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BARRIERS TOWARDS EU CITIZENSHIP

Being a Citizen in Europe: Insights and Lessons from the Open Conference, Zagreb 2015

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EXECUTIVE SUMMARY

With the Open Conference 'Being a Citizen in Europe' in Zagreb (Croatia, 29-30 June 2015) external scholars were invited to connect to the bEUcitizen-project and to explore theoretical foundations and political as well as practical realities of today's European citizenship. The structuring idea was to highlight potential core barriers towards EU citizenship and to do so by way of conceptual discussions as well as empirical analyses mapping a variety of citizenship practices in the EU. This was reflected in four thematic streams gathering contributions from both external and bEUcitizen researchers. The streams reflected on different kinds of barriers, conceptual and practical ones. They revolve around the normative promise of citizenship, the diversity of practices and possible paths of future development.

While stream 1 reflected on the dynamic of (re)configuring citizenship as a bounded or unbounded concept, stream 2 applied a comparative perspective on the diversity of rights-based citizenship practices. Stream 3 addressed the political dimension of EU-Citizenship and discussed a lack of citizenship participation as a far-reaching barrier as well as possible remedies. Finally, stream 4 focused on linguistic diversity and the difficulties it creates regarding the conceptual and practical dimension of EU-citizenship. Taken together the contributions lucidly reflect the variety of disciplines cooperating in the bEUcitizen-project and their different points of view on EU-citizenship.

The crucial lesson from the contributions to the Open Conference for the theoretical task of WP 2 and the bEUcitizen-project more generally is that without conceptual clarity about the meaning of EU-citizenship the task of identifying practical barriers and evaluating the latter's effects remains ambivalent. A shared understanding of the meaning of a (future) EU citizenship is still missing. What shall EU citizenship be or become: a fully-fledged democratic citizenship or a market-citizenship, bundling certain rights implied by the internal market freedoms? This undecided question is at the core of the debate on EU citizenship. In order to prevent citizens from turning their backs on the EU a public contestation of our understanding of the EU is needed. European democracy *à venir* requires an ongoing public debate about what European integration is all about and where it should lead us to – even and especially when there is no consensus about it.

INTRODUCTION: UNBOUNDED CITIZENSHIP, POLITICAL PARTICIPATION, LINGUISTIC DIVERSITY – BARRIERS TOWARDS EU CITIZENSHIP AS A CONCEPT AND PRACTICE?

DANIEL GAUS AND SANDRA SEUBERT (GOETHE-UNIVERSITY FRANKFURT)

The main goal of the bEUcitizen-project is to inquire into possible barriers towards EU citizenship. But what kind of barriers might there be? Barriers and hindrances can exist in two broad and related dimensions: regarding the *concept* of EU citizenship and the *practices* realizing EU citizenship. In conceptual terms, European integration has, sometimes more sometimes less explicitly, induced a change of our views and understanding of citizenship. The establishment of EU citizenship in the Maastricht Treaty 1992 added a formal dimension to changes in transnational social relations that had been going on long before and are still going on to this day. But legal concepts do more than just reflecting existing social practices. They also shape expectations and thereby have a slow but steady transformative impact on citizens' views and understandings of the political world they are living in. This is why EU citizenship, contrary to early interpretations, has always had more than a mere symbolic and decorative function. For sure, in substantial terms EU citizenship at first appeared to be nothing more than a mirror-image of pre-Maastricht 'market citizenship' (Everson 1995; d'Oliveira 1995). However, this view neglects the constructive power of legal concepts (Kostakopoulou 2008). The modern notion of citizenship combines two elements that point in opposite directions and cause a tension characteristic of the citizenship-concept: the idea of political participation, on the one hand, and a legal status, on the other (Pocock 1992). The former points to a political community and citizens as members, the latter transcends boundaries and implies every individual as being entitled to having certain rights. This constructive tension between membership and universal rights is the reason why the birth of EU citizenship marks a break. Although substantially it was (and maybe still is) right to term it 'market-citizenship,' EU-citizenship has planted expectations regarding the kind of political entity the EU is or aspires to become. Preuß puts it in a nutshell:

'the mere association of the idea of citizenship with the European Community seems to promise its transformation into a polity whose constituent elements are no longer only the member states…the exciting and challenging quality of European citizenship is the underlying claim that political participation - the activist element of the concept of citizenship - is not necessarily confined to the nation-state, but is also a constitutive element of a transnational polity.' (Preuß 1998: 15)

Thus, in conceptual terms, one main barrier consists in the fact that EU citizenship challenges the well-established notion of national citizenship without offering a clear alternative. While not claiming the substitution of national citizenship, it implies the EU as a self-standing order that grants citizenship and, accordingly, as having citizens of its own. In a world that was used to mapping the political space in terms of a 'Westphalian frame' (Fraser 2008) this creates a lacunae. On the one hand, in the European context it is no longer natural to associate citizenship with what goes on 'inside' nation-states and to subsume everything 'outside' states to international diplomacy or, in case of failures in the system of states (refugees, withdrawals of nationality etc.), to the realm of humanitarian law (Shaw 2007: 22-3). On the other hand, we still do not know where this journey will lead us to: are we on the brink of a new kind of EU state? Or are we travelling towards a non-state EU with a new kind of citizenship? And what about national citizenship, how will it be affected? Will it maintain its status against the challenges of EU citizenship and ultimately condemn the latter to insignificance? Or will national citizenship be weakened giving way for a kind federative (or, if you prefer, multi-layered) European order of citizenship?

