Indeed, it runs counter to the Community's practice. The willingness to develop the human rights capacity of the Community has seen interference in the Member States parallel to and perhaps beyond the ECHR system. The role of the Parliament and the beginnings of scrutiny on specific matters such as racism (however much they are in their infancy) do not suggest that the ECHR is seen as sacrosanct. Nor does the argument explain the distinction made for applicant states that have ratified the ECHR but are still subjected to scrutiny and enforcement by the Community. By applying a higher standard the Community is acknowledging that the ECHR is insufficient protection for its purposes. There is no justification therefore for portraying the attachment to the ECHR as a sufficient reason for the bifurcation outlined above.

Finally, although the political arguments are persuasive they do not explain sufficiently why on the one hand the Community can present itself as an entity that respects and promotes a universal notion of human rights and on the other maintains fundamental distinctions of definition and practice that undermine that position. Nor do they explain why there should be such sensitivity in the first place given the fundamental and non-negotiable nature of human rights that the Member States and the Community suggest determines their action.

The overall unsatisfactory nature of these arguments therefore suggests a different analytical approach needs to be adopted.

4.5 Conclusion

The requirement for a deeper understanding of the Community's position with regard to human rights returns me to the methodological and theoretical appreciations outlined in Chapter 1. It is my contention that to understand more completely the bifurcation in human rights narratives (and thus policies), rather than just the distinctions in approach, we must look deeper into the institutional narrative that has determined the divergent trajectories of the Community's rights practice. This necessitates an analysis of the genealogy of human rights in the Community and the means by which human rights has become a part of the Community's constitutional framework. The next two chapters undertake this investigation.

CHAPTER 5

THE INVENTION OF HUMAN RIGHTS IN THE COMMUNITY AND THE ORIGINS OF BIFURCATION

This chapter commences the investigation into the genealogy of human rights bifurcation within the Community by addressing two preliminary questions. First, why did the notion of human rights come to be embraced as a part of the Community's constitutional structure? Second, how were human rights deployed in this respect?

The answer to the first question centres on the Community's search for legitimacy. In the political and moral climate of the post-Second World War world human rights were identified as a prerequisite for the establishment of the Community as an "authentic" polity capable and authorised to involve itself in the affairs of its constituents and the international community. Legal arguments concerning its competence to act in certain fields did not provide sufficient justification for this assumption of powers. Rather, even though the Community was originally presented as an economic entity its wider ambitions required that a human rights discourse be deployed as a necessary ideological addition to its "proto-constitution". In

conjunction with other concepts, such as democracy and the rule of law, the discourse of human rights was identified as providing both the ethical direction for the Community's actions and the constraints upon its interference in the sovereignty of its Member States. The language of human rights was thus used to authenticate the Community as a site of governance. This argument is explored in part 5.1.

Part 5.2 then considers the second question by determining how the Community has rhetorically and legally addressed the need for authentication through human rights. The institutional narrative is traced to show that the identification of respect for human rights enshrined as a founding principle of the Community, was a mythic construction, a retrospective account that imputed values into the original design of the Community. This myth depended on the "invention of a tradition" purportedly establishing the Community as an authentic guardian and successor of a West European approach to human rights. The consequences of this mythic narrative were to create the base conditions from which the bifurcation of rights materialised. By relying upon vague notions of rights and imprecise means of employing them in the Community's decision-making processes, human rights and the principles that would govern their relevance were left indeterminate and open to interpretation. The possibility for differing influences determining policy depending on *where* they were applied thus became instituted.

5.1 Human Rights as Institutional Authentication

5.1.1 Legitimacy and Authentication

Since its creation, many of the debates concerning the form and substance of European integration have focused upon the legitimacy of the Community. Should it acquire the powers of governance that have been pressed upon it? Should the Member States see their sovereignty reduced through the transfer of powers? What, indeed, should be the extent of the Community's jurisdiction and competence? And what are the legal ramifications of these issues? Such questions have been present throughout the Community's political development. Both internal discussion and external critique have analysed the issue either with a view to finding solutions for any perceived lack of legitimacy or to forming arguments to support resistance to any further transmission of powers to the Community.

Much of the attention has concentrated upon the "democratic deficit" apparent in the Community's decision-making process.¹ However, as Joseph Weiler has noted, legitimacy and democracy are not interchangeable concepts. He suggests that

"a non-democratic government or political system in the West could not easily attain or maintain legitimacy, but it is still possible for a democratic structure to be illegitimate – either *in toto* or in certain aspects of its operation."²

¹ For recent analyses see, Larry Sidentop, *Democracy in Europe* (Allen Lane, London 2000) and J.H.H. Weiler, 'European Democracy and its Critics: Polity and System' in *The Constitution of Europe* (Cambridge University Press, Cambridge 1999).

² See, J. H. H. Weiler, 'The Transformation of Europe' in *The Constitution of Europe* (Cambridge University Press Cambridge 1999) p79.

Furthermore, legitimacy can be divided into two components. First, formal or legal legitimacy looks to the observance of the law “in the creation of the institution”, which in the Western model inevitably identifies democracy as a central part of that process.³ Second, social legitimacy, which “connotes a broad, empirically determined, societal acceptance of the system.”⁴ Again democracy amounts to a necessary if not sufficient condition in the Western context, although as Weiler confirms, such legitimacy might be more generally engendered through a government’s commitment and active guarantee of “values that are part of the general political culture.”⁵

Other authors have attempted to define the concept of legitimacy in similar terms. Andreas Føllesdal, for instance, suggests that laws and authorities need to satisfy three requirements to be deemed politically legitimate. First, they will be considered “legally legitimate in so far as they are enacted and exercised in accordance with constitutional rules and appropriate procedures.” Second, they will be, “socially legitimate if the subjects actually abide by them.” And finally, they will be “normatively legitimate in so far as they can be justified to the people living under them, and impose a moral duty on them to comply.”⁶

³ *Ibid.* p80.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Andreas Føllesdal, ‘Democracy, Legitimacy and Majority Rule in the European Union’ in Albert Weale and Michael Nentwich (eds.) *Political Theory and the European Union; Legitimacy, Constitutional Choice and Citizenship* (Routledge London 1998) p36.

Both Weiler's and Føllesdal's conceptions, as with similar analyses of political legitimacy,⁷ have been informed by liberal democratic traditions that relate to the creation and development of states in the western mode. When such conceptions are applied to the Community, however, a distinction needs to be made. Whatever else it might be, it is not a state. Nor is it simply an international organisation or agreement between states. Rather as discussed in Chapter 1 a different kind of polity has emerged, one that operates with, on, and beyond states, acting internationally if not supranationally.

The multi-faceted nature and possibilities of the Community placed it outside familiar polity patterns. Consequently, it has not been easy for the Community to attain a form of ready made *prima facie* legitimacy by mimicking other legitimated polities. Instead it has had to address a test that precedes any specific questions of legitimacy, one more concerned with political geography than political activity. In other words, the Community embarked on a process of "authenticating" itself as a site of governance before turning to justify the way in which it exercised any assumed power.

The process of authentication entailed the conjunction of a three-fold discourse. First, the Community needed to represent itself as an *authentic* institutional site of governance so as to authorise the making of decisions and laws that were to bind the Member States and their citizens and to intrude politically and legally on their lives. Second, the Community had to justify its claim to represent its constituency beyond

⁷ See David Beetham and Christopher Lord (eds.) *Legitimacy and the European Union* (Longman London 1998).

its borders. And third, the Community had to authenticate its right to act as a “locale” of power internally and externally.⁸ In all three areas, the issue of competence has been of key importance. Indeed, the issue has vexed courts and commentators alike raising questions of international law and constitutionalism. The European Court of Justice (ECJ) has had a pivotal role to play in this respect and its interventions to pace out the parameters of authority for the Community and its law have been fundamental for the development of a “new legal order” that has constitutional pretensions. The ECJ summed up its own view in *Opinion 1/91 (Re the EEA Agreement)*

“the EEC Treaty...constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only the Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of its provisions which are applicable to their nationals and to the Member States themselves.”⁹

Internally, the cases of *Van Gend en Loos*¹⁰ and *Costa v. ENEL*¹¹ laid down the central principles of supremacy and direct effect respectively and thus clarified the conditions under which the Community could assert authority over its constituents.

⁸ “Locale” in this sense follows Anthony Giddens definition as “circumscribed arenas for the generation of administrative power”. The arenas, he acknowledges, can range from “cities to nation-states and beyond.” It therefore seems appropriate in the context of the Community. See Anthony Giddens, *The Nation-State and Violence: Volume Two of a Contemporary Critique of Historical Materialism*, (Polity Press, Cambridge 1985) p13.

⁹ *Opinion 1/91 (Re the EEA Agreement)* [1991] ECR 6079 para. 21.

¹⁰ *Van Gend en Loos v. Nederlandse Administratie der Berastingen* [1963] ECR 1.

¹¹ *Costa v. ENEL* [1964] ECR 585.

Crucial in this respect was the finding that the process captured individuals as well as states.

In the external sphere the Community's legal competence was also developed by the ECJ. The EEC Treaty may have provided specific powers, for instance to associate with overseas countries and territories¹² and to act in the field of commercial policy,¹³ but the Court also introduced a notion of implied external powers. As a result the Community expanded its competence so that it could truly portray itself as possessing an authority to act in a broad range of external areas.¹⁴

The parallel stories of the principles of supremacy and direct effect on the one hand and the establishment of external competence on the other have been told frequently enough.¹⁵ They have been crucial in the Community's negotiation of legal authority *vis à vis* the Member States. However, such matters of law could not hope, I suggest, to fully satisfy any perceived need for social and political authenticity in both the internal and external spheres. Indeed, as the integration of powers at Community level began to infringe increasingly on the sovereignty of the Member States and the Community developed its presence on the international stage, the problem of authenticity grew more acute. The Community thus looked to factors that would unify states and peoples alike rather than merely satisfy relatively arcane legal requirements developed by the ECJ. The law might have possessed significant

¹² See Articles 182-188 (ex Arts. 131-136a) TEC.

¹³ Article 133 (ex Art. 113) TEC.

¹⁴ See I. Macleod, I.D. Hendry and Stephen Hyett *The External Relations of the European Communities* (Oxford University Press Oxford 1996) pp37-74.

¹⁵ See Marise Cremona, 'External Relations and External Competence: the Emergence of an Integrated Policy' in Paul Craig and Gráinne de Búrca (eds.) *The Evolution of EU Law* (Oxford University Press, Oxford 1999) pp137-175.

political value for the Community in acquiring acceptance but on deeper socio-psychological levels it was not sufficient in itself. For integration and union to be recognised in hearts and minds as well as to capture political territory other means were required. In Weiler's terms Europe needed an "ethos and telos to justify...the constitutionalism it has already embraced"¹⁶ and, for that matter, the constitutionalism it had in mind.

5.1.2 Human Rights Discourse and the Search for Authenticity

It is in the context of a search for an authenticity and thus an ethos that I suggest the discourse of human rights has become of particular constitutional importance. This is not to imply that other means of authentication and legitimacy have not been deployed. The principle of democracy has seen an equally prominent rhetorical role in the authenticating process. Cases can also be made out for more specialist arguments. The possibility of increased efficiency, consumer protection, more effective governance in matters such as environment and competition policy may all justify the Community's existence and those actions carried out in its name. However, few of these warrant the label of fundamental condition that human rights have acquired. Working alongside the rhetoric, if not practice, of democracy, the rule of law and the free market, the language of respect for human rights has developed into an essential precondition promoted by the Community for its claim to be an

¹⁶ J.H.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastricht Decision' in Peter Gowan and Perry Anderson (eds.) *The Question of Europe* (Verso, London 1997) pp265-294 at p266.

authentic and legitimate institution of governance. Whatever the audience, internal or external, human rights have been deployed to acquire authenticity.

Why might this be so? Two crucial and interconnected aspects of the discourse of human rights are relevant for the Community's institutional narrative. First, the status of international human rights discourse has acquired such a position of symbolic pre-eminence in the post World War II world that turning to human rights as a means of authentication for any polity would be both logical and inevitable. Second, a regional discourse of rights (one focused on Europe) fulfils a similar function but more specific to the European stage. In both respects, the language is fluid and variable. The recognition of specific rights and the articulation of their meaning and scope are not subject to any exact scheme of definition. Rather we are dealing with a symbolic construct the power of which transcends the specific. It is this power, I suggest, that provides the authenticity described. It is subtly different in the two aspects mentioned.

Authentication in the International Sphere

In the global field, the story of an evolved international human rights discourse is a familiar one.¹⁷ It is not a story that needs to be rehearsed here. Suffice to say that the Universal Declaration of Human Rights, the foundation of the UN and the seemingly constant production of international human rights instruments over the past 60 years

¹⁷ See, Henry Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford 1996).

have underpinned the development of a universally promoted language, a sort of “political Esperanto”¹⁸ or “sociolect”.¹⁹ As the World Conference on Human Rights in Vienna in 1993 declared, “[t]he universal nature of human rights and freedoms is beyond question.”²⁰ Even though it is subject to constant refinement and dispute, the discourse has become entrenched within the global network, acting as a foundation for the assessment of a regime’s acceptability on the international stage.²¹ Equally, the words “respect for and promotion of human rights” have served as a mantra for those seeking ready international recognition if not assistance. In both cases, the representation of human rights may appear only through rhetoric, hiding practices that pay lip service to respect for human rights. But the power of the discourse provides the basis for determining the legitimacy of any particular state or political entity operating internationally. Moreover, by referring to the range of human rights instruments produced by the UN or regional intergovernmental organisations there has been an apparent checklist against which any polity can be judged, at least at the level of ratification or signature if not observance. The language of human rights, therefore, offers a universal formula that provides the first step towards modern institutional authentication.

¹⁸ Boaventura de Sousa Santos’ term could be interpreted as both descriptive of the current state of rights discourse and a suggestion of how it might fulfil an emancipatory potential. It could also be an ironic comment upon the inability for the discourse to find any permanent roots. See, B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, London 1995) pp348-349.

¹⁹ See Upendra Baxi, ‘Human Rights: Suffering Between Movements and Markets’ in Robin Cohen and Shirin Rai (eds.) *Global Social Movements* (Athlone Press, London 2000) at p34.

²⁰ See Kevin Boyle, ‘Stock-Taking on Human Rights’ in David Beetham (ed.) *Politics and Human Rights* (Blackwell, Oxford 1995) pp79-95 for a review of the conference and extracts from the declarations.

²¹ As Yash Ghai observes, “[t]here has even been an attempt by the Organization for Security and Co-operation in Europe to make respect for human rights, especially of cultural minorities, a condition of the recognition of states.” Yash Ghai, ‘Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims’ (2000) *Cardozo Law Review* Vol.21 p1095-1140 at p1095.

Admittedly, the process of universalisation, inferred from the above, is by no means uncontested.²² Within the term itself lurks a self-sustaining and self-reflexive ideology that denies alternative. In many respects therein lies its discursive power. The precept of the universal does not admit fundamentally distinct approaches. It denies that there are other perspectives and other cultures that might view the notion of rights in a wholly distinct way and have equal social and political validity. The imposition of a universal view has therefore been criticised for being a product of Western dominance and neo-colonialism. By some accounts, adherence to the discourse of universal human rights has amounted to the pedalling of a “global morality” that has been “bound up with the global manufacture of the independent western nation-state.”²³

Even with the potential neo-colonial subtext, the concept of universalism possesses significant international credibility. It is portrayed as a non-negotiable fundamental principle against which states will be judged. It can hardly be surprising, therefore, that the Community should look towards the discourse as part of its search for authentication. Whatever the critique, the international language of human rights is a powerful tool for providing an institution with a recognisably acceptable ethos. As Griánne de Búrca has suggested

“The international status of human rights had become such that no state and no developed political entity, especially not such an

²² Arguments against a universal conception of human rights have raged for many years. For an introduction to the debate see, Steiner and Alston n17 above pp166-255.

²³ Gustavo Esteva & Madhu Suri Prakash *Grassroots Post-Modernism* (Zed Books, London 1998) p114.

ambitious emerging supra-national order [as the Community] could afford to eschew its language or its values.”²⁴

The implication for the Community was that in order to acquire credibility on the world stage it had to embrace human rights.

Authentication in the Regional Sphere

At a purely European level, a parallel and interrelated projection has developed. In the aftermath of the horrors of WWII, the Holocaust and the excesses of nationalism, human rights assumed a position of central concern to western European democracies. Within West European states the traditions of liberal-democracy and human rights were acknowledged as representing the values that could counter National Socialism and safeguard against extremism of all kinds. Those nations that had seen the overthrow of fascist regimes saw to it that rights formed a central constitutional position post 1945, thus protecting against possible resurrection of any politically extreme tendencies. Equally, in the external sphere, human rights provided a defining language for challenging the Soviet system and *its* claims to authenticity as a means of political and social organisation. In particular, the European Convention on Human Rights (ECHR) acquired an almost iconic status of ethical ‘purity’ during the Cold War and symbolised the values that finally ‘triumphed’ after the collapse of the Iron Curtain.

²⁴ Gríáinne de Búrca, ‘The Language of Rights and European Integration’ in Jo Shaw and Gillian More (eds.) *New Legal Dynamics of the European Union* (Clarendon Press, Oxford 1995) p40.

As a moral bulwark against a past filled with violence and abuse and a present threat from other dictatorial regimes, the ECHR therefore became a moral text that provided basic conditions for any system within the region. It provided a symbolic construct that could form the basis for talking about human rights in the European context. The rush to become members of the Council of Europe and to sign up to the ECHR by the Central and Eastern states showed its political and diplomatic significance after 1989.²⁵ Even before that, the fact that the Community was concerned to debate on a number of occasions the possibility of it becoming a signatory to the ECHR was testament to the Convention's influential status.²⁶

Beyond the ECHR, the responses to the demand for rights in particular states' constitutions after the War also served to place human rights at the heart of political authenticity in the region. Indeed, as will be seen below, that position gave rise to the forceful reaction of the constitutional courts of West Germany and Italy to the principle of supremacy that the ECJ had put in place. The idea that a continental institution such as the Community could ride roughshod over basic rights by taking actions that might compromise their protection without challenge or review by constitutional courts was always likely to be a concern.

The general and specific notions of rights at the international and European level respectively therefore became heavily interlinked with the Community's need to

²⁵ We have already seen the significance attached to the ECHR in relation to states seeking accession to the Community in Chapter 3.