This undecided situation naturally calls forth another kind of barriers towards EU citizenship, namely, barriers regarding the realization of citizenship practices. It is one thing to establish EU citizenship as a new legal

concept, it is another fill it with life. This cannot be accomplished by Treaties or political compromises, but only bottom-up by people making an effective use of their newly granted rights, by their attempts to expand their life chances with the help of EU citizenship rights and by their claims for new rights based on expectations created by EU citizenship provisions (Saward 2013). It is mainly this level of EU citizenship practices that decides the future course of the journey. Whether the bundle of EU citizenship provisions remains inside the boundaries of market-citizenship or also extends to making use of political rights is largely dependent on citizens' everyday practices. New social rights challenge the national 'social contract' and are to be mediated within the various publics of the member states. At the micro-level the process of taring national and EU citizenship manifests in citizens struggling with their national authorities while seeking to get access to their EU rights. All this draws attention to a second, more practical kind of barriers to the realization of EU citizenship.

The contributions to the Open Conference 'Being a Citizen in Europe' in Zagreb (Croatia, 29-30 June 2015) addressed both kinds of barriers. Besides participants in the bEUcitizen research project, external scholars with overlapping research interests were invited to connect to the project and to explore theoretical foundations and political and practical realities of today's European citizenship. The structuring idea behind the conference was to highlight potential core barriers towards EU citizenship and to do so by way of conceptual discussions as well as empirical analyses mapping a variety of citizenship practices in the EU. This is reflected in the four thematic streams gathering contributions from both external and bEUcitizen researchers. Although, naturally, there are overlaps, the streams focus on different barriers towards EU citizenship.

The dynamic of reconfiguring citizenship as an unbounded concept marks the center of attention of the contributions to stream 1 on 'EU-Citizenship: new forms of bounded or unbounded citizenship.' Since the 19th century, citizenship has been viewed as a bounded concept. Modern citizenship refers to a coherent status with particular rights and duties based on a collective identity of a self-determining national community within the bounded territory of a state. EU citizenship comes as a double challenge to this understanding. On the one hand, it implies the EU as an autonomous political community and thus suggests extending the boundary of the self-determining community from the national to the European level. Despite all assurances of member-state sovereignty, the idea of a genuine political Union is lurking in the background. On the other hand, and more obviously, EU citizenship shows tendencies towards unbounded forms of citizenship: rights are being granted not qua being members of a certain community but based on their status as individuals (citizenship based on *personhood*). This is a dynamic fostered by various European Court of Justice rulings slowly perforating the boundaries of the national (Besson/Utzinger 2008). What are the consequences of these developments for the concept of citizenship and how are they to be evaluated? The contributions to stream 1 shed light on different aspects to this issue.

In contrast stream 2 'EU Citizenship rights in law and practice – comparative perspectives' applies a comparative perspective on the diversity of rights-based citizenship practices in the EU. It starts by asking if EU citizenship is on the way to become – like national citizenship – a coherent and holistic concept or still a diverse bundle of rather independent and mostly economic rights. From the beginning, the development of EU citizenship has been mainly driven by one particular actor, namely, the European Court of Justice (ECJ). Accordingly, the contributions to stream 3 focus on rulings of the ECJ relevant to the development of EU citizenship, cases in which the ECJ rulings would be necessary for the further development of EU citizenship but are still lacking as well as differences regarding the (political) impact of ECJ rulings on national citizenship practices.

A far-reaching potential barrier towards EU citizenship consists in citizen participation in EU politics, or rather, a lack thereof. This is at the core of stream 3 'The European Union's political rights: rights, practices, challenges and alternative models of participation.' Obviously, the right to vote in European Parliament elections is a well-established form of political participation in EU politics. However, the tensions between Member States and the reactions of national publics in the course of the Euro crisis have shown it insufficient to establish the

democratic legitimacy required for effective EU-actions. But maybe a narrow definition of European political citizenship that focuses on additional electoral rights misses the wider dimension of political citizenship as a process of acquiring access to participation in EU-related decision-making at various levels of government. Are there other, less explicit but maybe not less effective mechanisms of participation in the EU? What participatory practices exist and under what circumstance do they become challenged or maybe developed further? The contributions to stream 3 address these issues.

Linguistic diversity in Europe and the difficulties it creates regarding the conceptual and practical dimension of EU citizenship is another important potential barrier. Stream 4 'Linguistic diversity as a hindrance to the realization of European citizenship rights?' deals with linguistic diversity and asks in how far this constitutes obstacles to the realization of European citizenship rights. The EU shares many features with other known federal political orders, but it is unique in the number of official and unofficial languages spoken by its citizens. While this is one of the strongest assets, the richness of cultural diversity, it might also turn out as a barrier to an integrated form of EU citizenship. If a shared identity is conceived as a precondition of citizenship, then linguistic plurality might turn out as a core barrier to its formation. To give one example, it obviously stands in the way of establishing a common mass media (TV or newspaper) that would be able to address all EU citizens. Moreover, linguistic diversity is a challenge to the shared interpretation of EU law. Even small linguistic differences potentially cause crucial differences in the comprehension of relevant documents, with a direct impact on citizens' attempts to get access to citizenship rights. A plethora of issues is affected by linguistic diversity, some of which are dealt with by the contributions of stream 4, such as difficulties in the formation of a collective European identity, the protection of cultural diversity and local identities as well as the relevance of language in exercising EU citizenship rights.

Taken together the thematic streams revolve around the normative promise of citizenship, the diversity of practices and possible paths of future development. They give extended country insights when contributions focus on specific case studies, discussions and conflicts in particular member states, e.g. politics of immigration in Croatia, rights of residence and free movement in Sweden and Denmark or the relevance of the historical trajectories in Moravian domestic party politics for exercising political citizenship in Europe.

REFERENCES

Besson, Samantha/Utzinger, André (2008): Toward European Citizenship, Journal of Social Philosophy 39: 2, 185-208

Everson, M. (1995) 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.) New Legal Dynamics of European Union, Oxford: Oxford University Press, pp. 73–90.

d'Oliveira, J. (1995) 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.) A Citizens' Europe: In search of a New Order, London: Sage, pp. 58–84.

Fraser, Nancy (2008): Scales of justice: reimagining political space in a globalizing world. Cambridge: Polity.

Kostakopoulou, Dora (2008): The evolution of European Union citizenship, in: European Political Science 7, 285-95.

Pocock, John G.A. (1992): The ideal of citizenship since classical times, in: Queen's Quarterly 99: 33-55.

Preuss, Ulrich K. (1998): The relevance of the concept of citizenship for the political and constitutional development of the EU, in: Preuß, Ulrich K./Requejo, Ferram (eds.) European Citizenship, Multiculturalism, and the State, Baden-Baden: Nomos, 11-27.

Saward, Michael (2013): The dynamics of European citizenship: enactment, extension and assertion, Comparative European Politics 11: 1, 40-69.

Shaw, Jo (2007): The transformation of citizenship in the European Union: Electoral rights and the restructuring of political space, Cambridge: Cambridge University Press.

STREAM 1: EU CITIZENSHIP – TOWARDS NEW FORMS OF BOUNDED OR UNBOUNDED CITIZENSHIP?

STREAM COORDINATORS: SANDRA SEUBERT (GOETHE-UNIVERSITY FRANKFURT) AND FRANS VAN WAARDEN (UTRECHT UNIVERSITY)

When the project of European integration was increasingly deemed to suffer from a democratic deficit in the late 1980s the Maastricht Treaty and, in particular, the establishment of EU citizenship carried hopes for strengthening EU's legitimacy. At first, however, these hopes were disappointed as EU citizenship seemed to be nothing more than old wine in new bottles. For one thing, EU citizenship was introduced as a complementary 'on top of' national citizenship, leaving the latter untouched. For another thing, Union citizenship rights were mostly a reiteration of already existing rights of free movement.

Notwithstanding this, EU citizenship has turned into a challenger of the paradigmatic understanding of citizenship based on a congruence of nation, state and membership rights in Europe (Preuss 1998). Modern Citizenship has long been constructed as a bounded concept, intimately related to the nation state. Since the 'nationalization' of citizenship in the 19th century it refers to a coherent status with particular rights and duties based on a collective identity, a 'we' perspective, defined by those being born into the bounded territory of a 'nation state'. EU citizenship, however, has developed a life of its own and – although hardly replacing national citizenship – gradually transforms rights, membership and participation in the multi-level European polity (Shaw 2007). It has a pluralizing impact on our view of citizenship (Besson/Utzinger 2008). On the one hand, being a national citizen no longer means being member of one political community, but of many layers of governance in the EU. On the other hand, national political communities become themselves increasingly inclusive and, thus, pluralistic.