²⁶ See the studies prompted by the Commission in 1976, *The Report of the Commission on the Protection of Fundamental Rights as Community Law* EC Bull Supp. 5-1976 and 1979, *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* EC Bull Supp 2-1979 pp6-21 and the ECJ's consideration of the issue in *Opinion 2/94 re: Accession by the Community to the ECHR* [1996] ECR I-1759.

acquire authenticity. Economic arguments for the Community's existence would never suffice legally or politically in such an environment. The gradual infiltration of human rights language into the Community was a natural consequence of these conditions. For this reason, I argue, human rights became a vital concern for the Community and could not be ignored as it developed. How the institutional narrative of human rights in the Community then evolved and formed the base from which a bifurcation eventually emerged is the concern of the next section.²⁷

5.2 The Myth of Human Rights as a Founding Principle of the Community

5.2.1 The Creation of the Community and the Silence of Human Rights

Perhaps ironically, given the later significance attached to the subject, the narrative begins with an acknowledgement of a protracted silence. Indeed, consensus has been reached between commentators and institutions alike that the founding treaties contained no explicit reference to human rights. Nor did they incorporate a constitutional requirement that the Community's constituents (the Member States and the various Community institutions) should respect human rights in their activities under the treaties.

²⁷ It should be borne in mind throughout that the subtle differences between the international and European human rights discourses drawn on in the search for authenticity may well have contributed to the eventual development of bifurcation. This is a matter that will be returned to in the Conclusion to this chapter.

Joseph Weiler comments that “[n]either the Treaty of Paris nor the Treaty of Rome contained any allusion to the protection of fundamental human rights”.²⁸ Peter Neusse goes further to suggest that “[t]he founding Treaties of the European Communities did not foresee any human rights provisions.”²⁹ Others have been perhaps more cautious. Christiane Duparc concludes only that no explicit reference to human rights based on international texts was made in the EEC Treaty.³⁰ And Rudolph Bernhardt, in his report made to the Commission in 1976, merely acknowledges that nothing in the way of a catalogue of rights was provided or indeed intended.³¹

Such interpretations are not confined to commentators on European integration. They are acknowledged institutionally by the Community. In particular, the ECJ specifically pronounced in *Opinion 2/94* that “[n]either the E.C. Treaty nor the ECSC or EAEC Treaties makes any specific reference to fundamental rights”.³² It is thus widely accepted that the Treaties failed to provide either a catalogue of rights (or even any specific rights *per se*) or a statement of principle regarding the respect and promotion of human rights within its constituting framework.

²⁸ J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in *The Constitution of Europe* (Cambridge University Press, Cambridge 1999) p.107.

²⁹ Peter Neusse, ‘European Citizenship and Human Rights: An Interactive European Concept’ (1997) *Legal Issues of European Integration* p54.

³⁰ See, Christiane Duparc, *The European Community and human rights*, (Commission of the European Communities, Luxembourg 1992) p11.

³¹ Rudolf Bernhardt, ‘The Problems of Drawing up a Catalogue of Fundamental Rights for the European Communities’, Annex to *The Report of the Commission on the Protection of Fundamental Rights as Community Law* EC Bull Supp. 5-1976 pp8-69.

³² See, *Opinion 2/94* n26 above para. III.1

Patrick Twomey suggests that the original silence is not surprising. The Community was originally economic in character. The possibility of human rights (as widely recognised in Western Europe in the 1950s) being affected by the new arrangement was considered remote.³³ Equally, the field of human rights remained captured in any event by either nation states alone (under the principle of non-interference in the internal affairs of sovereign states) or potentially by other international fora such as the Council of Europe³⁴ (and its human rights mechanisms) and the United Nations.³⁵

Perhaps of greater immediate significance, however, was the failure of the European Defence Community and a European Political Community, which in the latter case included statements recognising the need to respect human rights, to emerge from the creation of the European Coal and Steel Community in the early to mid-1950s. The political opposition to these proposals in France in 1954 led to “sober utilitarian considerations” taking precedence when it came to drafting the EEC Treaty.³⁶

³³ See Patrick Twomey, ‘The European Union: Three Pillars without a Human Rights Foundation’ in David O’Keefe and Patrick Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, London 1994) pp121-122. Twomey quotes from Bernhardt’s report to the Commission (see n31 above) in which it was opined that “the essentially economic character of the Communities....makes the possibility of their encroaching upon fundamental human values, such as life, personal liberty, freedom of opinion, conscience etc, very unlikely.”

³⁴ Article 1(b) Statute of the Council of Europe 1949 affirms that the Council’s aims will be pursued through, *inter alia*, “the maintenance and further realization of human rights and fundamental freedoms”. See, David de Giustino, *A Reader in European Integration*, (Longman, London 1996) p53.

³⁵ Article 1(3) Charter of the United Nations 1945 states one of the purposes of the UN is, “to achieve international cooperation....in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

³⁶ Manfred Daus, ‘The Protection of Fundamental Rights in the Community Legal Order’ (1985) *E.L.Review* Vol. 10 p399.

Nevertheless, despite the cumulative reasons for the absence of human rights principles from the originating treaties, the fact of that absence called into question the authenticity of the new Community as an institution worthy of power.

Over time the institutional response has been to deny the importance of, if not explain, the acknowledged silence. The Community has proclaimed that it is and always has been founded on a respect for human rights. The institutional narrative is retroactive and owns a 'live' genealogy. It has been composed, and continues to be so, in strata through the gradual accumulation of rhetorical and legal expressions and re-interpretations of texts that purportedly demonstrate the Community's original commitment to human rights as a constitutional imperative. The narrative has culminated in two important texts.

First, the Treaty on European Union as amended by the Amsterdam Treaty confirms the Member States'

"attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law."³⁷

More significantly, Article 6(1) (ex Article F.1) TEU establishes that the EU

"*is founded* on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" [emphasis added].

Second, the EU Charter of Fundamental Rights 2000 makes clear at its outset that

³⁷ See third recital of the Preamble TEU.

“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”³⁸

Together, these provide important statements of constitution. In some respects, they may even be interpreted as the ‘final word’ on the foundational narrative. Unlike Article 6(2) TEU³⁹ they are not a collective expression of intent on the question of human rights promotion or recognition. Rather, they form a declaratory statement of interpretation, an interpretation of what was, and has ever since been, a fundamental precept underpinning the whole European project and the institutions that have given it form.⁴⁰

In this crucial respect, Article 6(1) TEU in particular as a constitutional provision, represents one example in a long line of a developing history of imputation. Faced with the undeniable fact that the Treaties founding the Community contained no statement of principle on the question of human rights the Community forged a retrospective institutional account of its own formation. The account maintained that human rights were not only within the minds of the “founding fathers”, or “European saints” as Alan Milward calls them,⁴¹ but also buried subtly within the Treaties

³⁸ Charter of Fundamental Rights of the European Union, paragraph 2 Preamble, (2000) OJ C 364/08.

³⁹ Article 6(2) TEU states “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” It does not indicate any retroactivity.

⁴⁰ The fact that reference is made to the Union only could suggest a limited retrospective interpretation. However, given the narrative that has been constructed, it would be disingenuous to suggest that the Communities were not also subject to this statement of founding principle. Indeed, it is inconceivable that an argument would be raised that the Community or any part was not founded on respect for human rights.

⁴¹ Milward refers to Monnet, Schuman, Adenauer, de Gasperi *et al* as the European saints in the process of integration after WWII. Alan Milward, *The European Rescue of the Nation-State* (Routledge London 1992).

themselves. They were *imputed* over time into the very structure of the Community, into the core of its project.

The genealogy of the process of narrative construction has two fundamental interweaving strains. First, through institutional rhetoric, the Community has evolved a discourse that suffuses it with a set of values, including respect for human rights, with increasing vigour over the years. Second, the Community has succeeded in establishing the motif of founding principle within its legal order thus imbuing the discourse with the force of law and all that that implies for constituting legitimacy and authenticity. The two cross-referential themes have worked together to form an institutional narrative (essentially mythic in nature) that has been employed as a central means of authentication. Both themes are relevant to the institution of the conditions that have enabled bifurcation to develop.

5.2.2 Constituting Authenticity through Rhetoric: The Foundation of a Myth

One function of myth can be to establish, in Roland Barthes' words, "a natural and eternal justification....a clarity which is not that of an explanation but that of a statement of fact."⁴² The myth may be a "cruel deceit", as Ian Ward suggests in relation to "the whole idea of European integration",⁴³ but this is not necessarily its purpose. The Community's early construction of a story about the role of human

⁴² Roland Barthes, *Mythologies* (Vintage, London 1993) at p143.

⁴³ See, Ian Ward, *The Margins of European Law*, (Macmillan Press London, 1996) p51.

rights in its own formation was more about establishing *its* interpretation of the purpose behind the European project.

Initially, the narrative construction emerged through a rhetoric that ignored the lack of reference to a human rights ethos within the founding treaties. Instead, reliance was placed on a history that looked beyond and beneath the available texts. Rather than be constrained by the patently obvious economic design and early practice of the Community, actors drew, in particular, upon two latent sources of authority.

The “Spirit of the Treaties”

The first related to the hidden meanings that lay within the initiating texts. What was frequently termed the “spirit of the Treaties” was invoked to justify their interpretation so as to incorporate the designs of the “founding fathers”. The Commission was intent on adopting the theme. In 1961, for instance, it advocated an awareness of a “Community spirit” in all aspects of the Member States activities.⁴⁴ In 1967 it commented

“[i]n accordance with the spirit of the Treaties, [the Commission] will therefore continue to base its action on the necessary convergence of social and economic exigencies, so as to contribute, by all the means in its power, to the welfare of the peoples of the Community.”⁴⁵

⁴⁴ See Fourth General Report on the Activities of the Community EC Bull 5-1961 p14.

⁴⁵ EC Bull 3-1968 p29.

Although human rights were absent, the recollection of a spirit associated with a people's welfare provided a basis for future rhetorical developments. It also suggested the presence of values and ambitions that could be uncovered even though they were not explicit textually.

Equally, when celebrating the achievement of the Customs Union in 1968, the Commission recalled the aim of a "political Europe", evoking the designs of Schuman, Adenauer, de Gasperi and the like and emphasising that "Europe is not only customs tariffs...[i]t must also be the Europe of the peoples".⁴⁶ By thus calling upon the "human aspect" of the European project,⁴⁷ it became possible to lend more credence to the Community's involvement in the wider realm of European affairs. In alluding to the underlying spirit and intention it was then open for the institutions to move into political and social spheres that might otherwise lie out of its legally constituted boundaries.

Within the developing narrative, one can infer the presence of human rights as one of the possible sets of underlying values attributed to the founding fathers. Indeed, Walter Hallstein when President of the Commission maintained from an early stage

"[o]ur Community...is entirely based on freedom. The spirit of freedom imbues every provision of our Treaty, our regulations, our decisions and all our acts of our Institutions."⁴⁸

⁴⁶ Declaration by the Commission on the Occasion of the Achievement of the Customs Union 1 July 1968, EC Bull 7-1968 p5.

⁴⁷ See Jean Rey's introduction to the Commission's declaration on the Occasion of the Achievement of the Customs Union 1 July 1968, EC Bull 8-1968 p7.

⁴⁸ See Hallstein's contribution to the debate in the European Parliament on the Berlin Situation, EC Bull 11-1961 p11.

The reference to “freedom” cannot be restricted to a purely technical interpretation, one focusing on the four freedoms (of movement of goods, workers, services and capital) that the Treaty of Rome specified. Rather it symbolised something far greater, socially and politically, in which the language of human rights would not be alien. The EEC Treaty itself provided some justification for taking such a view. The preamble referred to the resolution to pool resources to “preserve and strengthen peace and liberty”. Admittedly, however, the freedoms that appeared explicit in the text remained fixed on the economic aspects of European affairs. The free movement provisions, the prohibition of discrimination on the grounds of nationality and the equal pay provisions, were all “in the nature of fundamental rights.”⁴⁹ These were essential for the completion of a common market and had little if any relevance to the human rights’ discourse as discussed above, at least as regards their inclusion in the Treaty.

Consequently, the imputation of a spirit within the Treaties, reasonably enough assumed to substantiate the political designs of the institutional actors, required some extra ballast if it were to contribute to the search for authenticity beyond the economic. The response was to allude to another spirit, a spirit of Europe, a far deeper and older concept that entailed the adoption of a rhetoric of tradition and common heritage that was incorporated into the European enterprise by implication.

⁴⁹ Dauses n36 above p399.

The Spirit of Europe: An Invented Tradition

At the Bonn Conference in July 1961 the Heads of State and Government issued a communiqué that affirmed the “*valeurs spirituelles*” and “*traditions politiques*” that formed a common inheritance between the Member States.⁵⁰ The references to tradition echoed similar rhetoric that imbued other European attempts at international co-operative ventures. The 1948 Brussels Treaty, for example, committed its signatories to, “fortify and preserve the principles of democracy, personal freedom and political liberty, the constitutional traditions and the rule of law, which are their common heritage”.⁵¹ It also reaffirmed faith in, “fundamental rights, in the dignity and worth of the human person and in the other ideals proclaimed in the Charter of the United Nations.” The Statute of the Council of Europe equally referred to the aim to, “achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage”.⁵²

The fact that the EEC Treaty did not also include a similar statement is telling in itself but this did not preclude the Community from imputing retrospectively the sentiments expressed in other international instruments. Human rights were assumed part of a “common heritage” that had been inherited by the Community by reason of its geographical and political location. The Luxembourg Report,⁵³ commissioned by the Heads of Government at the 1969 Hague Conference, confirmed the construction.

⁵⁰ EC Bull 7/8-1961 pp37-39.

⁵¹ See paras 1 and 2 respectively in de Giustino, n34 above p47.

⁵² *Ibid.* p53.

⁵³ First Report of the Foreign Ministers to the Heads of State and Government of the European Community's Member States of October 27, 1970. See, Press and Information Office of the Government of the Federal Republic of Germany *Texts Relating to the European Political Co-operation* 1974 pp18-25.

The overall framework of a united Europe was envisaged as “founded upon the common heritage of respect for the liberty and the rights of men”.

Was this discovery of human rights in the foundations of the Community therefore a mythic construction? If one adopts the perspective of myth as “a transforming signifier capable of re-ordering the ‘radical imaginary’ of the European polity”⁵⁴ then the subsumption of human rights within a notion of common heritage did have mythic qualities. It was not evident that human rights, the “rights of men” or other general concepts of liberty and freedom were guiding forces behind the construction of the Community. The concept of the underlying influence of human rights relied upon a *belief* that they were fundamental. Its adoption signified a transformation of the text from functional to encompass a spiritual dimension. In this sense, the embrace of human rights acted as a means of making explicable and authenticating not only past events and decisions but also present activities and future intentions. This returns us to the role of narrative and myth in establishing origins and justifying behaviour of an institution. On that basis the story told so far has all the hallmarks of a myth in the making.

The notion of “invented tradition” advocated by Eric Hobsbawm and Terence Ranger supports this analysis.⁵⁵ According to them an “invented tradition is taken to mean a set of practices...which seek to inculcate certain values and norms of behaviour,

⁵⁴ James Henry Bergeron, ‘An Ever Whiter Myth: The Colonization of Modernity in European Community Law’ in Peter Fitzpatrick and Bergeron (eds.) *Europe's Other: European Law Between Modernity and Postmodernity* (Ashgate Aldershot 1998) p4.

⁵⁵ Eric Hobsbawm and Terence Ranger (eds.) *The Invention of Tradition* (Canto, Cambridge 1992) pp1-14.

which automatically implies continuity with the past.”⁵⁶ They serve a number of purposes including “establishing or symbolising social cohesion or the membership of groups, real or artificial communities” and “establishing or legitimising institutions, status or relations of authority.”⁵⁷ The reference to the tradition of human rights by the Community achieves a similar result. It is invented in the sense that the tradition is deployed rather than evoked with the aim of establishing some kind of Community cohesion. It is also a tool that is utilised to authenticate and thus legitimate the Community and its assumption of powers. The fact that the tradition is marked more by its abuse than respect in modern European history suggests the invention is based on myth and not just fiction.

However, the rhetoric employed should not be read in isolation. The parallel developments undertaken through law and the ECJ are of vital importance in the creation of the myth.

5.2.3 Constituting Authenticity through Law: The Contribution of the Court

It was the ECJ that began to make *explicit* the re-interpretation of original intent as regards human rights. As many authors have pointed out, this aspect of the story has been subjected to intense scrutiny by commentators and the institution alike and has certainly been well rehearsed over time.⁵⁸ Despite the wealth of literature, however, a

⁵⁶ *Ibid.* p1.

⁵⁷ *Ibid.* p9.

⁵⁸ See, Weiler n28 above pp102-129, and Andrew Clapham, *Human Rights and the European Community; A Critical Overview* Vol. 1 (Nomos, Baden-Baden 1991).

brief review of the Court's involvement in the textual and rhetorical (re-)construction of the formative period is warranted. It will, of course, cover familiar ground. That is to be expected when dealing with the construction of an authorised version appearing as an institutional narrative.

The initial aspects of the story were recorded succinctly by the Commission in its 1976 Report on the Protection of Fundamental Rights as Community Law.⁵⁹ A three-stage sequence was identified. First, the Report recalled initial judgments of the Court, which “held that it was not competent to examine the legality of acts of the Community institutions according to the yardstick of national fundamental rights.” Second, it referred to the cases of *Stauder*⁶⁰ and *Internationale Handelsgesellschaft*⁶¹ as displaying, “a new attitude in the jurisprudence of the Court,” which insisted that respect for fundamental rights were in fact an integral part of the general principles of law that the Court would apply. Third, it interpreted the case of *Nold*⁶² as in effect cementing the new approach to human rights, taking “one step further...towards a sort of optimum standard of fundamental rights”. In so doing the ECJ drew explicit inspiration from international human rights treaties and the “constitutional traditions common to the Member States” as sources of law.

⁵⁹ EC Bull Supp 5-1976 pp8-9.

⁶⁰ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419-430

⁶¹ Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel* [1970] ECR II 1125-1155.

⁶² Case 4/73 *Nold v. Commission* [1974] ECR I 491-516.

Although the three stages identified by the Commission's report do not accord with some commentators' opinions on the development of the ECJ's approach,⁶³ they do represent a clear attempt to compose the story of human rights as founding principle.

The ECJ and Human Rights: Stage One

The initial reaction by the ECJ to applicants seeking to challenge the legitimacy of Community acts on the basis of a breach of fundamental rights contained in the national constitutions of individual Member States was to retreat into the rhetoric of competence. The possibility of human rights as a foundational principle of the Community was largely ignored. Rather, a strict interpretation was applied to the Treaties. This was demonstrated by *Stork*,⁶⁴ in which it was held that

“[u]nder Article 8 of the [ECSC] Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of Member States.....Consequently the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law.”⁶⁵

Consequently, the Court restricted the extent of its own authority by a rigid reading of the Treaty wording. Any flexible interpretation of the text was eschewed in favour of a strict depiction of the Court's competence. That the issue involved questions of

⁶³ For instance Dausies preferred to separate consideration of the cases of *Stauder* and *Internationale*, suggesting that they represented distinct developments. Such a distinction does not add to (or, for that matter, detract from) the analysis proffered here. Nevertheless, cf. Dausies, n36 above, pp398-419.

⁶⁴ Case 1/58 *Stork v. High Authority* [1958-1959] ECR 17-40.