The main challenge of EU citizenship to the well-established modern conception of citizenship is thus its tendency to detach citizenship from the national. EU citizenship seems to pull the direction towards unbounded citizenship, that is, towards citizenship rights that are not tied to the boundaries of a community but to the basic and unconditional individual 'right to have rights' (Arendt 1951: 294-5). While EU citizenship shares some features of bounded citizenship, e.g. by being based on national citizenship in a member state (citizenship based on *peoplehood*), it also shows tendencies towards unbounded forms of citizenship: rights are being granted not qua being member of a European political community but based on the status of the individual as a second-country national worker in another EU member state or a family member of an EU citizen. How does this affect the relation between EU citizenship and national citizenship? And more generally, does a new type of unbounded citizenship constitute a barrier or, to the contrary, a bridge towards EU-citizenship as a democratic citizenship? The contributions to this section shed light to these questions from both a normative and an empirical angle.

Seen through a normative-conceptual terms, do we need reconstructing (national) democratic citizenship in the EU towards more unbounded forms citizenship? ***Emanuel Richter*** and ***Lana Zdravković*** both apply a 'radical democratic' perspective to this question, while coming to different conclusions. Richter argues that EU citizenship in its current form, mainly including a right to vote locally and in EP elections, is insufficient from the standpoint of radical democratic theory. While there is a lack of institutional inducement to stimulate a supranational democratic sovereignty of the people in the EU, Richter points to the national referenda on EU Treaties and the citizens' initiative as activities of a new kind of spontaneous and volatile supranational demos that needs to be strengthened. So, for Richter radical democracy in the EU requires strengthening EU citizenship towards a bounded democratic citizenship. Zdravković, on the other hand, argues in favour of an unbounded EU citizenship. She draws attention to the fact that, in contrast to EU citizens, more than 20 million third-country nationals and at least 10 million undocumented migrants live in the EU as de facto second-class

citizens without proper citizenship rights. Drawing on the work of Balibar and Rancière she stresses the need for a renewed and desubstantialised EU citizenship that includes the unconditional right of entry and residence, work, education and political participation for everyone in order to overcome what she sees as a fundamental inequality in the EU.

The expansive and transformative nature of EU citizenship was mainly initiated by interventions of the ECJ. Its case law contributed to new interpretations of the nature as well as broadening the scope of application of EU citizenship. From an empirical perspective, the contributions of ***Leandro Mancano*** and ***Davide De Pietri and Raul Rodríguez-Magdaleno*** focus on ECJ case law, tracing how the concept of residency gains importance, while the concept of nationality loses importance in the application of EU citizenship. Mancano discusses the intersections, interplay and mutual influence of EU-grounded detention of individual citizens and EU citizenship. He shows that in the ECJ rulings regarding EU-grounded detention residence has become a recurrent element with increasing importance while at the same time the relevance of nationality links diminished. It is however an open question how the relation between residency and nationality will turnout in future developments of EU citizenship practice. Focusing on the effect of ECJ rulings, De Pietri and Rodríguez-Magdaleno demonstrate that many rights entailed in EU citizenship are granted regardless nationality and thus are likewise enjoyed by third-country nationals, blurring the lines between the statuses of EU citizens and third-country nationals. Taking this into account, and seen from a more bounded perspective, the authors question whether EU citizenship can be successful in establishing a political relationship between EU citizens and the Union that helps legitimizing the EU.

REFERENCES

Arendt, Hannah (1951): *The Origins of Totalitarianism*, New York: Harcourt, Brace & Co.

Besson, Samantha/Utzinger, André (2008): Toward European Citizenship, *Journal of Social Philosophy* 39: 2, 185-208.

Preuß, Ulrich K. (1998) Citizenship in the European Union, in: Archibugi, Daniele/Held, David (eds.): *Re-imagining Political Community*, Cambridge: Polity, 138-61.

Shaw, Jo (2007): The transformation of citizenship in the European Union: Electoral rights and the restructuring of political space, Cambridge: Cambridge University Press

EUROPEAN CITIZENSHIP: THE TENSIONS BETWEEN A VOLATILE DEMOS AND ITS POLITICAL FRAMES OF REFERENCE

EMMANUEL RICHTER (RWTH AACHEN UNIVERSITY)

1. INTRODUCTION

Like all political concepts, also 'citizenship' must be regarded as a key term that exhibits changing and arbitrary meanings. The common understanding does no longer solely hold that citizenship signifies the status of a legal membership to a certain constitutional political entity. A couple of social, cultural, political, and economic changes and transformations in the Western hemisphere and specifically in Europe have to be taken into consideration: international movements of persons, workplaces, and capital, the individualization of life goals and lifestyles, the delimitation of national coherence through inter-, trans- and supranational institutions, the enhancement of traditional modes of government by elements of governance that include new forms, new topics, and new actors, and also the crisis of representative mechanisms that leads to a more spontaneous and volatile political involvement of citizens.

Under these conditions, a couple of political key concepts have to be reconsidered: politics, integration, democracy, participation, and of course citizenship. The importance of the state and of the national constitutional order as reference points for the definition of citizens' roles declines, more general functions of political actors and of their collective roles and performances step forth. Citizenship under the conditions of contemporary, multilevel interaction and organization can no longer be restricted to the formal membership to a constitutional political entity like the nation-state. It has to be regarded in its primordial dynamics that only eventually lead to traditional forms of coherence like the formal membership to a certain nation-state. More generally, citizenship has to be deduced as the creation of a status of adherence to a certain collective body (a 'demos'), as a sense and as an incarnation of togetherness which gives every member weight and voice in the respective community (Tully 2009: 50). 'Personhood' elements of citizenship preponderate over conventional 'peoplehood' elements. Those collective dynamics encompass a certain understanding of democracy, and they are not necessarily bound to conventional political entities or procedures.

It becomes evident that such a re-conceptualization of citizenship starkly contrasts with the political conditions that the European Union (EU) provides in its current shape. On the one hand, the EU adopts the character of a state-like political system that deploys individual political membership either through the conventional status of the national citizenship among one of the member-states, or through the status of EU citizenship that was created in 1992 as a booster for more mutual affinity among the Europeans. On the other hand, the EU has not gained sufficient importance to replace all other reference points of political adherence below the supranational level. Consequently, it does not necessarily have to be regarded as a serious, compelling, and mandatory reference point for citizenship in the sense of a status of membership to a certain collective body. Thus, a modern concept of citizenship seems to easily dislodge from any affiliation to the EU in its current shape.

However, the involvement with a genuine 'European' citizenship will not be concluded with this reference to the inappropriate character of the EU. On the one hand, within the EU certain elements of a comprehensive model of citizenship can be identified first in some of the EU-referenda that have been accomplished in order to vote on the possible creation of a closer European Union, second in the stimulating effect of the recently established 'citizens' initiative' within the Lisbon Treaty of the EU. On the other hand, an increasing number of very agile political actors in Europa can be identified who engage transnationally and who take care of common European political issues. Thus, the slight emergence of a comprehensive embodiment of European citizenship

can be observed that, remarkably, does not necessarily merge into a formalized affinity to the EU-system. A 'demos' arises apart from and beyond the EU.

I will develop my re-conceptualization of citizenship and its assignment to the European level in three steps. First, I will briefly indicate the characteristics of a modern concept of citizenship (II). In a second step, I will describe the possibilities for a European citizenship that relate to the EU in its current shape and constitutional characteristics, and also the evolvement of citizenship that reaches beyond (III). Finally, I will evaluate the profile and the consequences of these different modes of citizenship with regard to its democratic dynamics next to and apart from the supranational development (IV).

2. Elements of a comprehensive model of citizenship

In the following passages, I extensively refer to the so called 'radical-democratic' models of citizenship. The radical democratic theories of citizenship are heuristically promising because they trace back the general purpose of politics to the very basic role of singular individuals (better: 'subjects') to a collective body of cooperative interaction. The radical democratic models return to basic interactive procedures that have to be accomplished in any occurrence of political cooperation. 'Citizenry' is regarded as the process of a mutual recognition among cooperative actors, associated with their common presence in the political sphere. Citizenship is interpreted as the product of an inclusionary process of shaping a collective will. It goes along with the individual perception of everybody's reciprocal allegiance to the coexistence with other individuals, and it merges with democratic roles that everybody gains through the mere affiliation to a collective body. Citizenship is not primarily directed towards its conclusion in a formal membership to a political or constitutional entity. Instead, it addresses the process of democratic agency itself, and consequently it goes along with a continuous questioning and with the critique of the existing institutional results of collective interaction, expressed by states and by all kinds of political order or decision-making. Any fixation of the collective will-formation implies a closure of the interactive process and an exclusion of possible subjects who are entitled to get access to an interactive political body. The radical democrats point to the symbolic compliance of politics as a space of collective interaction instead of reproducing widely practiced and accepted determinations of the purposes of politics. Thus they facilitate to develop a critical perspective on any manifestation of democracy, politics, and of citizenship instead of simply describing and legitimizing their current appearances.

Pierre Rosanvallon wants to tell a different, 'deviant' story of democracy and points to the significance of the process of collective will-formation that is unavoidably interrupted by any political institution-building, by the settlement of a fixed constitutional order, by the establishment of unalterable rules and procedures of decision-making. For Rosanvallon, democracy does not end up in an act of voting, in legitimate representative procedures, or in the public acceptance of institutionalized decision-making. For him, democracy mainly consists of the possibility to critically scrutinize all fixed manifestations of politics as a possible infringement of the continuous instantiation of the collective will-formation. Democracy creates the attitude of derogation, of refusal, of non-compliance. 'The power of the people is a veto power.' (Rosanvallon 2009: 15) However, this veto power does not consist of a stubborn rejection of any current political developments, but of a reflexive examination of the political occurrence and of one's own role with regard to the general purpose of the collective will-formation and of the cooperative interaction. The singular actors have to attain their visibility in the public sphere. Democracy in its basic destination means the 'capacity to do things', it signifies 'a *demos*' collective capacity to do things in the public realm.' (Ober 2008: 6, 7; cf. Celicates 2010: 277)