⁶⁵ *Ibid.* p27.

the application of rights enshrined in a Member State's constitution was merely incidental.

However, as if to re-emphasise the absence of human rights principles in the ECSC Treaty, which was the extent of the Court's concern at that time, *Stork* was closely followed by a more explicit rejection of any such contrary contention in the case of *Ruhrkolen*.⁶⁶ The Court ruled

“Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.”⁶⁷

Even though this definitive and accurate reading only applied to the ECSC Treaty, the Court adopted the same approach, at first, in respect of the EEC Treaty in a number of cases during the mid-1960s.⁶⁸ Nevertheless, the distinctions that existed between the form and content of the two treaty documents offered the scope for a more flexible interpretation made increasingly necessary given the noises made in certain constitutional courts within the Member States.

The ECJ and Human Rights: Stage Two

G. Federico Mancini has made the point that as

⁶⁶ Case 40/59 *Ruhrkolen-Verkaufsgesellschaft mbH v. High Authority* [1960] ECR 423-462.

⁶⁷ *Ibid.* p439.

⁶⁸ See *Sgarlata v. Commission* [1965] ECR 215 and *Van Eick v. Commission* [1968] ECR 329.

“Community law came to govern diverse and sometimes unforeseen facets of human activity, it encroached upon a whole gamut of old and new rights with both an economic and a strictly “civil” content.”⁶⁹

Consequently, the ECJ’s stance as represented by *Stork* had little chance of placating national constitutional courts concerned at the possible erosion of rights through the activities of the Community.

The challenge, in particular in West Germany and Italy, to the unfettered principle of supremacy was of great moment for the establishment of the narrative of human rights in the Community. The growing disquiet felt at the possibility that the application of Community law could result in the contravention of national constitutional rights threatened to undermine the “new legal order”. Indeed, the prospect of consistent findings by national courts that Community law was incompatible with constitutional rights would make a mockery of the notion of supremacy. Lars Krogsgaard has suggested that it was “the Courts fear that this principle would be endangered rather than philosophical considerations of a humanitarian kind that led to the introduction of the concept of fundamental rights.”⁷⁰ M. H. Mendelson also called it an “act of self-preservation.”⁷¹

Likely as that may be, the case of *Stauder*⁷² was the first to recognise the possibilities inherent in the EEC Treaty as a means to overcome the difficulty. As an element of

⁶⁹ G. Federico Mancini, ‘The Making of a Constitution for Europe’ (1989) *CMLR* 26 pp595-614 at p609.

⁷⁰ Lars Bondon Krogsgaard, ‘Fundamental Rights in the European Community after Maastricht’ (1993) *Legal Issues of European Integration* p101.

⁷¹ M.H. Mendelson, ‘The ECJ and Human Rights’ (1981) *Yearbook of European Law* p130.

⁷² *Stauder* n60 above.

its judgment the Court determined that in relation to the fundamental right or principle of non-discrimination

“[t]he protection guaranteed by fundamental rights is, as regards Community law, assured by various provisions in the Treaty, such as Articles 7 and 40(3); supplemented in its turn by unwritten Community law, derived from the general principles of law in force in Member States.”⁷³

It then concluded, almost by way of an aside, that fundamental rights, “were enshrined in the general principles of Community law and protected by the Court.”⁷⁴

No depth consideration of this crucial statement of principle was provided in the judgment. It was, rather, a bold and pure finding, intensely presumptive, rendered without detailed reasoning, based on a reading of the written text and on an assumption of the unwritten intentions lying behind the Treaty. The opinion of Advocate General Roemer concurred, suggesting that fundamental rights recognised by national law represented, “an unwritten *constituent* part of Community law” [emphasis added].⁷⁵

The reference to “constituent part” is key. In effect, it meant that *Stauder* had provided a critical form of constitutional remembrance. The Court, echoing the sentiments (if not the wording) of the rhetoric of the Commission made at the time, embraced fundamental rights as an-already-present constitutional given. The decision thus installed a legally authenticated history of the Community’s ethical origins and design. In so doing, the message underpinned the institutional narrative that sought to

⁷³ *Ibid.* p422.

⁷⁴ *Ibid.* p425.

⁷⁵ *Ibid.* p428.

justify the Community's existence *and* deflect any legal challenge to the assumption of sovereign powers.

The Court lost little time in approving its creation of an originating orthodoxy in the subsequent case of *Internationale Handelsgesellschaft*.⁷⁶ The Court suggested that a Community measure could not be rendered invalid on the basis that it contravened fundamental rights contained in a national constitution but went on to conclude

“an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.”⁷⁷

The explicit concepts of inherence and integrality again indicate a retrospective representation of the formation of the Community as a system and structure that not only recognised fundamental rights but would be unbelievable as an institution of governance in the modern world without their presence.

Advocate General M. Dutheillet de Lamothe substantiated the Court's interpretation by drawing attention to the fundamental rights that were already guaranteed expressly in the Treaty. He claimed that these veiled rights were suggestive of an unwritten Community law, “one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.”⁷⁸ Certainly, AG de Lamothe had no difficulty describing Article 40 in combination with Article 39 in suitable

⁷⁶ *Internationale Handelsgesellschaft* n61 above.

⁷⁷ *Ibid.* para 4 p1134.

⁷⁸ *Ibid.* p1146.

rights language as ensuring, “a more precise guarantee of the rights of individuals than the general principles of Community law.” He therefore echoed the language of rights that had been applied by the Court to those non-discrimination provisions of the Treaty in *Stauder*. The ready acceptance of the rhetorical acceptance of rights for the individual was a key precedent for the development of rights as a founding principle. It suggested that human rights issues, although not covered in their entirety, had been enplaced throughout the Treaty merely awaiting recognition and suitable application.

So we see another element of the authorised version appear. Professor Bernhardt’s study report in 1976 confirmed that it would be, “wrong to infer that the Treaties ascribe no importance to fundamental rights and the rights of the individual, or even take no cognisance of them.”⁷⁹ That the rights might be chiefly “in relation to economic endeavour” did not negate such a view. Rather, Professor Bernhardt utilised the economic inspired rights as vital precedents for his central contention.

In any event, it became common ground that, setting aside the economic based rights, the Treaty still incorporated provisions that may be interpreted in the language of rights. Twomey, for instance, specifically acknowledges, “[t]hough not formulated in ‘rights language’ many of the provisions in the Treaty are concerned with the rights of the individual.”⁸⁰ They included the original Articles 7 (non-discrimination on the basis of nationality), 48 (free movement of workers) and 119 (equal pay) EC Treaty.

⁷⁹ Bernhardt, n31 above.

⁸⁰ Patrick F. Twomey, *The European Union: Three Pillars without a Human Rights Foundation*, in *Legal Issues of the Maastricht Treaty* David O’Keefe and Patrick F. Twomey (eds.) (Wiley Chancery Law, London 1994) p122.

The fact that Twomey then points out that many so-called rights do not “inhere in the individual by his or her humanity, but flow from one’s status as a Community national” and that “non-natural persons do not automatically benefit from the protection afforded”⁸¹ does not negate the starting assumption.

Nevertheless, that this interpretation might be open to doubt was recognised by the Commission in its 1976 ‘Report on the Protection of Fundamental Rights as Community Law’. It felt compelled to confirm that

“[t]here are provisions in the Treaties themselves *whose aim, or at least effect*, is to guarantee and improve the position of the individual in the Community...It is on the basis of some of these articles that the Court of Justice has been able to give important judgments as regards the protection of fundamental rights [emphasis added].”⁸²

The equivocal suggestion as to the “aim” or “at least effect” of the listed provisions, set up a possible distinction in original design that was quickly rendered less ambivalent within two paragraphs.

“Turning to fundamental rights, strictly speaking, the Community institutions have, since the beginning of the Community, been faced with the question of their existence and with a precise definition of their scope under the Community legal order. Today fundamental rights - however they may be defined - undeniably constitute an essential part of the Community legal order.”⁸³

The failure to address the question of definition suggested that definition was unimportant. It confirmed the symbolic attachment to “human rights” rather than

⁸¹ *Ibid.*

⁸² EC Bull Supp 5-1976 para 7 p8.

⁸³ *Ibid.* para 8 p8.

their specific interpretation. The message was that rights, whether called “fundamental” or “human” were respected through law and through the Community’s political practice. That was all that was deemed necessary for the Community to appropriate authenticity through the language of rights. Further delineation was portrayed as an ancillary concern, which would be addressed by means yet to be determined.

The ECJ and Human Rights: Stage Three

Having founded the principle of fundamental rights that underpinned the formative structure of the Community through *Stauder* and *Internationale Handelsgesellschaft* the Court then provided a degree of guidance as to how this might be interpreted in practice. In particular the case of *Nold*⁸⁴ affirmed that the Court would be entitled to “draw inspiration from the constitutional traditions common to the Member States” and that

“international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”⁸⁵

⁸⁴ *Nold v. Commission* n62 above.

⁸⁵ *Ibid.* para 13 p507.

The ECHR was the “international treaty” of note in this respect, a fact confirmed by the ECJ through subsequent judgments.⁸⁶ Human rights rather than simply fundamental rights were therefore drawn into the narrative.

However, the acknowledgement of the importance of rights in the Community was tempered by practical considerations. Human rights were not unconditionally accepted. They could still be subject to interference through Community law if that were required in the public interest in pursuance of the Community’s objectives and the interference was proportionate and the substance of the rights concerned remained guaranteed.⁸⁷

Notwithstanding these limitations, the effect of *Nold* was to encompass within the foundational narrative the authenticity supplied through the international and regional (as well as national) discourses considered in part 5.1. It looked not only to the universal precepts of rights but also those that might have developed specifically within Member States. It therefore provided the formal means by which the genealogy of rights within the Community was given substance. Equally, it echoed the institutional promotion of a common tradition focused on human rights. Without in anyway specifying what these traditions might amount to, the Court succeeded in embracing the rhetoric at work elsewhere in the institution, contributing in the process to a substantiation of the myth already under construction. The mythic nature of the enterprise was re-emphasised in Bernhardt’s 1976 report. There he concluded

⁸⁶ It soon became common practice to relate human rights issues to articles of the ECHR. *Rutili* instituted this tendency, see Case 36/75 *Rutili v. Minister for Interior* [1975] ECR 1219.

⁸⁷ See *Nold* n62 above.

that although there were “many common features of principle” with regard to the constitutional traditions of rights in the Member States, there were also “deep-rooted differences in the manner in which these fundamental rights have been elaborated”.⁸⁸

The Court’s three stage scheme of emplacement of the concept of fundamental and human rights in the Community’s formative ideology thus provided the legal cement for the myth that had already begun to be developed politically. The Court had styled the language of rights into a constitutional and constituting performance, one that was readily adopted and followed by the other organs of the Community.

5.2.4 The Consolidation of the Myth of Founding Principle

The adoption of the language of rights through the conduit of law filled a gap which might have otherwise threatened to undermine the Community’s attempt at structuring its own authenticity. Whether the opponents were the constitutional courts of the Member States or political actors concerned with the transfer of powers to the Community, the Community relied on its story of a pedigree of rights adherence and initiating principle to substantiate its position politically *and* legally. Implicitly, this was recognised by the Parliament, Commission and Council through

⁸⁸ Bernhardt n31 above p45.

the Joint Declaration on Human Rights issued in 1977.⁸⁹ Indeed, the Declaration represented the first major rhetorical movement to fuse the forces of law and rights into the very core of the Community. The line of reasoning is clear from the Declaration's text. It is worth quoting in full.

“Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;

Whereas, as the Court of Justice has recognised, that law comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based;

Whereas, in particular, all the Member States are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,

Have adopted the following declaration:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. In the exercise of their powers and in the pursuance of the aims of the European Communities *they respect and will continue to respect* these rights” [emphasis added].

On close reading, the Declaration plays two intersecting themes. First, it substantiates that the Community is imbued with the force of law; it was created in law and operates through law. The project was invested with an authority almost ethereal (certainly mythic) in character. The implication is that “law” exists outside the institution, independent and therefore wise and trustworthy, an essential guiding power transcending time and political manipulation. In James Bergeron’s understanding, Community law looks to the “mythical structure of national law and

⁸⁹ Joint Declaration by the European Parliament, the Council and the Commission on Human Rights [1977] OJ C103/1.

the representation of that structure as an external and autonomous, yet transcendent and supreme entity”.⁹⁰ Whether or not national law provides the external authority “fundamental rights” appear as a vital element of the “law” in the Declaration’s terms. The Court’s contribution to the scheme is its “recognition” of this fact. Its decisions merely confirm the Declaration’s substance. So much is implied by the preambulatory narrative.

Second, the body of the text of the Declaration then proceeds to establish the truth of the story of founding principle by confirming the existing and continuing respect that the institutions have (and by implication, always have had) for human rights. There is no acknowledgement of a change in approach. Rather it is an affirmation of an institutional “truth”. In order to substantiate the narrative the particular sources of human rights law that would have regional authenticity, namely the ECHR and the constitutional traditions of the Member States, are relied upon. Interestingly rights instruments from a wider background are not explicitly acknowledged. Even the Universal Declaration of Human Rights fails to find a mention.

The Joint Declaration thus channelled the force of law with the force of rights to produce a powerful constituting statement. Although possessing no legal authority, it added to the authentication of the Community (including of course the ECJ) as a site of decision-making and political power through its rhetorical performance. It was given added political weight by the fact that it would deflect the challenge of national courts to the supremacy of Community law. The Report that gave rise to the

⁹⁰ For a consideration of the mythology of European law see Bergeron n54 above.

Declaration concluded as much. It suggested that an alternative strategy to a catalogue of rights would be to allow the Court to develop a rights jurisprudence of its own. It would rely upon “general legal principles” under the umbrella of a statement that “the protection of fundamental rights is, in the view of all Community organs, secured under Community law”.⁹¹ The Community “organs” adopted the approach partly in the hope that the Declaration would, “deal with existing legal uncertainties and dispel misgivings”⁹² but also, it is submitted, with a view to entrenching the authenticating foundational narrative of rights.

The Declaration was, however, insufficient to establish the entrenchment on its own. The very nature of narrative and its efficacy depends upon the repetition of the key narrative elements in order to ensure its survival. A constructed myth may require constant re-affirmation to ensure its institutional position as an unquestioned principle. Only then can atrophy of the authenticating process and the forgetting of foundational principles be prevented.

The textual productions that have emanated from the Community since the Declaration have therefore served to cement the story within the constitutional framework. It is possible to trace the lineage through the textual output of the institutions.⁹³ Taking the form of non-legally binding but official statements and

⁹¹ Bernhardt, n31above, p69

⁹² *Ibid.*

⁹³ This same lineage has been identified as ‘soft approval’ of the ECJ’s developed jurisprudence (see Paul Craig and Gráinne de Búrca (eds.) *EU Law, Text, Cases and Materials* 2nd Edition (Oxford University Press, Oxford 1998) p331). However, my interpretation is that the ECJ was a contributor to the narrative of rights constructed not its sole progenitor. It did not create the response to a need for authenticity. It added a jurisprudential component that the remainder of the institutions was able to

declarations and, in time, treaty amendments, which have assumed positions of legal doctrine,⁹⁴ the first significant constitutional development after 1977 occurred with the determination to hold elections by direct universal suffrage to the European Parliament. The European Council declared in 1978

“The creation of the Communities, which is the foundation of ever closer union among the peoples of Europe called for in the Treaty of Rome, marked the determination of their founders to strengthen the protection of peace and freedom. The Heads of State and of Government confirm their will....to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.”⁹⁵

Human rights were therefore inextricably linked with the “creation of the Communities”. One flowed from the other, peace and freedom giving rise to, amongst other things, respect for rights. And as a part of the connection, the notion of the rule of law was implicated in the project by appearing as an element of the Member States’ “cherished values”, one that must be safeguarded by the Communities. Law and rights in the Community remained interlocked, coupling with democracy to underpin the authenticity sought by the institution and to emphasise its historical and future commitment.

The Parliament also contributed to the developed narrative. Its Committee on Institutional Affairs, through Rapporteur K. De Gucht, reported in 1983 that, “[r]espect for fundamental rights and their development are the prerequisite for and

enfold into the story that had already begun to be developed. Thus, it was not a situation of ‘approval’ as such but incorporation.

⁹⁴ Culminating in the constitutional assertion of “founding” principle expressed in Article 6(1) TEU.

⁹⁵ European Council Copenhagen Declaration on Democracy, EC Bull 3-1978 pp5-6.

the essential foundation of the Union” and would provide, “the construction of Europe with the necessary legitimacy.”⁹⁶ A subsequent parliamentary Resolution in 1989 stated that, “respect for human rights is indispensable for the legitimacy of the Community.”⁹⁷ Whilst it then made clear its determination to, “achieve a basic Community instrument with a binding legal character guaranteeing fundamental rights”⁹⁸ it would, in the meantime, restate, “the legal principles already accepted by the Community”.⁹⁹ The attendant Declaration did just that, maintaining that, “it is essential that Europe *reaffirm* the existence of a common legal *tradition* based on respect for human dignity and fundamental rights”¹⁰⁰ [emphasis added].

So we see the formation of the respect for rights played out as a “legal tradition” reaffirmed rather than created, a tradition echoing the expressions of “common heritage”. The phrases confirm the mythic nature of the narrative, its inventedness. With little in the way of hard textual support, a myth of origin became fixed through its re-iteration. By repeating the connection between law and rights in the context of a supposed long history, the statements operated so as to authenticate the Community as a source of decision-making both in the present and in the future.¹⁰¹ The actual decisions made still required legitimating but this was a matter of programme administration rather than constitution. Thus the Parliament’s expressed design to

⁹⁶ European Parliament, *Working Document on the Law of the Union*, [1983] PE 83.326/fin/C European Parliament Working Documents 8.2.1983 p5.

⁹⁷ European Parliament, *Resolution adopting the Declaration of Fundamental Rights and Freedoms*, [1989] OJC 120/51-52 at p51 para. B Preamble.

⁹⁸ *Ibid.* at 52 para. G Preamble

⁹⁹ *Ibid.* at 52 para. H Preamble

¹⁰⁰ European Parliament, *Declaration of Fundamental Rights and Freedoms*, para. 1 [1989] OJC 120/52

¹⁰¹ It might also be said that in attaching the Community to this history, the Community makes clear its resolve to act as a successor to the states of western Europe *not* their companion but that will take us into a territory that is outside the scope of this thesis.

promote the cause of a catalogue of rights did not undermine the current statement of principles. Such a move would clarify operational dilemmas of rights application rather than substantially affect the role of rights in the Community's institutional story.¹⁰²

The Parliament continued to operate on this basis. It would, "contribute to the development of a model of society which is based on respect for fundamental rights and freedoms and tolerance".¹⁰³ It worked with the other Community organs to re-emphasise the Community's rights' traditions and heritage. A noteworthy example was the Preamble to the joint declaration by the Parliament, Council and Commission against racism and xenophobia, which stated,

"Whereas the Community institutions attach prime importance to respect for fundamental rights.....
Whereas respect for human dignity and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of all the Member States."¹⁰⁴

The second paragraph, in particular, indicates the application of myth. Any history of the Member States individually or collectively would find it almost impossible to establish a persuasive case for an effective heritage (legal, cultural or otherwise) that indicated a resolve to eliminate racial discrimination. Philosophical argument and social programmes designed to counter racism may have existed but to suggest any

¹⁰² This interpretation was given force by the Council at the Cologne IGC in 1999 when in advocating for a Charter of Fundamental Rights of the European Union it stated that, "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy." By implication, therefore, the Charter would merely be a step towards the improvement in the clarity of rights.

¹⁰³ See n97 at p51 para.C Preamble.

¹⁰⁴ European Parliament, Council, Commission, *Declaration Against Racism and Xenophobia* [1986] OJC158/1.

deeper historical commitment is hardly credible. Yet the Declaration seeks to fix within its historical structure, its institutional story, a *post*-ordained truth that attempts to place the Community on the moral high-ground. Thus an important element of rights, and indeed of general principles of the Community in the form of non-discrimination is set amongst the ethical and, it must be stressed, the *mythical* traditions that make up the foundational principle.

The theme of tradition and heritage of rights, substantiating the founding principle, has also assumed a prominent position in the Parliament's annual resolutions on human rights in the Community. In 1993 it made plain the link between rights and the project of integration by determining that "respect for human rights is the foundation of democracy and constitutes a basic principle of Community integration".¹⁰⁵ In 1995 it recommended and declared that, "the fiftieth anniversary of the end of the Second World War should be celebrated solemnly by the European Institution which, by its democratic nature and purpose, is attached to respect for and the promotion of human rights."¹⁰⁶

Equally, the Parliament and the other European organs have seen fit to introduce the notion of values into the rhetoric. The values expressed, including human rights, have been claimed to, "constitute the very essence of European integration".¹⁰⁷ In

¹⁰⁵ Resolution A3-0025/93 and A3-0025/93/suppl: *Resolution on respect for human rights in the European Community (annual report of the European Parliament)*: [1993] OJC 115/178 p179.

¹⁰⁶ Resolution A4-0078/95: *Resolution on human rights in the world in 1993 to 1994 and the Union's human rights policy*: [1995] OJC 126/15 Preamble para A.

¹⁰⁷ Resolution A4-0083/95: *Resolution on progress in implementing the common foreign and security policy* (Nov 1993 - Dec 1994) [1995] OJ C151/223: preamble para. D.

1996 the Commission brought open market economics into the net of an ethical heritage by contending that

“Europe is built upon a set of values shared by all its societies, and combines the characteristics of democracy human rights and institutions based on the rule of law and with those of an open economy underpinned by market forces, internal solidarity and cohesion.”¹⁰⁸

The principle of respect for human rights has thus become inextricably interwoven into the framework of all aspects of the Community. Stretching from the social and political to the economic, the genealogy of rights as founding principle has become fixed both as an idea, a tradition, as a determinant of future action and as an element of consistent values that “now inform on everything the Union does.”¹⁰⁹ The Treaty of Amsterdam and the EU Charter of Fundamental Rights in particular merely repeat the message. In this sense, they should not be viewed as a final constitutional word. Rather, they are yet further contributions to the genealogy described.

Nevertheless, such is the power of the narrative described that to challenge its authenticity can be problematic. Even severe critics of the Community’s human rights policies have given the story of founding principle credence. In the *Comité des*

¹⁰⁸ Commission Opinion Re-inforcing Political Union and Preparing for Enlargement 28.2.1996:para 8. See also, the Vienna European Council Presidency Conclusions 11 and 12 December 1998 para. 4, which brings the Universal Declaration of Human Rights within the authenticating net by stating, “[t]he European Union, which is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, shares the values in which the Declaration (UDHR) is rooted and bases its actions on those values”. This returns us to the authentication sought from international instruments that was promoted by the Court.

¹⁰⁹ Jacques Santer, ‘Foreword to the Commission’s Report on the External Dimension of the EU’s human rights policy’ [1995] COM(95) 567 final.

Sages' report issued in 1998, entitled "Leading by Example: A Human Rights Agenda for the European Union for the Year 2000", it was stated that

"[a]s the century and the millennium draw to a close, we call upon the European Council to restore human rights to the central role they enjoyed at the dawn of the European construction: that of the cornerstone upon which the fabric of a united Europe must rest."¹¹⁰

Nevertheless, without the founding myth it is difficult to consider how the Community's human rights activities, however limp or effective one considers them to be, could have been enacted. For this reason alone, the story has assumed a position of textual impregnability, a base upon which human rights policies and, I suggest, their bifurcation, have been instituted.

5.3 Conclusion

Paradoxically, the narrative of human rights began with a silence on the subject. However, as the Community evolved, as it practised its acquired sovereignty, as it developed its text, the political structure created became capable of "defining its own past and writing its own history."¹¹¹ Consequently, the Community, in both trying to address the debilitating omission of a human rights dimension in its founding treaties

¹¹⁰ Reprinted in Philip Alston *et al* (eds.) *The EU and Human Rights* (Oxford University Press, Oxford 1999) pp921-927 at p926.

¹¹¹ See J.G.A. Pocock's essay, 'Deconstructing Europe' in Gowan and Anderson (eds.) n16 above pp297-317 at p309, in which he argues that for the Community to possess authority in the present it must capture its past.

and seeking an authenticity it otherwise lacked, deployed the discourse of human rights retrospectively. It engaged in the formation of an interpretation of text and latent intent that sought to overcome the effects of the original condition. In so doing, it structured a framework for a history of the formation of the Community that is largely mythic in nature.

But why mythic? First, the rhetoric, law and language employed relate to an assumed fact, that there is a heritage of human rights that belongs to and has been passed down by the peoples and states of Europe. Second, they maintain that the Community was and remains a natural successor, or co-owner of the purported common heritage. Together, the two elements combine to provide the Community with an ethical pre-history, a story of its generative ethos, *and* a history in the making, a self-constructed narrative that may authenticate the Community as a continuing and future site of governance. The narrative then serves as an authenticating link between memories of positive and inspiring humanitarian aspects of the European past and the aims of the Community in its moves towards union.

Here we begin to touch upon the myths that lie beneath the narrative. Human rights and fundamental freedoms may undoubtedly have a history within Western Europe, a history that can be traced back to the Greek and Roman civilisations, but to suggest that they are uncontested subjects, common throughout the nations of even the Member States of the Community, would be problematic, particularly if considered in terms of states' practice. Since the Declaration of the Rights of Man, history confirms the abuse of all human rights throughout Europe, sometimes on an unimaginable scale. Paul Ricoeur sums it up well.

“The history of Europe is cruel: wars of religion, wars of conquest, wars of extermination, subjugation of ethnic minorities, expulsion or reduction to slavery of religious minorities; the litany is without end.”¹¹²

Even focusing on civil and political rights, one would be hard pressed to identify any consistent and uniform respect in any state prior to 1945. Admittedly the liberal elite in Europe may have espoused a rhetoric of rights, demonstrated on occasion in practice, but this was invariably expressed in contingent terms. Human rights found little application, for instance, outside national borders in the European colonies.

The mythic elements of the narrative, therefore, came into play not simply in what was said but what was omitted. The abuse, the violence inflicted, the regimes that institutionally incorporated discrimination and repression whether at home or abroad were left to one side, forgotten in favour of what was “good” about “Europe”. All in the interests of compiling a narrative of constructive commonality. In making that choice the Community composed an essentially mythic story, part history, part “symbolic discourse”, the rhetoric of common heritage providing a foundational institutional narrative for the project.

The analysis above also refers to Paul Ricoeur’s reading of myth as a form of narrative (institutional in my terms) that connected a community’s traditions with its projected utopia. That is precisely the interpretation that I seek to employ in the case of the narrative formed with regard to human rights. In other words, it is through

¹¹² Paul Ricoeur, ‘Reflections on a New Ethos for Europe’ in *The Hermeneutics of Action* in Richard Kearney (ed.) (Sage London 1996) p9.

myth that the Community mediates a genealogy of basic values and norms that underpin Western European society and ties it wholesale to the European project. The former authenticates the latter.

Which brings us to the issue of bifurcation. The creation of the myth of founding principle *and* the nature of its composition, which has been discussed in this chapter, has, I contend, two significant consequences central to my thesis.

First, as the concern of the Community's institutions was to stave off criticism on the one hand and gain authenticity on the other, the phrase "human rights" was employed without regard to its meaning or possibilities. Using the language of rights as a mythic construct was considered sufficient to satisfy the potential detractors of the Community and its project. The resulting indeterminacy of human rights, the repeated failure to constitutionalise any definition of the term, ensured that the field was open to interpretation. Thus, the possibility of different human rights discourses, practices and definitions emerging in different arenas inspired by different sources of law and philosophy became apparent. The most significant demonstration of the potential for bifurcation was at the external/internal divide. In both realms, the failure to define what the Community meant by human rights or how they should be applied and promoted in any coherent fashion determined that other forces could influence their evolution. As we have seen in relation to development policy and enlargement, these other influences, perhaps based on prejudices against the "South" at one level and on supposed political exigencies at another, resulted in quite distinct patterns of human rights discourses and practices between the internal and external arising. The founding principle myth ensured that there was no constitutional, practical (and thus

no narrative) base that could guide human rights policies along consistent and parallel lines. Equally, the two connected human rights traditions of the international arena on the one hand and the European on the other that I have suggested were necessary for the Community's search for authenticity, have also contributed to the sense of bifurcation. The UN inspired discourse is not identical to the European. Although highly inter-related the possibility arises for a distinction in interpretation to develop, for different sources of law and meaning to be relied upon in the dichotomous spheres.

Second, the mythic nature of the narrative has presented a debilitating factor in any attempt to rectify a perceived bifurcation. Due to its lack of substance, its lack of certainty, the narrative of founding principle left the subject of human rights open to interpretation. Indeed, I suggest that the formulation has become a vapid construction, a wistful statement repeated as law without any certain content or appreciation of practice. It ignores the "considerable differences" between the attitudes of Member States to rights.¹¹³ It has thus been incapable of providing a framework for any kind of consistent human rights activity. Rather the myth has lost its vitality *and* relevance and has left human rights to the vagaries of context and inherent discrimination. As Chapter 4 demonstrated, the resulting distinctions between the internal and external approaches are significant. In this respect the myth's putative role in the authentication of the Community ironically represents the very means for doubting the Community's authenticity in human rights terms. For how can the Community hope to present itself as a polity informed by human rights

¹¹³ Bernhardt n31 p45.

principles when it has failed to provide any coherent understanding of what those human rights may comprise and how they might be applied?

Significantly, Ricoeur warned of the political utilisation of myths forged around an interpretation of history. He suggested that the past “can be perverted, usually by monopolistic elites, into a mystificatory discourse that serves to uncritically vindicate the established political powers.”¹¹⁴ There is a sense that this has occurred in relation to the Community and its discourse of human rights. The reliance upon a mythical tradition to partially validate the continuation of the European project is an attempt at authentication that may adhere to the rhetoric but not necessarily the underlying principles of human rights. Significantly, it has enabled a basic discriminatory fault line in the Community’s human rights policies to be created.

In essence, therefore, I argue that the myth of founding principle provided the *environment* for bifurcation to develop. It now remains to consider why bifurcation has evolved in the form I have suggested. This is the central theme of the next Chapter.

¹¹⁴ Paul Ricoeur, ‘The Creativity of Language: an Interview’ in Richard Kearney, *Dialogues with Contemporary Continental Thinkers* (Manchester University Press, Manchester 1984) pp29-30, as quoted in Richard Kearney, ‘Between Tradition and Utopia’ in David Wood (ed.) *On Paul Ricoeur: Narrative and Interpretation* (Routledge London 1991) at p65.

CHAPTER 6

EUROPEAN IDENTITY AND THE PRODUCTION OF BIFURCATION

Two questions now need to be addressed to complete the genealogy of human rights in the Community. First, why has the bifurcation of human rights policies arisen. Second, what prompted the bifurcation to take the shape that it has? In both respects I suggest that the adoption and subsequent development by the Community of a narrative of European identity was a formative and crucial factor. In an effort to contribute to the construction of an overarching authenticity, one that would have both internal and external application, and promote the credibility of the whole European Project, the Community specifically deployed identity as a unifying and distinguishing concept. The resulting narrative incorporated human rights as an essential element in its definition. It was this, I suggest, that provided the impetus for a bifurcation to develop.

Three specific arguments support the proposition. First, by adopting the term “human rights” as one of the rhetorical components of the Community’s initiating discourse of identity the institutional narrative that had already established the base conditions for rights language in the Community was given an added dimension. In other words,

the representation that the Community was founded on respect for human rights (as discussed in the previous chapter) was paralleled by the assertion that rights were inherent in the concept of a European identity. Together these components formed the narrative environment for the development of bifurcation.

Second, I argue that the conscious legal and political construction of “*the* European Identity” as it was to become known, ensured in both practice and in concept that human rights were left to develop along two generally distinct lines. Internally, rights were associated with the desire to create an identity *with* the Community for its constituents. Externally, rights became party to the construction of an identity *of* the Community. The two realms operated with different policy objectives in mind. Thus distinct and bifurcated narratives evolved, applying different forces and conditions on the nature and scope of human rights that emerged in each sphere.¹

My third argument turns to the theoretical aspects of identity. I suggest that the bifurcation encouraged by the adoption of a concept of identity was rendered inevitable for two interrelated reasons. First, the nature of the process of collective identity foundation is one of distinction or discrimination. It creates dichotomous dimensions; the internal through a search for definitions of commonality amongst constituents, and the external by delineating differences with others. Second, by making human rights a central component of a concept of identity, and by naming that identity “European”, the Community’s institutional narrative of human rights

¹ This is not to say that different dimensions of rights were not constructed within the internal sphere. However, the fundamental variance between the interior and the exterior approach is what concerns me here.

was implicated in the internal/external differentiation. As no explanation or exposition was provided of rights in that narrative foundation, human rights became fluid subjects, open to distinct definition and application through their development in the two separate spheres.

This chapter explores these propositions. Part 6.1 examines the generation of the myth of a European identity, tracing its roots back to the Community's founding narratives. Part 6.2 then explores the specific construction of *the* European Identity. It traces the conditions for bifurcation and the signs of the external/internal human rights distinction that have become evident. Finally, in part 6.3, I analyse the concept of identity and make the claim that its potential discriminatory nature made the development of bifurcation if not inevitable then significantly more likely.

6.1 The Generation of a Myth of European Identity

The possibility of a 'European identity' in the construction of a continental polity was not a phenomenon introduced by the Community. Its possibility, if not its existence, had been posited for centuries. Since at least Abbé de St. Pierre and Rousseau, it had formed the basic assumption from which strategies for peace within the continent, for co-operation and mutual advancement, for some kind of unity of purpose, had evolved.² In particular, as Carlo Gamberale outlined, it was the

² For a review of this history of a European identity see, for example, Denis de Rougemont, *The Idea of Europe*, (Macmillan, New York 1966), Gerard Delanty, *Inventing Europe: Idea, Identity, Reality* (Macmillan Press, London 1995) and Derek Heater, *The Idea of European Unity* (Leicester University Press, Leicester 1992).

resistance movement during the Second World War that relied on a notion of a European identity of values to give strength to its opposition to fascism.³ Western European attempts to organise international co-operation on the continent immediately after the war took a similar stance. It would have been surprising, therefore, if the Community had not at some stage also drawn on the same discourse. This it did, at first obliquely and then openly. Throughout, as I demonstrate below, the narratives that were constructed both established and reflected an external/internal divide.

6.1.1 Early Rhetorical Moves

Although no direct reference was made to the concept of identity in its initiating texts, the Community as a projected idea relied strongly upon notions of commonality for its inspiration. The dominant recurrent theme in the early stages may have been one of a mutuality of economic benefit possible through collective action but the Schuman Declaration, the ECSC Treaty, and the EEC Treaty, were all linked to a greater or lesser extent with the *re*-construction of an identifiable “European” community.

The preamble of the ECSC Treaty, for instance, resolved,

“to substitute for age old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis

³ Carlo Gamberale, ‘European Citizenship and Political Identity’ (1997) *Space and Polity*, Vol. 1, No. 1, pp37-59.

for a broader and deeper community among peoples *long divided by bloody conflicts*" [emphasis added].⁴

The emphasis of the text, and that of the Schuman Declaration from which the rhetoric was borrowed, was not only on the transformation of violent relations but also the return to a community that had purportedly been subjected to an historical division. The natural bonds that somehow defined Europe as a single entity were to be re-established.

The EEC Treaty adopted the inference by looking towards the future of "an ever closer union" not amongst states but "the peoples of Europe".⁵ The eradication of division and the improvement in the "living and working conditions" of the peoples of the Member States provided the dual focus of the programmes. The emphasis was placed on the economic structures to be instituted, an explicit intention of those who advocated a functionalist approach to European integration. Inherent in the scheme was a promise of regeneration and future material benefit. Alan Milward even suggests that European integration was "the predictable response to the development of a universal international capitalist economy" and indeed the originating treaties readily demonstrate the preference.⁶ But to see the enterprise as purely economic would run counter to the significant presence of an authenticating rhetoric that looked far beyond such materialist objectives. Importantly, the project was supported throughout by association with the mythic entity named "Europe". The fact that the initial enterprise could call itself *the* European Community when so many on the

⁴ Preamble, Treaty Establishing the European Coal and Steel Community.

⁵ Preamble para.1 EEC Treaty.

⁶ Alan Milward, 'The Springs of Integration' in Peter Gowan and Perry Anderson (eds.) *The Question of Europe* (Verso, London 1997) p11.

continent remained outside was indicative of the central pretension and presumption put to work. In employing the epithet, a definition of the project had therefore already cast its vision far beyond the politico-economic structures that were actually produced in the founding treaties.

Even with the lack of direct reference to a European identity within the originating constitutional texts, it did not take long before the rhetoric emanating *from* the institutions began to play on notions of identification. Gradually during the early to mid-1960s the institutions' self-commentaries transcended the largely technical nature of their work. Increasingly they encompassed the underlying political ambitions of the whole European project.

Initiatives enacted by the European Parliament in its formative period provide an example. During its plenary session in October 1960, it passed a resolution calling for a "Right of Legation" and suggested that, "the creation of a flag common to the three Communities" was, "a political exigency."⁷ The blatant regard for the symbolic trappings associated with the nation-state (trappings that have since included an anthem, a passport, an assigned day for Europe) imitated nation-building strategies that might instil, or echo, feelings of popular identification. Indeed, the question of the reception of ambassadors sparked one of the first crises to interrupt the course of the Community. Wallace described the resulting friction as an "embittered quarrel between Hallstein [President of the Commission] and de Gaulle" which "reflected de Gaulle's determination to prevent the EEC developing the symbols of statehood –

⁷ EC Bull 10-1960 p76.

and Hallstein's intentions that it should acquire them."⁸ So the rhetorical fault lines between the desire for a super-state on the one hand and an intergovernmental agreement on the other were set in place.