Jacques Rancière emphasizes that democracy cannot come off with fixed, established procedures, but has to be regarded as the volatile manifestation of the public presence of interactive subjects. He wants to go beyond the prevalence of an 'ascribed' citizenship status and emphasizes the 'voluntary' elements. 'Democracy can never be identified with a juridico-political form. This does not mean that it is indifferent to such forms. It

means that the power of the people is always beneath and beyond these forms.' (Rancière 2014: 54) Democracy means the 'subjectivization' of politics (Rancière 2002: 108). Democracy signifies an endless search for the coherence of subjects within a 'demos', but at the same time it has the purpose to prohibit its accomplishment because any conclusion would terminate the process of an open, unpredictable retrieval (Rancière 1996: 127). Democracy can only be comprised as a paradox that aims at the establishment of rules of interaction, but misses its own process orientation by its own resolution in fixed rules. 'The contemporary way of stating the "democratic paradox' is thus: democracy as a form of government is threatened by democracy as a form of social and political life and so the former must repress the latter.' (Rancière 2010: 47) Democracy will signify a form of togetherness that distrusts and defies all common, established forms of community building. It is the expression of coherence under the conditions of indissoluble apartness. 'Democracy is the community of sharing, in both senses of the term: a membership in a single world which can only be expressed in adversarial terms, and a coming together which can only occur in conflict.' (Rancière 2007: 49)

This understanding of democracy and politics creates a certain type of citizenship. Citizens are no longer defined by their role in the limits of an established political order and by their legitimatory function within an existing political system. Instead, they primarily are comprised as subjects who generally strive for political visibility, for articulation, for expression, for inclusion into any political forum and frame. The interactive foundations of human existence instantly create the entitlement to be present in the political sphere and to intervene into current political developments. For Etienne Balibar equal citizenship instantaneously emerges from the existential human condition. Political inclusion and participation turns out to be an elementary individual claim (Balibar 2012: 91ff; 223). Consequently, citizenship is not defined as a function of the established ways to deal with the necessity of cooperative problem-solving, but as the foundation of its shaping and justification. The roles of 'citizens' in this sense of the word encompass the entitlement for public visibility, for coordinated activity, and for critical scrutiny. Pierre Rosanvallon states: '*Democracy of expression* means that society has a voice, that collective sentiments can be articulated, that judgments of the government and its actions can be formulated, and that demands can be issued. *Democracy of involvement* encompasses the whole range of means by which citizens can join together and concert their action to achieve a common world. *Democracy of intervention* refers to all the forms of collective action by means of which a desired result can be obtained.' (Rosanvallon 2009: 20) Citizenship turns out to be the activity of the subjects in their collective appearance, the activity of the 'people' in general. This definition leaves behind any state-centric understanding of citizenship.

Citizenship can no longer be defined by its legal affiliation, but has to be interpreted as an activity that refers to and is located in any emerging or existing political space. Citizens are defined as subjects who make common experiences instead of subjects who dispose of a similar status. Citizens are defined by what they *do* instead of what they *are*. They create – particular – 'communities of shared fate.' (Williams 2009: 42) The significance of the legal coherence, the 'peopleness,' fades away. Any given frame of citizens' formal affiliation to a certain political unity can be reconstructed as a voluntary – or coerced – creation of affinity. Consequently, the political units like nation-states or like the supranational political unity appear as artificial, arbitrary – although indispensable – limitations to an unbounded accessibility of any subject to the political sphere. Alternatively, informal embodiments and unconventional practices of citizenship come to the fore: sudden activities, unexpected practices, surprising identities, or unattended solidary actions (Seubert 2014: 334). The concept of 'citizenship' is being disposed of its conventional imagination of coherence and framing.

This also leads to a revised understanding of the sovereignty of the people. The sovereignty of the people has to be regarded as the general foundation of any political interaction, institution-building, or decision-making. The sovereignty of the people cannot be cast into an ultimate, fixed institutional manifestation (Rancière 1996: 121). The 'people' remains the temporary entity of interactive subjects who have not yet handed over the constitutive reins of their power to certain political institutions and procedures. Instead, they insist upon the difference between their own destination and the attempts to perfectly accomplish it by a concluded

community (Rancière 1996: 138). The people remain an 'agency of political construction.' Consequently, the 'people' cannot be comprised as a collective body within certain borders, frames, or exclusionary manifestations. Instead, the 'people' are a 'multitudo' (not a 'populus') prior to its limited substantiation within a political unit. Wherever citizenship is exclusively proclaimed as a sequence of given political entities, it raises suspicion of neglecting this openness and incompleteness of the conference of subjects for the expression of their collective political will.