Even though de Gaulle's opposition to the ambitions of Community actors such as Walter Hallstein largely succeeded in the early part of the 1960s a rhetoric of identity nevertheless continued to find expression within the Community. Hallstein in particular drew on the concept of a commonality, stating in 1961 that

"amid all the differences there is a basic substance of identical elements, conditions, capacities, values, and psychological as well as intellectual concepts held in common, a sense of independence in happiness or misfortune, in jointly shaping or suffering our fate, in common weaknesses, but also in brilliant common achievements - cultural, economic and political."⁹

Hallstein's vision reflected the general tenor of rhetoric as primarily concerned with the internal manifestation of the Community, what it meant, what it could do, for the people of the Member States. Ultimately, the expressed wish was for the people, "to be co-citizens in our common Europe", a natural consequence perhaps of their affiliation to the Community project.¹⁰

The European institutions adopted similar language. In its introduction to the Fourth General Report on the Activities of the Community in May 1961 the Commission described itself as, "contributing to the establishment of a European idea which is

⁸ William Wallace, *The Transformation of Western Europe* (Pinter Publishers, London 1990) p30.

⁹ Speech by President Hallstein on receipt of the Charlemagne Prize, see EC Bull 5-1961 p20

¹⁰ *Ibid.* p21.

penetrating more and more deeply into the consciousness of the public”.¹¹ It also advocated an awareness of a “Community spirit” in all aspects of the Member States’ activities.¹²

The assimilation of cultural concerns into the deliberations of the Community institutions held an equal significance in this regard. At the Bonn Conference in 1961, the Heads of State or Government produced a Communiqué that was a key document in the textual inception of a myth of identity within Europe.¹³ It affirmed the “*valeurs spirituelles*” and the “*traditions politiques*” that formed a “*patrimoine commun*” or common inheritance between the Member States. It drew inspiration from the intent to act in concert to safeguard freedom and peace and expressed the determination to re-enforce the “*liens politiques, économiques, sociaux et culturels*” that existed between their peoples. Resonating throughout was the assumption of both a common spirit and a common ‘sense’, of place, of origin and of purpose. The myth of identity between peoples (rather than states) provided the rhetorical connection that bound these elements inextricably to one project, that of the union of Europe. It also set a determined agenda designed to attract other European states ready to assume in, “*tous les domaines*” the same responsibilities and obligations now accepted by the then current members. The prospect of embracing an affinity with a past, which was only made coherent by a mythic and undefined notion of what it was to be “of Europe”, and a utopian future, was therefore held out to states who

¹¹ EC Bull 5-1961 p12.

¹² *Ibid* p14.

¹³ EC Bull 7/8-1961 pp37-39.

could qualify under those terms. The project (linked rhetorically to all aspects of society and in particular culture) thus set its own definitional limits.

Other institutional actors in the Community acknowledged the possibilities of the discourse unleashed at Bonn. The European Parliament described the Communiqué as “a recognition of the fact that education and culture have a considerable effect on the development of a European spirit.”¹⁴ Hallstein commented that progress towards the “political unity of Europe” would occur not just through “economic and social policy, the specific subjects of the Treaty establishing the EEC” but also foreign policy and cultural policy.¹⁵

The Communiqué therefore provided an early impetus *within* the Community for repeated renditions of the notion of an *internally* appreciated European collective identity that extended far beyond the otherwise dominant economic structures. Even at this stage the conditions for bifurcation were beginning to emerge.

In embarking upon the effort to give credence to an internal identity, there was not only a self-conscious recognition that the process was one of “revelation” (in other words, the “truth” of the Community’s rightful inheritance of the “European” mantle was being “revealed” to the people) but also an appreciation, ironically, that it required some degree of “creative” interference. The Commission’s publications on the “flow of information on Europe”, for instance, pointed out that there appeared to be, “little awareness that the *long-heralded concept of Europe* was in the process of

¹⁴ EC Bull 8-1963 p58.

¹⁵ Speech 9 March 1961 EC Bull 3-1961 p14.

becoming a political reality” (emphasis added).¹⁶ It advocated the use of the media, “to foster the sense of being a citizen of Europe through increased knowledge and improved understanding of events.”¹⁷

Consequently, a keen appreciation of the value of establishing an internal narrative of identity was displayed even at this early stage in the life of the Community. Although not expressed in such stark terms the language indicated the institutional will to draw on the concept. Equally relevant was the concurrent development of Community law and the language used by the European Court of Justice (ECJ).

6.1.2 Internal Identity and the Foundations of Community Law

Three judgments can be interpreted as giving legal substance to the burgeoning discourse of a European identity. All are of constitutional importance and readily familiar. All provide contributions towards an identity formed with an internal/external divide in mind.

First, the case of *Van Gend en Loos*¹⁸ introduced the doctrine of direct effect into Community law. In deciding that Treaty provisions that give rise to rights or obligations could be relied upon by individuals under national law the ECJ drew on and contributed to the discourse already expressed through the other institutions. In

¹⁶ EC Bull 6-1963 pp 42-44.

¹⁷ *Ibid.* p44.

¹⁸ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR I p55.

particular, the judgment of the Court adopted a method of interpretation in reaching its decision that Paul Craig and Gráinne de Búrca describe as involving

“reading the text – and the gaps in the text – of the Treaty in such a way as to further what it determines to be the underlying and evolving aims of the Community enterprise as a whole.”¹⁹

Indeed, the judgment clearly demonstrates an appreciation of the nascent identity rhetoric already considered. It referred to the “spirit” of the Treaty as an important aspect for its interpretation. It observed that the “Treaty is more than an agreement which merely creates mutual obligations between the contracting states” confirmed by the preamble “which refers not only to governments but to peoples.” It noted that institutions had been “endowed with sovereign rights, the exercise of which affects Member States and also their citizens.” It confirmed that these citizens were intended to take part in the enterprise through the European Parliament. And it concluded that,

“The Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals....Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”²⁰

Although there was no attempt to rely on a *revelation* of identity, by which I mean that the Court did not suggest that Europe possessed an identity that awaited re-discovery, there was an implicit acknowledgement that an identity of interests and

¹⁹ Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* 2nd edition (Oxford University Press, Oxford 1998) p166.

²⁰ *Van Gend en Loos* n18 above p12.

purpose in a constituency of the people had been created through law. The reference to a “legal heritage” also inferred a shared history that could now be enhanced by the application of Community law.

The second significant judgment, the case of *Costa v. ENEL*,²¹ established the principle that Community law should rule supreme over national law where any conflict arose. There was no constitutional provision to this effect and therefore the Court “once again turned to the ‘spirit’ of the treaty”.²² It evoked the image of a

“Community of unlimited duration, having its own institutions, its own personality, its own legal capacity...and real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community.”²³

Specifically

“the terms and the spirit of the Treaty, make it impossible for the states...to accord preference to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity.”²⁴

The judgment confirmed the creation of a new legal order, one originating in the idea of the European project rather than its technical presentation in the Treaties. Again, therefore, the Court gave legal credibility to the notion that the Community represented an institution of Europe, an institution that in turn represented Europe and its peoples.

²¹ *Flaminio Costa v. ENEL* (Case 6/64) [1964] ECR 585.

²² Renaud Dehousse, *The European Court of Justice* (Macmillan, London 1993) p42.

²³ *Van Gend en Loos* n18 above p594.

²⁴ *Ibid.*

The third judgment, I suggest, provides an example of the ECJ's wide ranging involvement in the shaping of a legal environment for the construction of a European *internal* identity. It involved the determination of the extent of the free movement of workers provisions laid down by Article 39(ex Article 48) EC Treaty. The Article provided that, "such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States".²⁵ The implication was that internal distinctions would be rendered invalid in law. The case of *Hoekstra*²⁶ held that the definition of "worker" was not to be left to national legislation. The Court decided that "the Treaty attributes a Community meaning to that concept." Consequently, the ECJ would be able to ensure that the free movement of workers as one of the "foundations" of the Community would be established so as to give it full effect. It could not be undermined by errant national legislatures.

Naturally, the free movement of workers was but one of the principles required to form the internal market. However, the fact that it was the Court that was to determine the extent and application of the provisions ensured that fundamental social terms were to receive identification through the Community. Such was the basis for the development of a notion of citizenship. The Commission recognised as much as early as 1968 when M. Levi-Sandri, Vice-President of the Commission, made the connection explicit.

²⁵ Article 39(2) (ex Article 48(2)) EC Treaty.

²⁶ *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (Case 75/63) [1964] ECR 177.

“Free movement of persons represents something more important and more exacting than the free movement of a factor of production. It represents rather an incipient form - still embryonic and imperfect - of European citizenship.”²⁷

The introduction of the concept of citizenship, which was encouraged by *Hoekstra*, implied a clear internal/external divide in the matter of rights. The free movement of workers provisions were only to benefit the citizens of the Community thus excluding those not of Europe.

These judgments therefore helped contribute to the political and legal climate for talking more substantively about a European identity focused on the Community. One could even suggest that a Community legal culture was being created through the Court’s practices, a culture that would also inspire identity with the project.²⁸ The audience was nevertheless primarily the Community’s constituents and thus an internal affair.

6.1.3 The Construction of an External Expression of Identity

At the same time as the Commission began to talk about the possibility of fostering a sense of citizenship it also considered the implications of the Community acting as an identifiable actor on the world stage. It commented

²⁷ EC Bull 11-1968 p6.

²⁸ For a discussion on the possibility of a European legal culture see Volkmar Gessner, Armin Hoeland and Csaba Varga, *European Legal Cultures* (Dartmouth, Aldershot 1996).

“our thinking as well as in the facts of social and national life the word Europe is imbued with a vitality that assures this Europe of the position due to it in the free world.”²⁹

Here we find the creation of a vision of Europe through an external lens. Hallstein recognised the development of a distinct focus when trying to define “the European order” as he termed it.

“The symbol of this order, its concept, remains unchanged. Seen from within, it is democratically constituted Europe built on a federal pattern. To the world around us it is outward looking and is inviting others to join it.”³⁰

The presence of a similar double-vision in the thinking of the Community actors at this stage was also evident. At the 1961 Paris conference the Heads of State expressed the hope that

“Amidst the crises and upheavals which beset the world, Western Europe, so recently ravaged by national rivalries and conflicts, is to become an area of understanding, liberty and progress. In this way, what Europe does will carry more weight in the world.”³¹

Credibility and influence as an international actor were to be achieved, in part, through the display of an “appropriate” ethos, partially constructed through notions of liberty and freedom and the demonstration of that ethos in practice. The Community could then justify its position as successor to some of the sovereign powers of the Member States in the international arena.

²⁹ EC Bull 11-1968 p44.

³⁰ Statement on the negotiations concerning the UK’s accession to the EEC and the causes of their interruption, EC Bull 2-1963 p17.

³¹ Final Communiqué of the Meeting of 6 Heads of State and Government, Paris 10/11 February 1961, EC Bull 3-1961 p13.

But herein lay a central political tension. On the one hand the Community desired to promote itself as an internally authenticated polity. To achieve that authenticity external recognition would be required. On the other hand, certain Member States, although willing to give up some sovereign powers for the economic benefits that would accrue, still jealously guarded their foreign affairs. France in particular was loath to let slip its position of independent power operating with an individual role in the world. Its seat on the UN Security Council and its continuing colonial presence strengthened that desire.³² Nevertheless, a functioning internal market *necessitated* an external face for the Community. The founding treaties had already established the principle. Article 6(2) ECSC confirmed that “in international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives”. The EC Treaty also conferred external powers on the Community, enabling the conclusion of agreements in relation to common commercial policy and trade and economic co-operation agreements with non-Member States.³³ Article 310 (ex Article 238) provided for the completion of “association agreements” with preferred third party states.³⁴ Article 281 (ex Article 210) conferred legal personality on the Community and the case of *Costa v. ENEL* concluded that the Community possessed, “capacity of representation on the international plane”.³⁵

³² See Panayiotis Ifestos, *European Political Co-operation; Towards a Framework of Supranational Diplomacy?* (Avebury, Aldershot UK 1987) p122 and generally.

³³ See Articles 133 (ex Article 113) and 300 (ex Article 228) EC Treaty respectively.

³⁴ Later, the ECJ in *Commission v. Council* [1971] ECR 263 concluded that the Community had the capacity to form contracts with third countries in relation to *any* of the objectives of the Treaty. For a discussion on this subject see I. Macleod, I.D. Hendry and Stephen Hyett *The External Relations of the European Communities* (Oxford University Press, Oxford 1996).

³⁵ *Costa v. ENEL* n21 above.

The powers laid down enabled the Community to increase its presence in the world. The Yaoundé Convention, establishing trade relations with the Overseas territories and countries in 1963 (considered in Chapter 2), and the GATT discussions seeking to cut tariffs in 1967 were both significant demonstrations of the possibilities.³⁶

The affirmations of external competence ensured that the basis for establishing the Community as an entity capable of acting internationally, albeit in the economic realm only, was laid. The economic foundation was then used to enable progressive movement in the political field. Hallstein expressed the view that the Community now had a “political responsibility in the world.”³⁷ This accorded with earlier rhetoric. Since, indeed, the erection of the Berlin Wall in 1961, a discourse of an external face founded upon a contrast with other regimes was firmly established. It would be wrong to assume this was all directed towards the East, however. The distinction with Soviet controlled states was based on a notion of “freedom” but the USA was also singled out for contrast. The relationship with the USA provided the test for the Community’s position in global affairs. Again, as Hallstein commented,

“the United States is starting to share - to share willingly - its position as a world power, which it is the only nation in the free world to possess, with a Europe which is increasingly assuming economic and political proportions comparable to its own.”³⁸

³⁶ See Derek W. Urwin, *The Community of Europe: A History of European Integration Since 1945* (Longman London 1991) p131.

³⁷ See Hallstein’s address to the joint meeting of the European Parliament and Consultative Assembly of the Council of Europe, EC Bull 11-1966.

³⁸ Address to the European Parliament on 26th June 1963, EC Bull 7-1963 p10

The USA was thus represented as a competitor for world influence. Europe had no particular interest in being subsumed as an American satellite. Indeed, it needed to establish its new identity by differentiating itself from the USA as well as the Soviet Union. Failure to do so would imply that Europe had lost its independence. William Wallace even suggests the desire to distinguish the Community from the USA at this time “represented a claim to greater political autonomy, based on the assertion of ‘European values’ and interests distinct from those which American leadership fostered.”³⁹ Wallace demonstrates that the Atlantic alliance although providing essential security against the Soviet Union also created a feeling of dependence on the USA which France in particular was unhappy in continuing. The possibility of an American dominated continent was perhaps almost as unpalatable for some as a Soviet dominated one. Consequently, the projection of a Europe founded upon distinguishable values indicated the formation of a particular type of identity that was as much “anti-American” as “anti-Communism”.⁴⁰ How true this was is difficult to gauge, and there have certainly been other interpretations that suggested an ambivalence towards the USA, an ambivalence that could not determine whether the USA represented a federal form to mimic or resist.⁴¹ Nevertheless, the external condition was beginning to be deployed more frequently to define the European project in tandem with the internal.

³⁹ Wallace n8 above p31.

⁴⁰ *Ibid.*

⁴¹ See Stanley Hoffman, ‘Europe’s Identity Crisis: Between the Past and America’ in Stanley Hoffman, *The European Sisyphus: Essays on Europe 1964-1994* (Westview Press, Oxford 1995) pp9-50.

The interior and exterior rhetorical moves described above, I suggest, provided the textual basis upon which was to be constructed a politically promoted narrative of European identity. Internally, the early discourse captured asserted commonalities established in a mythical past and projected the Community as a utopian prospect fulfilling the needs of peace and prosperity. It was aimed at an unspecified constituency but relied on an anticipated ability to create *and* reveal an identity *with* the Community and its project. Externally, the rhetoric and practice focused upon security and establishing the Community as an independent and distinguishable power on the world stage. It was here concerned with the identity *of* the Community. The basis was thus laid for a more concerted attempt by the Community to capture the two aspects of European identity. It was in the deliberate construction of *the* European identity, as it became termed, that human rights issues were then explicitly incorporated.

6. 2 Human Rights and the Construction of *the* European Identity

The internal and external projections of a sense of identity grew in intensity towards the end of the 1960s. The success of the customs union venture, realised in July 1968, was the primary reason for this change. The prospect of the project moving beyond its economic roots now received significant attention. M. Armengaud (French representative of the Liberal and Allied Group) summed up the mood when he suggested in the European Parliament that Europe needed to

“show by results that we can create an economic, political and moral force that will have sufficient power of attraction for our fellow citizens and the Third World.”⁴²

The Commission declared, “Europe is not only customs tariffs...[i]t must also be the Europe of the peoples, of the workers, of youth, of man himself.”⁴³ It emphasised the need to break through old structures of national governance inherited from the past whilst still retaining

“the old cultures, traditions, languages, originality, everything which gives the States their personalities and which constitutes the beauty, the diversity, the charm, and the *immanent value of Europe*” (emphasis added).⁴⁴

The direct appropriation of an “immanent value of Europe” to the European project, of a certain heritage and tradition, a civilisation no less, mirrored the projection into the past already encountered when discussing human rights as founding principle in the previous chapter. On one level, it was inherently, and of necessity, an internal matter designed for consumption by constituents actual or potential. It was intended to create perhaps, as Epaminondas Marias suggests, “a psychological community” or “feeling of ‘belonging to’ a *Gemeinschaft* with a common destiny, common beliefs and common values.”⁴⁵

⁴² General Debate in the European Parliament on problems connected with the admission of new members, EC Bull 3-1968 p12.

⁴³ Commission, Declaration on the occasion of the achievement of the Customs Union on 1.7.1968, EC Bull 7-1968 p5-8.

⁴⁴ *Ibid.*

⁴⁵ Epaminondas A. Marias, ‘Mechanisms of Protection of Union Citizens’ Rights’ in Alan Rosas and Esko Antola (eds.) *A Citizens’ Europe: In Search of a New Order* (Sage, London 1995) p208.

The narrative constructed in the Community's early phase now began to embrace a concept of 'citizenship' to fulfil this aim. It provided a shorthand for appreciating that the need for authenticity stretched beyond convincing governments and powerful economic interests to the wider constituency of the Community; the people. Already the subject of the mythic bases of community, the people's involvement in the project continued to occupy the institutions. Public support was necessary if integration was to have any meaning. Mario Scelba, the President of the European Parliament in 1969, drew attention to a lack of "enthusiastic support of the coming generations" and suggested that it was for the Parliament to take responsibility for the "diffusion of the European idea and the ideals of European unity".⁴⁶ The desirability of the people participating in the election of the European Parliament was now recalled.⁴⁷

Similarly, greater effort was required if the Community was to confirm its burgeoning external acceptance. The end of de Gaulle's presidency of France in 1969 and the earnest re-opening of negotiations for the enlargement of the membership of the Community provided the opportunity for the external aspects of European union to be reassessed. It has even been suggested that the then six Member States recognised the need to set in train the future development of European union *before* enlargement took place to ensure the new members, particularly the UK, did not curtail ambitions.⁴⁸

⁴⁶ Speech to the European Parliament in March 1969, EC Bull 5-1969 p5-7

⁴⁷ Article 190 (ex Article 138) EC Treaty required Parliament to be "elected by direct universal suffrage."

⁴⁸ See Urwin n36 above p146.

Consequently, at the end of the 1960s both the internal and external nature of the Community became the subject of keen discussion.⁴⁹ The two elements were lodged together during the period 1970 to 1973 and gradually drawn into a common project theme. Human rights were directly implicated in the conjoined discourse. First, they were infused into the internal through their relation to citizenship and public participation. Second, they were embroiled in the external through the need to establish a moral identity for Europe on the world stage, one based on the values of human rights and democracy. The development of the process appears in a series of vital texts then produced.

6.2.1 The Initiating Texts of *the* European Identity

The Communiqué issued at the Hague meeting of the Heads of State in December 1969 set the rhetorical scene. It noted the final stage of the Common Market as

“paving the way for a united Europe capable of assuming its responsibilities in the world of tomorrow and of making a contribution commensurate with its traditions and its mission.”⁵⁰

The subsequent Luxembourg Report issued by the Foreign Ministers of the Member States in October 1970 advocated a speedier move towards political union. In particular, it observed that a “united Europe must be founded upon the common

⁴⁹ *Ibid.* pp131-146.

⁵⁰ EC Bull 1-1970 pp11-18.

heritage of respect for the liberty and the rights of men”.⁵¹ The integration and co-ordination of Member States’ foreign policies was also essential to enable Europe “to speak with one voice.” This was the base upon which the Community could be formed and developed, politically as well as economically. Europe could then “show the whole world that [it] has a political mission”.⁵²

The Paris Conference that followed in 1972, which saw the Community’s enlargement to a membership of nine member states, pursued the connection between union and external voice. It was declared that

“The Member States reaffirm their resolve to base their Community’s development on democracy, freedom of opinion, free movement of men and ideas and participation by the people through their freely elected representatives.”⁵³

and that

“In line with its political aims, the construction of Europe will allow the continent to assert its personality....and to make its mark in world affairs as a distinct entity.”⁵⁴

The use of the word “reaffirm” echoes the process of constructing a myth of human rights as a founding principle. It suggests that this set of principles has always been

⁵¹ First Report of the Foreign Ministers to the Heads of State and Government of the European Community’s Member States of October 27, 1970. See, Press and Information Office of the Government of the Federal Republic of Germany *Texts Relating to the European Political Co-operation* 1974 pp18-25

⁵² *Ibid.*

⁵³ EC Bull 10-1972 p15.

⁵⁴ *Ibid.* p16.

part of the establishment of Europe. Consequently, a collaboration in the presentation of myths underpinning the Community was underway.

Nonetheless, the new affirmations did much to mark the emphasis that was now placed on the formation of an identity. Commission President Ortoli summed up the intention when he declared, “[i]f a European Identity is to emerge, Europe’s place in the world must first be defined.”⁵⁵ The external was thus ascribed as the arena for establishing an “Identity”. It was in the process of fleshing out the themes that the distinction became more manifest and the involvement of human rights also became more concrete.

The two texts that emerged from meetings between the Foreign Ministers of Nine Member States held in Copenhagen in July and December of 1973 were vital in fixing the ground. The first, known as the Copenhagen Report,⁵⁶ set the agenda for the work of the newly labelled European Political Co-operation (EPC) (co-operation by the Member States in foreign affairs). It declared that

“[t]he Political Co-operation machinery, which deals on the intergovernmental level with problems of international politics, is distinct from and additional to the activities of the institutions of the Community which are based on the juridical commitments undertaken by the Member States in the Treaty of Rome. Both sets of machinery have the aim of contributing to the development of European unification.”⁵⁷

⁵⁵ Presentation by François-Xavier Ortoli, 6th General Report on the Activities of the Communities 1972.

⁵⁶ Second Report of the Foreign Ministers to the Heads of State and Government of the European Community’s Member States of July 23 1973, EC Bull 9-1973.

⁵⁷ *Ibid.* paragraph 12 Part II.

The demarcation ensured that foreign policy would remain the preserve of the individual states acting outside the confines of the Community's regulative control. Specific Ministerial meetings (four times a year), the institution of a political committee to oversee the work required, a group of foreign ministry "correspondents" to follow the implementation of political co-operation, working parties, studies, were all adopted as part of a strategy to co-ordinate external relations. But it remained clear that control was *outside* the Community's institutional framework. The Commission, the Parliament, and the ECJ had no legal role in the arrangements. Consequently, although the extra-Community activity was presented as a means of boosting the image of the Community in the world, it remained steadfastly within the control of the Member States.

6.2.2 The Declaration on European Identity

The second document to emerge from Copenhagen, the Declaration on European Identity, was more explicit still in producing an internal/external divide.⁵⁸ The Declaration described its intention to enable the Member States to "achieve a better definition of their relations with other countries and of their responsibilities in world affairs." It set out the parameters of the definition suggesting that it involved "reviewing the common heritage, interests and special obligations of the Nine, as well as the degree of unity so far achieved within the Community". The elements of

⁵⁸ EC Bull 12-1973 pp118-122.

the “European Identity” (as it was specifically termed) then emerged in a sophisticated and structured narrative framework.

First, the desire to “ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures” was expressed. The shared “attitudes to life, based on a determination to build a society which measures up to the needs of the individual” were noted. The will “to defend the principles of representative democracy, of the rule of law, of social justice - which is the ultimate goal of economic progress - and of respect for human rights” was affirmed. Notions of a common heritage coursed through the words providing a kind of general ethos for the Community. However, none of the terms was given any definition. They were presented as self-explanatory and axiomatic.

Second, the parties noted that the common market and the “common policies and machinery for co-operation” qualified as “an essential part of the European Identity.” Thus, the Community project was coupled with the ethos described and reaffirmed as an “essential” component of the identity being proposed. One was implicit in the other. The deliberate sense of capture was palpable.

Third, the document stated that the

“diversity of cultures within the framework of common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a united Europe, all give the European Identity its originality and its own dynamism.”

“Unity in diversity” was the catchphrase to be employed. It pleaded internal difference but argued an essentialist discourse of commonality through an intangible, value based construct. The European Identity was therefore a concept enabling the Community to subsume all those factors, cultural, economic, political, which might define Europe. Portraying the Community in this way was an exercise in filling the ethical and moral void that remained in the European project as it had developed.

Fourth, the Declaration considered the European Identity “in relation to the world.” Member States agreed to co-operate where possible in foreign policy to help manufacture a European Identity “as a function of the dynamic of the construction of a united Europe.” They concluded that in “their external relations the Nine propose progressively to undertake the definition of their identity in relation to other countries or groups of countries.” The external was to be employed as a method of providing meaning for the European Identity through contrast or conceivably through comparison.

The four-part construction outlined above set the pattern, I suggest, for the Community’s discursive practices when acting upon or defining value-based concepts. For human rights no definition was provided. Thus their meaning, scope and practical effect were open to future formulation. As internally and externally policy construction operated independently, with different frameworks, different political agendas and different legal bases, the potential for distinct understandings and applications forming in each sphere was set within the institutional narrative. Human rights were shaped by two separate attitudes towards identity. Internally, human rights developed in conjunction with a narrative that sought to construct an

identity *with* the Community. Externally, the narrative was concerned with identity *of* the Community. The distinction is a subtle but important one and is considered below.

6.2.3 Rights and Identity *with* the Community

Internally, embracing human rights as a general governing principle of a potential union was presented as a necessary strategy to acquire popular support. The Report on European Union in 1975 indicated the Commission's perspective.

“European Union will naturally rest on certain general principles which are held by all the Member States. These principles, which have repeatedly been reaffirmed, whether in existing Treaties or in statements approved by the meetings of the Heads of Government, are democracy, freedom of opinion, the free movement of people and of ideas, participation by the peoples through their freely elected representatives, and the protection of human rights.”⁵⁹

The ethical location of human rights within the framework of a union of peoples was thus strongly advocated. In practice, however, reliance was placed on the development of rights through the jurisprudence of the ECJ. The alternatives, namely the creation of a separate catalogue of legally enforceable rights or accession by the Communities to the European Convention on Human Rights (ECHR) could not acquire the necessary political and legal support. The Joint Declaration on Human Rights of 1977⁶⁰ and the preceding Commission Report⁶¹ acknowledged the

⁵⁹ Report on European Union, EC Bull Suppl. 5-1975 para.4 p9

⁶⁰ OJ C 103/1 1977.

⁶¹ *Report on the Problems of Drawing up a Catalogue of Fundamental Rights for the European Communities* EC Bull Suppl. 5-1976.

compromise and the ECJ was left to operate independently and piecemeal in establishing a rights discourse in Community law. This it did relying heavily on the ECHR for inspiration. Subsequent moves by the Commission to acquire a concrete definition of rights applicable in the Community failed to find a solid constitutional foundation but the efforts made continued to mark the connection between human rights and identity *with* the Community. A Commission report in 1979, for instance, noted the potential advantage of acceding to the ECHR as “improving the image of Europe as an area of freedom and democracy.”⁶² Eventually, however, as we have seen, the Charter of Fundamental Rights appeared as a compromise measure, neither acceding to the ECHR nor creating a justiciable instrument but at least formulating a “more visible” presence of rights in the Community.⁶³

Human rights internally have also been subject to definition through their association with the burgeoning concept of a European citizenship. Although Gamberale has a point in refusing to equate citizenship with identity (the former he asserts is based on the principle of action, the latter on the principle of being)⁶⁴ the discourse that made up the identity narrative did not rely upon such a distinction. Rather identity *with* the Community was to be encouraged through, at first, the granting of “special rights”, the development of economic and social rights emanating from the Treaties, and the right to participate in the election of the European Parliament. Leo Tindemans suggested the purpose of such developments in his famous report on European Union in 1975.

⁶² Commission, ‘Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms’, EC Bull Suppl. 2-1979 p11.

⁶³ EU Charter of Fundamental Rights [2000] OJC 364/08 Preamble.

⁶⁴ Gamberale n3 above.

“The construction of Europe is not just a form of collaboration between States. It is a *rapprochement* of peoples who wish to go forward together, adapting their activity to the changing conditions in the world while preserving those values which are their common heritage. In democratic countries the will of governments alone is not sufficient for such an undertaking. The need for it, its advantages and its gradual achievements must be perceived by everyone so that effort and sacrifices are freely accepted. Europe must be close to its citizens.”⁶⁵

The link between values, Europe and a citizenry of the Community therefore seemed uppermost in Tindemans’ rhetorical presentiment of the Community’s future. Questions of identity *with* the Community by the people were key to the political construction in view.

The European Parliament also expressed the connection between citizenship rights and identity in 1975 by suggesting, “practical measures capable of contributing to the development of a European Community consciousness will be adopted.”⁶⁶ These measures related to rights that could be given to citizens under the existing Treaty provisions. They were what Antje Wiener has called the “legal ties of belonging”.⁶⁷ As the internal narrative of human rights developed from the 1970s onwards, the ties became more defined and set into the constitutional framework of the Community, culminating in the establishment of citizenship in the Treaty on European Union. Citizens’ rights have since been outlined in the EU Charter of Fundamental Rights.⁶⁸

⁶⁵ EC Bull Supp. 1-1976 p26.

⁶⁶ European Parliament Resolution 6.8.1975 [1975] OJ C179 p28.

⁶⁷ Antje Wiener, ‘Assessing the Constructive Potential of Union Citizenship – A Socio-Political Perspective’ (1997) *European Integration online Papers* Vol. 1 No.17 at <http://eiop.or.at/eiop/texte/1997-017a.htm> at p16.

⁶⁸ See n63 above Articles 39-46.

However, this is not the place to enter into detailed discussion concerning the nature and scope of the narrative of citizenship. That project has been the subject of intensive studies in recent times.⁶⁹ The point for my purposes is that the definition of rights internally was subject to a dual process, first through the jurisprudence of the ECJ and second through the initiatives of the Community with regard to citizenship. In both cases, identity with the Community was sought through human rights. As Gráinne de Búrca has suggested they

“may be seen as capable of providing a moral grounding to a legal order which on its face was established principally to support the pursuit of economic goals, and also to forge an identity which could simultaneously (i) have a cross-national appeal to individuals and to groups within the Community and (ii) emphasize shared or common values already existing within the member states.”⁷⁰

Human rights were thus a “tool of integration”. They were not defined in relation to a predetermined set of ethical precepts but were rather the subject of political and legal negotiation and argument. The consistent theme, however, was that they had internal application. Both human rights discourse, as developed in the ECJ, and citizenship and other Treaty based rights provided the means by which the Community could acquire acceptance from its constituents and encourage a sense of identification with its institutional existence. In this sense, rights and citizenship are inseparable from the institutional construction of an identity with the Community. Both affect the

⁶⁹ Carole Lyons lists many of the relevant works in ‘A Voyage around Article 8: An Historical and Comparative Evaluation of the Fate of European Union Citizenship’ (1997) *Yearbook of European Law* 17 pp135-163 fn2. See in particular Siofra O’Leary ‘The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law’ (1995) *CMLRev* pp519-554 in which the potential for linking citizenship with fundamental rights is explored.

⁷⁰ Gráinne de Búrca, ‘The Language of Rights and European Integration’ in Jo Shaw and Gillian More (eds.) *New Legal Dynamics of European Union* (Clarendon Press, Oxford 1995) p43. The Reflection Group Report at Messina 1995 specifically linked citizenship with the Community as a “unique design based on common values”.

scope and character of the other. Whether that process necessarily reflected an exclusionary project is something that cannot be discounted.⁷¹

6.2.4 Rights and Identity of the Community

Externally, the picture was somewhat different. The terminology of European Identity was here retained and frequently recited. Ortoli, referred to the 1973 Paris Conference, for instance, in the following terms

“Ever present in the minds of those taking part in the Conference was a concern to establish a European identity. In this, they were expressing a heartfelt desire, shared by all our peoples, to differentiate ourselves from the rest of the world, not only to play our own role in the world and thus take Europe’s destiny into our own hands, but also to formulate and implement the plan for a civilisation which, to quote Leon Blum, would again be human.”⁷²

The Commission’s 1975 report on European Union stated that “peace, security, stability and cooperation with the Third World, will be the expression of the European identity defined in the Copenhagen document.”⁷³ In neither case was mention made of human rights. Indeed, the way the EPC developed in the early 1970s it was clear that respect for human rights was not such a fundamental principle to promote to the world as the Copenhagen rhetoric may have implied. Rather, issues that affected individual Member States were paramount.⁷⁴ The concern of external

⁷¹ For a discussion of this possibility see Jo Shaw, ‘The Many Pasts and Futures of Citizenship in the European Union’ (1997) 2 *E.L.Rev. Dec.* pp554-572.

⁷² Address by Mr Francois-Xavier Ortoli, President of the Commission, 13.2.1973, EC Bull 2-1973 pp6-7.

⁷³ See n59 above para.5 p9.

⁷⁴ For a review of the work of EPC during these formative years see Ifestos, n32 above.

relations was initially acknowledged by the Commission as focusing on “energy” (understandable given the oil crisis of 1973/4) “raw materials and general relationship with industrialized and developing countries.”⁷⁵ Political concerns of the Member States reigned in the projection of the Community to the outside world. The so-called “London Report” in 1981, produced by the Foreign Ministers as the third report on EPC, confirmed that a “flexible and pragmatic approach” would be maintained.⁷⁶ The “political aspects of security” were identified as the key issues in this respect.

However, over time human rights began to acquire a greater presence in foreign affairs. In the field of development policy and in accession matters, as we have seen, human rights promotion evolved as an issue that demanded attention. Indeed, as Chapters 2 and 3 have demonstrated, the Community has made an explicit and implicit correlation between its projection and the human rights it chooses to promote. The link is specific. This was eventually enhanced by the Treaty structure itself with the Single European Act (1986).⁷⁷ The Preamble stated that the Community should “display the principles of democracy and compliance with the law and with human rights” in speaking with “one voice” to the world. No mention of human rights was made in the Title on European co-operation in the sphere of foreign policy but the foreign ministers of the Member States did confirm in the

⁷⁵ See n59 above para.146 p41.

⁷⁶ EC Bull Suppl. 3-1981

⁷⁷ EC Bull Suppl. 2-1986.

same year as the SEA that “respect for human rights is an important element in relations between third countries and the Europe of the Twelve.”⁷⁸

Nevertheless, the constitutional seal was finally placed on the connection between the European Identity, external affairs and human rights in the TEU. The preamble stated that a common foreign and security policy (CFSP) would reinforce “the European identity”. Article B stated that the European Union would set objectives to include the assertion of “its identity on the international scene”. And Article J.1 established that a key principle of the CFSP was to “develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. The connection, always present since Copenhagen, now had constitutional form.

The two facets of identity related above, identity with the Community and identity of the Community, do not of themselves explain why rights practice should have developed differently in each sphere. However, it is my contention that the very association made between rights and identity ensured that different standards and attitudes would be applied. A bifurcation would evolve *because* of the nature of identity and the effects of its deployment as a political tool. The theoretical appreciations of identity in the context of the Community that justify this conclusion are considered below.

⁷⁸ EC Bull 7/8-1986 as quoted by Andrew Clapham, ‘Where is the EU’s Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?’ in Philip Alston *et al* (eds.) *The EU*

6.3 Identity as Unity; Identity as Distinction

Identity formation and assertion has assumed a critical importance for new social and political movements in recent times. In the fields of ethnicity, feminism, regionalism and particularly incipient nationalism (to name a few), identity has been used as a focus for gathering people together under the banner of some unifying notion or characteristic in order to critique or challenge existing socio-political structures or form new ones in their stead. The deployment of collective identities in this way has thus always been fundamentally concerned with acts of power. They represent sites of struggle and inevitably attract the attention of groups competing for political influence.

Stuart Hall has described how two possibilities exist for the shaping of these collective identities, the second in effect opposing the first.⁷⁹

From the first perspective Hall suggests that identities may be constructed through the recognition by people of “an unchanging ‘oneness’ or cultural belongingness” that overcomes any “superficial differences”.⁸⁰ For A.D. Smith, and his studies of national identities, the unity will occur through a complex intersection of common appreciations; a recognised geographical territory accompanied by

and Human Rights (Oxford University Press, Oxford, 1999) pp627-683 at p633.