The citizens' profile that follows from this revised recapitulation of its emergence draws the attention to all manifestations of collective intervention into conventional political procedures and orders. John Keane describes those dynamics as the manifestation of a 'monitoring democracy.' Such democratic activity signifies mainly all kinds of participatory queries of established representative mechanisms (Keane 2009: XXVII; Keane 2011: 214). The 'monitoring democracy' focuses upon the subjects who are currently excluded from the status of involvement and inclusion. Its aim is: 'strengthening the diversity and influence of citizens' voices and choices in decisions that affect their lives.' (Keane 2011: 216) 'Monitoring democracy' leads to the permanent scrutiny of established understandings and manifestations of political ruling. […] democracy comes to mean a way of life and a mode of governing in which power is everywhere subject to checks and balances, such that nobody is entitled to rule without the consent of the governed, or their representatives.' (Keane 2011: 224) 'Monitoring democracy' signifies a new stage of the reason of politics, expressed by unconventional participatory practices: 'Monitoring democracy is the age of surveys, focus groups, deliberative polling, online petitions and audience and customer voting.' (Keane 2011: 214)

The given frame in which this kind of democratic activity occurs will continuously be transgressed. Citizens delimitate from conventional, goal-oriented participatory activities and shift towards the mere expressivity of collective deployment and visibility. Chantal Mouffe introduced the term 'presentistic democracy' in order to designate this surprising appearance of a pure aspiration for public presence as such – she describes it as a democracy '*in actu*' (Mouffe 2014: 74). Presentistic democracy opposes all kinds of established representative and institutional mechanisms insofar as it is only 'present' as long as the collective appearance of the democratic actors take place. This way of practicing democracy cannot be solidified, democracy cannot be turned into representative procedures which would introduce an 'absence' of the actors from their own endeavours (Lorey 2012: 2). Mouffe ranges several current political movements under this 'presentistic' mode of implementing democracy. She states that for many new political movements it becomes important to receive public attention, not to conventionally strive for a certain political objective within existing political systems, in the manner of a classical interest group. Instead, they concentrate upon 'attention-generating tactics' (Kaldor et al. 2012: 15). Specifically with regard to general European political problems and challenges, the emergence of respective democratic actors can be observed. They regard Europe as 'a creative space to re-imagine democracy' (Kaldor et al. 2012: 24). I will come back to this later.

3. The current character of the European Union and the windows of opportunity for the evolvement of comprehensive citizenship claims

Regarded from the standpoint of radical democracy, the EU does not offer any comprehensive forms of democratic disposability and thus does not represent a starting point for the development of citizenship in its basic participatory character. The EU seems to occupy the space for citizenship disposability through deterministic political structures, it prevents substantial interventions of citizen into its basic configuration (Rancière 2002: 86). The people do not gain any opportunity to decide over the norms that create their coherence, they have no chance to approve, to control, or to deny the shape of the political system that regulates their life (Tully 2009: 231). Etienne Balibar attests the EU a 'closure' of participatory disposability and the replacement of a real sovereignty of the people by 'regulatory centralism' (Balibar 2005: 101, 152).

Indeed, European integration proceeds in the course of an executive-minded, output-oriented system of cooperation. The European Union performs well as a regulatory power that produces an effective 'output', which renders a 'Pareto-optimation' for the affected people ('better to dispose of the supranational power than relinquishing it') and apparently releases from a substantial participatory input (Scharpf 2005: 730). The political legitimacy of the supranational system is based upon efficiency, accountability with regard to the decisive political elites, and trustworthiness with regard to its mostly technocratic, neoliberal objectives (Streeck 2013). The weak democratic foundation of the EU is based upon a friendly, but disinterested public acceptance of all political developments (Kielmansegg 2015: 9). As Andrew Moravcsik states, the EU ' is simply specializing in those functions of modern democratic government that tend to involve less direct political participation.' (Moravcsik 2002: 606)

The foundational dynamic of the EU which still prevails can be characterized as a 'Caesaristic' model of citizenship: it turns out to be a top-down initialized authority which by ordinance creates the coherence among its members (Karolewski 2014: 306f). The members react to this artificial reciprocity with a 'permissive consensus' and acclamation. In the later development of the EU, specifically when the common market raised as the most important and influential purpose of the EU, 'liberal' elements of legitimization were added, like certain rights and benefits which citizens could only gain through the regulatory capacity of the EU (Karolewski 2014: 308). The European nation-states keep their role as gatekeepers, supervisors, and inspectors with regard to any cooperative project or achievement. Supranational integration does not provoke the emergence of a coherent European 'demos' as long as the basic 'permissive consensus' prevails which provides the low level public legitimacy of the regulatory power of EU institutions. The citizens of the member states leave the general setting, the destination, and the control of European politics to their national elites, while they confine themselves to 'persisting national loyalties' (Přibáň 2009: 45). If there exists any 'polity' to which radical democratic efforts could pertain, then it would still be the nation-state or subnational politics. In the end, the European citizens experience this unavailability of a genuine European political disposability as a 'politics of depoliticization' (Přibáň 2009: 45, 49). Such restricted disposability is also demonstrated by the fact that for a long time there was no vital incarnation of the principle of *opposition* within the European Union (Mair 2007). The supranational system missed a pluralistic party system in which different views and assessments of the integration found its expression. The process of legislation and execution did not display any fundamental political or normative opponents. This deficiency was only remedied as soon as the European and the Euro-crisis emerged. Now, fundamental opponents of the current supranational development occurred in the form of anti-European parties, executive politicians, and political movements.