⁷⁹ See Stuart Hall, ‘Cultural identity and diaspora’, in J. Rutherford (ed.) *Identity: Community, Culture, Difference* (Lawrence and Wishart, London 1990) pp222-237 and ‘Introduction: Who Needs Identity’ in Stuart Hall & Paul du Gay (eds.) *Questions of Cultural Identity* (Sage, London 1996) pp1-17.

⁸⁰ *Ibid.* Hall (1996) at p4.

“common memories and myths of origin, a mass, standardized public culture, a common economy and territorial mobility, and common legal rights and duties for all members of the collectivity.”⁸¹

Through a sense of “kinship”, based on a unity of understanding and common heritage, national identities may appear strong enough to underpin a feeling of nationalism.⁸²

Laurence Grossberg describes this model type as one where “there is some intrinsic and essential content to any identity which is defined by either a common origin or a common structure of experience or both.”⁸³ Where people see different commonalities at the same location, the struggle then becomes bounded by the search for *the* “authentic” identity.

Hall argues that the essentialist nature of the above model is unsustainable in itself. In some respects it is self-deluding. It is based on a premise that there can be an unchanging universal truth that binds people together irrespective of their actions. Thus identities are “found” or “revealed”, or even created, a process that denies the impact of time and changing social relationships as well as modes of communication.

Hall refuses to accept the notion of an “absolute” identity, composed of immutabilities, and proposes an alternative reading. His second perspective, or model, is preferred to the essentialist approach. It recognises that identities are in a

⁸¹ Anthony D. Smith, ‘National Identity and the Idea of European Unity’ in Peter Gowan & Perry Anderson *The Question of Europe* (Verso, London 1997) pp318-342 at p323.

⁸² See Anthony D. Smith, *National Identity* (Penguin, London 1991) for a full discussion of Smith’s views on identity and nationalism.

⁸³ Laurence Grossberg, ‘Identity and Cultural Studies: Is That All There Is?’ in Hall & du Gay (eds.) n79 above at p89.

constant state of flux, subject to negotiation over time and space and can never be truly unified. They are contingent on context or “position”, historical, linguistic, cultural, and are “multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions.”⁸⁴ “All forms of fixity and essentialism”, as Rutherford claims, are eschewed in favour of a “politics of articulation” that refuses to accept “social, political and class formations” as existing *a priori*.⁸⁵

Three interconnected appreciations help to understand the significance of Hall’s interpretations. All, I argue, are important for my thesis.

First, as Grossberg suggests, “struggles over identity no longer involve questions of adequacy or distortion, but of the politics of representation itself.”⁸⁶ In other words, identities are “constituted within, not outside, representation” and are crucially concerned with “using the resources of history, language and culture in the process of becoming rather than being”.⁸⁷ Thus “practices of representation” operate so as to constitute the field of any collective sense of identity. Commonalities, mythic or otherwise, are the subject of “articulations”, which combine to provide a discourse of identity open to continual alteration, definition and manipulation. “Identity politics” has been used to describe the struggles that emerge as a result.

⁸⁴ Hall (1996) n79 above, p4.

⁸⁵ Jonathan Rutherford, ‘A Place Called Home: Identity and the Cultural Politics of Difference’ in Rutherford (ed.) n79 above pp9-27 at p20.

⁸⁶ Grossberg n83 above p89.

⁸⁷ Hall (1996) n79 above p4.

The second appreciation, takes us back to the importance of narrative in the socio-political sphere as discussed in Chapter 1. In the present context, I suggest that representations or discourses of identity are structured and communicated through narrative. It is “through narrativity that we come to know, understand, and make sense of the social world” and it is through narrativity and narratives that social identities are constituted.⁸⁸ Paul Ricoeur asks, “do not human lives become more readily intelligible when they are interpreted in the light of the stories that people tell about them?”⁸⁹ and proposes that identities are formed through narratives as a result. The narrative process is therefore the means by which people structure the representations of their understandings of their identity over time and communicate that understanding to others. Equally, it is the means by which represented identities of others are comprehended. David Rasmussen summarises the process as follows

“A narrative can link the past with the future by giving a sense of continuity to an ever changing story of the self. Because narrative has this potentiality it is uniquely qualified to express the ongoing dialectic of selfhood and sameness.”⁹⁰

Thus people are able to conjoin with others in a sense of shared identity by accepting and repeating a particular narrative, or in other words, telling similar stories about themselves. At the site of the collective, an institutional narrative may be constructed that is concerned with substantiating the institution’s “authentic” position to speak

⁸⁸ Margaret R. Somers and Gloria D. Gibson, ‘Reclaiming the Epistemological “Other”: Narrative and the Social Constitution of Identity’ in Craig Calhoun (ed.) *Social Theory and the Politics of Identity* (Blackwell, Oxford 1994) pp58-59

⁸⁹ Paul Ricoeur, ‘Narrative Identity’ in David Wood (ed.) *On Paul Ricoeur: Narrative and Interpretation* (Routledge, London 1991) pp188-199 at p188.

⁹⁰ David Rasmussen, ‘Rethinking Subjectivity: narrative identity and the self’ in Richard Kearney (ed.) *Paul Ricoeur; The Hermeneutics of Action* (Sage, London 1996) p164-165. For the inspiration for the thesis of narrative identity, see Paul Ricoeur, *Time and Narrative Vol. III* (University of Chicago Press Chicago 1988).

for its purported members. From that location a collective identity may therefore be promoted both to reinforce a unity of constituents and provide the institution with justification for its existence.

Third, and most important for my thesis of bifurcation, is the appreciation that the construction of identities through representation (or rather narrative) inherently involves a process of definition, of delineation played out over time. Articulations of identities, “produced in specific historical and institutional sites within specific discursive formations and practices, by specific enunciative strategies” as Hall maintains, “emerge within the play of specific modalities of power, and thus are more the product of the marking of difference and exclusion, than they are the sign of an identical, naturally-constituted unity”.⁹¹ In particular, Hall claims that

“It is only through the relation to the Other, the relation to what it is not, to precisely what it lacks, to what has been called its *constitutive outside* that the ‘positive’ meaning of any term – and thus its identity – can be constituted.”⁹²

The process of constitution described consciously evokes the work of Jacques Derrida. Most significantly it echoes Derrida’s understanding of difference. Through the tendency of Western systems of knowledge to impose a fixed meaning on words and terms so as to stabilise or universalise them (and impose them on others) different world-views, different conceptions of culture and values are obscured and suppressed. Words are thus employed to maintain power structures through their

⁹¹ Hall (1996) n79 above p4.

⁹² *Ibid.*

denial of alternative. The effect is to create a language based on opposition and an opposition that assumes the domination of one term over its opposite.

Derrida describes the process as one “not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other.”⁹³ Thus masculine is opposed to feminine, rational to irrational, civilised to uncivilised, advanced to backward, internal to external. If a term is used institutionally it therefore immediately distinguishes and separates its alternative. And in the exercise of power, where words are infused with particular importance and sited as preferential, the effect is to portray the alternative as unworthy and dangerous. Identity construction through articulation can then become a process of definition through distinction, creating “margins” to a core of projected essential truths.

In Derrida’s conception, it is here that the sense of *differance* is deployed as a term to describe “the process of differentiation.”⁹⁴ The suggestion is that “without relations of *differance* no representation could occur”⁹⁵ and meaning is deferred or postponed, dependent always upon the “margin” to give it definition. The margin then operates as a “supplement, marking what the centre lacks but also what it needs in order to define fully and confirm its identity.”⁹⁶ Deconstruction is Derrida’s method for uncovering the whole scheme of *differance*.

⁹³ Jacques Derrida, *Positions* (Athlone Press, London 1981) p41.

⁹⁴ *Ibid.* p101 fn 13.

⁹⁵ Hall (1990) n79 above p229.

⁹⁶ Rutherford n85 above p22.

Hall recognises the value of Derrida's work in the analysis of identity formation and the dangers it uncovers. Differences that provide a conceived identity with meaning can change across time and space. Such is the play of identity formation. The danger occurs when presenting an identity as possessing a "natural and permanent" meaning rather than one that is "arbitrary and contingent".⁹⁷ Then the possibility for discrimination and violence becomes incorporated into the very political structures of an institution.

At the site of the institution therefore, narratives that draw on a concept of identity may well display a tendency, if not inevitability, to be fundamentally engaged in a practice of distinction. By making a choice of identity construction, an institution defines who is *not* part of its constituency as much as who is. The process of definition may be conscious or unconscious but it is always concerned with power relations, with determining the rights and interests of those who may be heard and authorised to take part in the politics of the institution. As such, there is always the question of narratives of identity providing the conditions for violent discrimination and oppression at worst and exclusion at best.

The exclusionary effects of identity narratives proclaimed by political institutions such as the Community (or nations or communities for that matter) might therefore result in an interior/exterior divide. Internally, the discourse will be concerned with defining unity, defining constituents, their original link with the institution, their rights to belong to and take part in the institution. Externally, the tendency will be to

⁹⁷ Hall (1990) n79 above p230.

present a collective unity already formed, distinct from other collectivities. The *terms* for creating or revealing an internal identity *with* the collective inside, and those utilised for determining an external identity *of* the collective outside thus become shaped by the domain in which they find themselves. Even if identical terms are applied initially in each sphere, as I have attempted to show is the case with human rights in the Community's identity discourse, their conceptualisation in and through practice may well be subject to differentiation as the internal and external narratives develop and deviate. It is this condition and process that I argue has provided the impetus for bifurcation.

The theoretical position advanced above has not been lost on studies of the idea of Europe and the attendant notion of a European identity. Many works have concerned themselves with the related questions of identity and legitimacy.⁹⁸ But then, the European project has always been infused with the need to bring the people of Europe together and in so doing cause a distinction to be made as to who is not of Europe. Derek Heater claims that

"No project for voluntary political integration would be at all credible unless the putative member states shared some cultural and political traditions and values. This sense of identity necessary for a successful union of states is Janus-faced. In looking inward it must recognise the characteristics which the members have in common and which thus provide at least a modicum of homogeneity. In looking outward it must recognise the distinctiveness, incompatibility, even enmity of those outside the union."⁹⁹

⁹⁸ For one of the many examples see Thomas Banchoff (ed.) *Legitimacy and the European Union: the Contested Polity* (Routledge, London 1999).

⁹⁹ Derek Heater *The Idea of European Unity* (Leicester University Press, Leicester 1992) p180.

Whether or not Heater is correct in assuming the necessity of the “Janus-faced” identity, the fact is that observers have noted the interior/exterior consequences of the Community adopting a discourse of European identity into its institutional narrative. Philip Schlesinger for instance recognises that “the making of identities is an active process that involves inclusion and exclusion” and in the context of the Community the construction of a collective identity will entail engaging with both the “official identities of existing nation states, and....the emergent identities of regions” but also with definitions imposed from without.¹⁰⁰

Similarly, although Zenon Bańkowski and Emilios Christodoulidis do not accept that exclusion is a necessary consequence of identity constructions in the Community (suggesting “the identification ‘Europe’” could be considered as a “contested rather than a natural setting...one that hosts mutually underwriting and mutually denying identifications”) they acknowledge the powerful pull towards exclusion and discrimination.¹⁰¹ Their solution, however, seems to deal only with the exclusion of the internal “other”. Those of the external, those not of Europe, are not considered and are potentially excluded by the very terms ‘Europe’ and ‘European’, which are not subjected to critique in their analysis.

Here, the importance of attaching the term “Europe” to identity, as the Community has done, is thrown into sharp focus. “Europe” as a definitional term involves a discriminatory process, *excluding* the “other” through geography firstly, but also

¹⁰⁰ Philip Schlesinger, *Media State and Nation: Political Violence and Collective Identities* (Sage London 1991).

¹⁰¹ Zenon Bańkowski and Emilios Christodoulidis, ‘The European Union as an Essentially Contested Project’ (1998) *European Law Journal* Vol. 4 No. 4 December pp341-354 at p354.

through the notion of a European society and civilisation, frequently presented as superior, developed, advanced all in opposition to the uncivilised, inferior, undeveloped, backward other. “Europe” reflects therefore those hierarchical relations of dominance that were employed as a hallmark of colonialism. And the terms “Europe” and “Europeans” continue to signify separation and distinction with “non-Europe” and “non-Europeans”.

The possible violent effects of subsuming the discourse of superiority into the narrative of identity adopted by the Community (through the almost synonymous treatment of Europe and the Community, Europe appropriated by the Community “as shorthand for itself”¹⁰²) has, of course, worried numerous commentators. Hence, there has been a great search for alternative methods of satisfying the perceived need to possess an identity. However, the concern has usually been with resolving the tensions that might exist between a putative European identity and competing national or regional identities *within* the Community. A.D. Smith, for instance, has sought to look to the past for inspiration, addressing potential unifying commonalities in his oft-quoted phrase

“The heritage of Roman Law, Judeo-Christian ethics, Renaissance humanism and individualism, Enlightenment rationalism and science, artistic classicism and romanticism, and, above all, traditions of civil rights and democracy which have emerged at various times and places in the continent – have created a common European cultural heritage and formed a unique cultural area straddling national boundaries and interrelating their different national cultures through common motifs and traditions.”¹⁰³

¹⁰² Victoria Goddard, Josep Llobera and Cris Shore, ‘Introduction: The Anthropology of Europe’ in Goddard *et al* (eds.) *The Anthropology of Europe* (Berg, Oxford 1994) p26.

¹⁰³ Smith n82 above p174.

Overcoming internal conflict is the aim. Equally, Daniela Obradovic may dispute the possibility of Smith's suggested enterprise, and the search for new myths, but her concern is that "the Union simply lacks the mythical ground for reinforcing its policy legitimacy in a way which would stabilize and institutionalize the community".¹⁰⁴ Thus, the internal play of identities provides the focus of attention. Admittedly this is a very important area for those concerned with internal legitimacy and social cohesion within the Community project. However, the possibility of distinction with the external and exclusion on a wider scale, remains a constitutional issue of equal importance even if the internal situation can be decided, which also must be doubtful.¹⁰⁵

Consequently, rather than focus on the works concerned with promoting "a stronger 'sense of community'" as "necessary if the Union is to overcome its shallow political roots",¹⁰⁶ my interest lies with the genealogy of exclusion that the discourse of identity implies. Onora O'Neill suggests that the dangers of such a discourse, one "idealizing community and unity", are that "we obscure the *distinctness* of others and overlook plurality".¹⁰⁷ In similar vein, it is the attempt to establish an institutionalised identity through shared commonalities and defining distinctions, I argue, that has provided the pre-script for bifurcation. Put simply, by adopting a narrative of distinction that incorporated human rights without definition in that

¹⁰⁴ Daniela Obradovic, 'Policy Legitimacy and the European Union' (1996) *JCMS* Vol.34 No.2 p215.

¹⁰⁵ See for instance the question of migrants, refugees and asylum seekers that continues to pose significant policy and ethical difficulties.

¹⁰⁶ Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) *JCMS* Vol.34 No.1 pp81-100 at p100.

¹⁰⁷ Onora O'Neill, 'Justice and Boundaries' in Chris Brown (ed.) *Political Restructuring in Europe: Ethical Perspectives* (Routledge, London 1994) p83.

distinction, the Community also set in train the conditions for the scope and application of human rights between the external and the internal condition to develop along separate lines. Human rights became subject to a process of differentiation as they became interpreted and applied in the two separate spheres.

6.4 Conclusion

Carole Lyons has maintained that, “the constitutional forces in the EU are aware and desirous of the creation of an identity for the Union and this is formulated in the main in terms of an external identity, one which has a manifestation outside rather than inside the entity.”¹⁰⁸ There is some truth in this although my interpretation of identity politics precludes such a simplistic reading. Rather I argue that the adoption of a discourse of identity has created two narratives, one adapted for the internal the other for the external. True, the explicit use of a “European Identity” has become the preserve of exterior projections but the discourse remains a dual-faced enterprise.

It is also clear that human rights have been implicated in each stream through their appearance as an undefined fundamental principle. But it is this lack of definition coupled with the effects of adopting a discourse of identity that I suggest has

¹⁰⁸ Carole Lyons, ‘The Politics of Alterity and Exclusion in the European Union’, in Peter Fitzpatrick & James Henry Bergeron (eds.) *Europe’s Other; European Law Between Modernity and Postmodernity* (Ashgate, Aldershot 1998) p170.

provided the roots of bifurcation. The conditions for distinction, difference and exclusion were thus set into the Community's narrative structure. The bifurcation that I outlined in Chapter 4 indicates its extent and nature. The significance of its existence and evolution through the process I have described is the subject of my concluding chapter.

CONCLUSION

BIFURCATION AND THE IRONY OF THE COMMUNITY'S HUMAN RIGHTS POLICIES

In this thesis I have examined a sequence of stories. From an investigation into those narratives concerning human rights externally and internally to those that explain the generation of human rights as a founding principle of the Community and its identity, I have attempted to demonstrate how the Community has constructed a policy that has affected both its constitution and its practice. The result has not been the rendition of a linear history or a chronicle. More accurately, it has been a genealogy, an excavation of the plurality of the Community's institutional narratives on human rights.

My aim throughout, however, has not been simply to uncover these stories but to interpret them, specifically to understand what they tell us about the Community and the role of human rights within it. At a time when human rights have acquired emblematic status, representing the imposition of order for Europe and the world, this is an increasingly necessary undertaking. Without a critical approach to human rights and the Community there is a danger that practices undertaken in the name of human rights and the narratives constructed around them, will be accepted without question. They will be *assumed* to be legitimate and justified accordingly. Any contradictions, inconsistencies

and open hostilities that emanate from those practices will be dismissed as irrelevant, heretical to the established order. The threat then is that the very values and standards that are proclaimed as defining the institution will undermine and destabilise it.

The purpose of this final chapter, therefore, is first to draw together the propositions that have underpinned this thesis and second to consider the significance of the bifurcation of human rights policies for the Community.

The Propositions Advanced

During the course of this thesis I have advanced a number of propositions. They can be summarised as follows:

Proposition One

In combining the insights of the “new institutionalists” with those of the “new history”, I have suggested that socio-political institutions such as the Community engage in the construction of narratives that are “autocentric” (histories of themselves and their decisions and actions)¹ and self-sustaining (determining the precepts for future

¹ I have taken the term from J.G.A. Pocock in his attempt to distinguish between histories that create autonomous political societies and those that narrate “other” histories, of those excluded from the political order concerned. See J.G.A. Pocock, ‘The Politics of History: The Subaltern and the Subversive’ (1998) *Journal of Political Philosophy* Vol.6 No.3 pp219-234.

institutional conduct). These narratives are concerned with both the institutions' origins and their policies, for want of a better term. But they are not purely representations. The narratives also serve as a structure of conditions for present and future practice. Although they are endlessly in formation, changing with each re-narration, they nonetheless set parameters. I have argued that the institutional narratives, as I have called them, if excavated from the Community's text provide vital evidence for the precepts and beliefs that help to define those parameters. Thus, an understanding of the motivation and direction, the "political unconscious", of the narratives and the resulting policies can be developed.

Proposition Two

In applying the narrative reasoning to the Community's human rights texts, I suggest that a fundamental and defining distinction between the Community's narratives of human rights projected externally and those assembled internally is revealed. Both, I have argued, emanate from a fundamental rhetoric of respect for human rights and yet both have developed along distinct paths from this base. I have therefore called the phenomenon a "bifurcation". In analysing the human rights narrative in development co-operation policy and accession policy, I have examined three specific aspects of human rights where the bifurcation can be observed, (a) in the definition ascribed to rights, (b) in the practice of scrutiny of human rights conditions and (c) in the enforcement of those rights. In each case evident differences between the two spheres have been uncovered.

The analysis has enabled a delineation of the distinctions in the Community's human rights policies to emerge. Internally, human rights are contingent. They are often referred to as "fundamental rights" thus signifying an underlying Community conception that owns a restricted definition. Rights are conceived as possessing a distinct European heritage. The European Convention on Human Rights is the primary source. Other international instruments apart from the Universal Declaration of Human Rights are treated with caution. Rather, the "constitutional traditions" of the Member States provide a more accessible precedent but even these remain vague in terms of their potential application. There is also a basic lack of structure to the Community's scrutiny of rights internally. Both with regard to its own institutions and more particularly the Member States, there is no systematic approach to the monitoring or investigation of human rights conditions in the Community. Due in part to self-imposed legal constraints, the Community possesses neither the capacity nor the resources to monitor human rights effectively. The field is left to other agencies and organisations, in particular the Council of Europe and the European Court of Human Rights. Equally, there are few effective methods of enforcement of human rights beyond those prompted by individual rather than institutional initiative. Restraint in rhetoric and action by the Community in relation to the Member States and their human rights record is a constant feature of policy and practice.

Externally, the story is different. Human rights are broad in concept and considered with a global perspective in mind. In particular, collective notions of rights (such as minority rights and the right to development) are given some credence and considered worthy of

promotion and protection. Scrutiny can also be intrusive and effective. Although often subject to political interests (both of individual Member States and the Community) the Community has assumed the necessary capacity to take action and ensured it has the financial resources and legal authority to do so. There may be a lack of consistency in this respect but it has been able to adopt methods and systems of enforcement that have become increasingly severe in scope and strength depending on context. The range of measures the Community lauds as available to it is extensive, and it is all too willing to pronounce and publish the actions it takes as a result.

Proposition Three

The bifurcation described above has, I have proposed, emerged from an institutionally constructed narrative, essentially mythic in character. This myth attempts to ascribe to the Community a respect for human rights that purportedly underpins the Community's ethos, its creation and its continuing evolution. In composing the myth, however, the Community failed to determine the content of its subject or recognise the importance of human rights beyond their symbolic role as providing legitimisation (or authentication in my more restricted terms) of the Community and its activities. I have argued that the nature and scope of the myth have provided an environment for human rights that has made them subject to diverse influences dependent on context. Thus the conditions have been established for a bifurcation of human rights policies or narratives to emerge.

Proposition Four

Finally, I have suggested that the search for a European Identity by the Community, whilst initially contributing to the enabling narrative environment described, has been instrumental in constituting the specific form of bifurcation that I have uncovered.² By bonding rights to notions of identity that both reflect and generate a narrative of exclusion and differentiation, the bifurcation has developed along an internal/external fault line. One stream of narratives has evolved in the Community's internal human rights policies and one stream in its external. Underlying the demarcation, I have suggested, is a discrimination based on a conception of Europe as superior and non-Europe as beneath, inferior, somehow deficient in moral and ethical standards that are expressed in human rights terms.

The four propositions advanced now leave a pressing question. Does the presence of the bifurcation described hold any significance for the Community? In short, should we, or the Community, care about bifurcation?

² In this respect I acknowledge that other forms of bifurcation may be discernible. In particular, the divergent approaches to human rights with regard to citizens and to refugees or asylum seekers have been the subject of increasing concern over the last few decades. However, this subject lies outside the scope of my analysis and represents an issue that would require in depth work of its own.

The Significance of Bifurcation

That distinctions exist between the Community's internal and external approaches to human rights has been well documented. However, the state of bifurcation suggests that we are dealing with more than a number of discrete inconsistencies. Rather, the analysis of the whole narrative of human rights in the Community suggests that a systematic and systemic division has been created along the internal/external fault line. Indeed, by adopting a more searching reading of the Community's texts a pervading sense of irony is revealed. This takes two related forms; the irony of distance and the irony of concealment.

As far as the former is concerned, in Philip Alston's weighty edited collection of reports on human rights and the Community Martti Koskenniemi observed pertinently that,

“A political culture that officially insists that rights are foundational....but in practice constantly finds they are not, becomes a culture of bad faith. A gap is established between political language and normative faith that encourages a strategic attitude as the proper political frame of mind as well as an ironic distance to politics by the general population.”³

The distinction envisaged, that between rhetoric and practice, is a common concern. Whether the actions of the Community match its fine words and authoritative statements on matters of ethics and values frequently underscores research agendas. And the

³ Martti Koskenniemi, 'The Effect of Rights on Political Culture' in Philip Alston *et al* (eds.) *The EU and Human Rights* (Oxford University Press, Oxford, 1999) p100.

discovery of such a distinction does indeed draw attention to a dangerous and destructive possibility. It suggests a failure of resolve on an issue of principle that sends messages of hypocrisy to those whom the Community purportedly wishes to influence if not govern. It encourages an institutional lack of regard for human rights that may in turn lead to abuse or the failure to deal with abuse whenever and wherever it occurs. Ultimately, one can imagine that it might even undermine the whole structure of the European project. Either the precepts it advocates as essential to its existence are rendered unbelievable, thus cutting the Community adrift from the very public whose support and allegiance it says it requires, or it attracts opposition from legal, political and social quarters that take away its foundations of authority.

In one respect, the significance of bifurcation does indeed lie in its manifestation as a gap between rhetoric and practice. Through firstly the promotion of a narrative that attempts to portray the Community as bound by a single concept of human rights, one that purportedly recognises their universal and indivisible nature, and secondly the contradictory adoption of policies and practices that apply different definitions of rights, different methods of monitoring and scrutiny and different measures of enforcement, the “gap” is of an order that goes to the heart of the Community’s credibility with regard to human rights. Internally, the distinctions leave those fighting for, say, the recognition of minority rights or those looking for an effective European political response to human rights violations, doubting the ability *and* the will of the Community to engage seriously in such matters. Externally, the distinctions threaten to leave the Community adrift on

the international stage if it becomes apparent that it is promoting a double-standard, attempting to push for policies and actions abroad that it fails to embrace internally.

An “ironic distance” might therefore, as a result of bifurcation, arise for two constituencies, the people of the Community on the one hand and the international community on the other. For each, the reading of the Community’s human rights policies and activities may be undertaken with an ever-present scepticism, a questioning that focuses on the political rather than ethical nature of human rights initiatives. Such a reading may thus by-pass the fundamental principles of human rights altogether rendering the interpretation of the Community’s policies always contingent upon the perception of its hidden purposes.

Evidence of this possibility has already emerged. The criticisms levelled against the Community for its failure to adopt a human rights policy that is consistent in both external and internal spheres have grown over the last decade. Joseph Weiler and Sybilla Fries provide one example. In their review of the Community’s competences in human rights they make the point that

“[the Community] is extremely apt to preach democracy to others when it, itself, continues to suffer from serious democratic deficiencies and to insist that all newcomers adhere to the ECHR when it, itself, refuses to do the same.”⁴

⁴ Joseph Weiler and Sybilla Fries, ‘A Human Rights Policy for the European Community and Union: The Question of Competences’ in Alston *et al*, n3 above, p149.

Andrew Clapham notes also that the Community's participation in "multilateral fora", such as the UN, is rendered incredible because of the lack of consistency between external and internal policies. Thus he points out that the

"schism...whereby external policy is divorced from internal policy and different considerations apply inside and outside the European Union, currently contributes to the credibility deficit in the context of UN human rights debates."⁵

To these observations should be added the inconsistencies identified in Chapter 4. All are symptoms or effects of the bifurcation of human rights. And all highlight the phenomenon's significance both for human rights and the Community's relations with its constituents and the outside world. This alone suggests that bifurcation signifies an approach by the Community that warrants rectification.

But in my submission, the credibility gap that has become evident through the Community's practices does not represent the only significant consequence of bifurcation. There is a further ironic strain that permeates the Community's narratives of human rights. This is irony not in a post-modern sense of interpretation by the Community as author whereby every statement, pronouncement and decision is subjected to self-critique. Such a sophistication seems beyond the inherently conservative nature of the Community. Rather, it is irony in the sense of dissimulation, of an attempt to present a fixed vision of the world and the Community's values and

⁵ Andrew Clapham, 'Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?' in Alston *et al*, n3 above, p642.

standards that in practice *conceal* more persistent, differentiated, complex, and contradictory appreciations.

As I have indicated in this work, the nature and scope of bifurcation, the character of its history and the narratives that have been woven throughout, are indicative of more than mere “inconsistency”. Bifurcation has been generated through the unconscious differentiation practised by the Community *and* the conscious adoption of a rhetoric of identity fundamentally concerned with establishing, reinforcing and maintaining a hegemonic position. Such a position distinguishes between the zenith of values that is represented by the Community, and the nadir of an external that is particularly characterised as “under-developed” or “newly democratised”. It is the product of a basic institutional discrimination. The external is excluded through the process of bifurcation and rendered inferior, subject to different rules and more stringent review. Those classified as “outside” or “other” may not enter the world of Europe and sully the Community’s otherwise taken for granted and self-promoted sanctified position on human rights.

The portrayal of the bifurcation of human rights as a story of discrimination relies upon a number of observations. First, the adoption of a myth that Europe possessed a heritage of respect for human rights ensured that the other histories *within* of abuse, violation and violence were effectively silenced or at least suppressed institutionally. As I considered at the end of Chapter 5 the myth presupposed a history of Europe that in essence was unproblematic. Thus, a self-critical evaluation of Europe and the values it stands for and

promotes has failed to materialise. Human rights within this narrative have been left adrift without precise institutional analysis or definition. The implication has been that the Community does not believe that it needs to address the past of Europe or its own value conceptions. It can present itself as breaking with the violent and conflictual tradition of Euro-centrism, colonialism, and imperialism whilst at the same time as trying to promote an invented counter-tradition of integrity and virtue that is “European” in character. The presumptive nature of this constructed (and mythic) narrative is coursed through with irony. It creates an institutional “distance” within the Community that separates it from its own discourse. In contravention of its own mythic precepts it disallows others, who desire to question the Community from within, from participating in its development and in the composition of its narratives. The extent of the democratic deficit so often related is just one such manifestation of this irony.

At the same time, the voices of others, those that might wish to present a different vision of the world, of rights and society, have been institutionally denied. Through the purported espousal of an unproblematised universalist thinking in relation to human rights whilst putting policies into practice that allow distinctions to be made between the internal and external conditions, an inherent discrimination can be read as underlining the bifurcation described. The past external activities of Europe have been forgotten. The colonial tradition has been suppressed even denied in the text, leaving the Community to present itself as virtuous in external affairs, unblemished by its Member States’ histories and current actions. In so doing, the Community has maintained the discrimination that lay at the heart of colonialism; the presupposition of superiority that

begat a belief in the “civilising mission” of Europe. Both Chapters 2 and 3 provide evidence of this presupposition. The very adoption of a discourse of development can be interpreted as promoting the sense of superiority. Equally, the negotiations with applicant states have been suffused with a discourse that holds the Europe of the Community as the pinnacle of progress and values to which others should aspire. Together these narratives reinforce the projection of the Community as heir to a civilisation that is European.

In sum, therefore, the bifurcation is indicative of an ironical institutional narrative that at the same time opposes and promotes fundamentally discriminatory thinking. Internally, the Community has adopted an assumption that human rights conditions within its borders do not require attention on the whole. Although open to some degree of institutional review, at no time has it turned its eyes with any force upon its Member States. One of the reasons put forward for this abrogation of responsibility has been that the Council of Europe and other international human rights regimes provide adequate protection and coverage of the subject. And yet, when assessing applicants for accession to the Community, such human rights regimes are not deemed sufficient. Another reason proffered is that the human rights standards in the Member States are superior to any external condition. But this is a dangerous assumption, one that is certainly not warranted as a statement of principle.

By contrast, the Community has presented itself externally as a practising guardian of human rights, a beacon of virtue. It has attempted to impose standards and values and

interpretations on the tacit understanding that, unlike its own constituents, “others” require constant scrutiny and the presence of potential sanction to ensure human rights are respected. The Community has, as I have demonstrated, consistently applied a wholly different approach to human rights between the two spheres to the extent that in some respects even the definition of human rights applicable internally and externally can be distinguished. Discrimination thus flows through the story presented of the Community’s policies. As a consequence, the authenticity that I suggested in Chapter 5 was originally sought through the adoption of a human rights discourse is severely undermined. Bifurcation questions the seriousness, commitment and integrity of the Community with regard to human rights.

Similar but related analyses support the notion of an underlying institutional discriminatory tendency. Verena Stolke, for instance, applied an anthropological perspective to the rhetoric of exclusion practised by the Community with regard to its advance of an immigration policy. She noted that there had arisen, “since the seventies a rhetoric of inclusion and exclusion that emphasizes the distinctiveness of cultural identity, traditions, and heritage among groups and assumes the closure of culture by territory.”⁶ Her concern was not only with the upsurge in racist action throughout Europe but also initiatives instituted by the Community that gave rise to “external boundaries” that “are ever more tightly closed.”⁷ The implication of her findings is that

⁶ Verena Stolke, ‘Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe’ (1995) *Current Anthropology* Vol.36 No.1 February p2. See also Peter Fitzpatrick, ‘New Europe, Old Story: Racism and the European Community’ in Paddy Ireland and Per Laleng (eds.) *The Critical Lawyers’ Handbook 2* (Pluto Press, London 1997) pp86-95.

⁷ *Ibid.*

the political rhetoric of common heritage lends itself to interpretation as imposing a cultural identity that emphasises its “incommensurability” with other traditions and value systems. Thus, one can argue that the adoption of any discourse that attempts to define a territory by reference to a particular culture is an act of exclusion. More significantly, perhaps, is Stolke’s analysis that at the core of collective exclusion “predicated on the idea of the “other” as a foreigner, a stranger, to the body politic is the assumption that formal political equality presupposes cultural identity”.⁸ Hence “cultural sameness is the essential prerequisite for access to citizenship rights.”⁹ As discussed in Chapter 6, the promotion of an identity by the Community, which relies in part upon a narrative of human rights distinguishing between the internal and external conditions substantiates the sense of exclusion and thus discrimination.

My reading of the story of human rights and the Community thus confirms and expands critiques of latent discrimination present in the Community’s structure. Indeed, the analysis I have provided suggests that the extent of discrimination is deeper set and more influential than has been previously considered. The fact that the identification of bifurcation indicates that discrimination attaches to those very precepts that purport to advance human rights (of which one would be the right not to be discriminated against) takes the issue on to an altogether more serious level. Indeed, one consequential critique is that the discrimination may signify a racist sub-text. By uncovering a sense of superiority that is based upon the fact that the Community is European suggests that issues of race may lie beneath the surface. This is a grievous charge and requires further

⁸ *Ibid.* p8.

⁹ *Ibid.*

research to determine whether it possesses any substance. However, one cannot discount the possibility given the presence of such a discrimination as I have described.

One can be forgiven therefore for assuming that the institutional narratives of the Community in relation to human rights are consumed by irony. Perhaps the reason behind such a position has been identified by Jean-Francois Lyotard when he suggested that “unification of Europe means the unification of hatreds.”¹⁰ Perhaps Conor Gearty is closer the mark when he claims that “at the centre of the plan for a new European landscape there is to be found a hard seed of hate.”¹¹ Faced with such an environment the question must be asked; has the Community truly attempted to combat the conditions of discrimination and exclusion that have scarred Europe over generations? Or has it subconsciously and subtextually allowed its human rights policies to be constructed by a discriminatory and exclusionary ideology?

It is hard to suggest that such questions are not fundamental to the future of human rights in the Community *and* the future of the European Project itself. The possibility alone that the critique of discrimination evidenced through bifurcation can be substantiated must engender a reaction. To some extent the Community has accepted the critique through its acknowledgement of the symptoms of bifurcation. Chapter 4 discussed those measures that have been introduced to counter the charges of incoherence and inconsistency. But such approaches will not, and cannot, address the

¹⁰ Jean-François Lyotard, *Europe, the Jews and the Book* (UCL Press, London, 1993) p159.

¹¹ Conor A. Gearty, ‘The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe’ in Philip Alston *et al* (eds.) n3 above pp325-358 at p327.

core problem, the cause of that incoherence and inconsistency. Bifurcation will not be dismissed by a piecemeal strategy that seeks to introduce a charter here, a Treaty amendment there. “Mainstreaming” human rights simply will not alter the condition. Nor will the laudable efforts of the European Parliament, which adopts a diplomatic approach without the resources to engage in diplomacy. Indeed, the Community’s attempts to gradually create a space for itself where it can pursue a human rights policy that is not based on the central discrimination I have described will continue to be beset by a sense of irony unless it returns to basic principles.

How this change could be achieved requires further research. But as a prerequisite it would necessitate counteracting the entrenched bifurcated institutional narrative that the Community has adopted. At the very least it would require an intellectual revision of the institutional discourse of identity that provokes a differentiation based on origin. Failure to address these narratives will, in my reading, ensure that future human rights activity will remain constrained by that bifurcation and plagued by discrimination and a sense of irony. Policy will continue to be crafted along bifurcated lines, following what has preceded it and maintaining the underlying discrimination that is present. If this is to be avoided new narratives will need to be moulded. An acknowledgement of the bifurcation and not simply its manifestations will be necessary. A deep analysis of the meaning of human rights, and the application of strategies to realise them must also be undertaken. The disparate narratives will need to be drawn together, thus challenging and realigning a whole institutional culture. A choice will then have to be made in the process. If the Community is to assume the role of guardian of human rights both in

relation to its Member States *and* its dealings with the rest of the world, perhaps to assume a role as a human rights organisation, then it must be able to ensure that distinctions in definition, scrutiny and enforcement of human rights can be erased. If not, it is difficult to see how the bifurcation can be overcome. It surely cannot absolve itself of its external involvement in human rights issues.

The signs are that such a radical alteration is beyond the Community at the moment. It does not have the best record in confronting its own history or that of its Member States. Nevertheless, the change may be forced upon it. The possible enlargement of the Community to incorporate much of central Europe may well affect the whole presentation of the issue of human rights internally. Whether the present Member States are willing to accept a policy that challenges the system of scrutiny and enforcement against themselves as well as the newcomers will perhaps be the severest test. If they are not, an internal bifurcation may be instituted where the new entrants are subjected to different standards from existing members. How the Community could function as a Union in such circumstances is difficult to imagine.

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