Even the 'European Union citizenship', which has been introduced to the EU in 1992, was unable to alter the weak democratic foundation of the EU. It remained an artificial creation of common concerns and of a common identity. It conceded a couple of rights to the citizens of the member-states and thus provided them with an equal status as 'members' of a common political system. However, it neither introduced an extension of the democratic disposability of the supranational development, nor did it ever deliver a substantial incentive for the citizens to critically or even benevolently deal with the EU as a common 'polity'. The European citizenship remains unable to induce basic questions about everybody's adherence to the EU, about the collective identity, or about the democratic roles that EU-citizens can and should occupy. Jürgen Habermas' attempt to derivate a solidary obligation for each European citizen from to 'double affiliation' to the EU as national and as European citizens seems not to be convincing: Habermas has to create a 'divided' sovereignty of the people in order to revalue the unmediated European citizenship (Habermas 2011: 67ff). He states that European citizens dispose of a double and antagonistic political affiliation. As national citizens they are members of a particularistic political community with a particularistic common loyalty. As EU-citizens they are part of a superordinate political entity which requires special loyalties which clash with their national affiliation. Thus, in Habermas' view European citizens have to act as solidary Europeans and as loyal members of national units at the same time. His future expectation is that this political and constitutional imposition for the Europeans will strengthen

their acceptance and support of the supranational system despite its lack of political legitimacy and despite its limited authority besides the member-states executives.

In the end, however, Habermas overstretches the principle of the sovereignty of the people. Taken as the necessary foundational initiation and justification of any political power by the subjects who interact and cooperate, Habermas neglects the lacking perception of the EU by the European citizens as a political entity that substantially competes with their national loyalties. The EU does not equally stand beside the political importance of the nation-states, as the continued existence of a supranational 'permissive consensus' demonstrates. By attributing to the current EU-system the necessity to express an elementary 'will of the people', Habermas at the same time overemphasizes the political significance of the EU and devaluates the political weight of the sovereignty of the people. Citizens would have to accept a technocratic, elite-governed system of regulatory power as a veritable object of their basic political concern, co-equal to their respective national endeavours. The elementary democratic dynamics of citizenship would be erased in favor of a collective permission for regulatory governance, far from a newly achieved political disposability.

In sum, the European Union citizenship does not express a basic democratic acquisition that constitutes a distinctive reference point for peoples' political concern. It remains a top down-created instrument to bring the regulatory power and dynamics closer to the affected subjects. It is not the result of a constitutive democratic act. Consequently, the European Union only provides one-half of Ackerman's 'constitutional moment': namely the legal stabilization of a coherent regulatory power, instantiated through the European treaties and the European Union citizenship. The other part, the creation of a coherent political body through individual actors who recognize their common concern, keeps still lacking (see Ackerman 1991).

However, the story is not completely told by the reference to the EU's insignificance for a comprehensive understanding of citizenship. Two general 'windows of opportunity' have to be mentioned which at least opened or still open a slight possibility to claim and to develop citizens' disposability in a limited range, at localized places, under temporary conditions. I refer to the practice of referenda in member-states on supranational issues, and to the 'citizens' initiative' introduced by the Lisbon Treaty in 2009 (cf. Richter 2015).

Referenda on basic political issues generally open a chance to at least temporarily activate citizens' constitutive political role. If they are broad enough in scope, depth, attendance and involvement, they might momentarily create a decisive disposability about important political questions. Generally, referenda can go along with 'high levels of collective mobilization; extensive popular support for some fundamental changes; the emergence of irregular and informal public spaces; and the formation of extra-institutional and antistatist movements that directly challenge the established balance of forces, the prevailing politicosocial status quo, the state legality, and the dominant value system.' (Kalyvas 2008: 6) Indeed, the established referenda in some of the EU member-states on supranational issues of major importance indicate the intention to involve the national citizens into determinant questions about the shape of the supranational political power. However, the compulsory holding of referenda is only stipulated in some of the European member states – a common, simultaneous execution of referenda in all member states on the same issue does not exist and is not in sight. Nevertheless, a couple of member-states stipulate the execution of a referendum about basic political options by their national constitution. Basic political options also include decisive supranational developments, like the European Union membership or any decisive change of its political or constitutional structure. Consequently, countries like Austria, Belgium, Cyprus, Czechia, Greece, Great Britain, Hungary, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, or Spain have held referenda on European issues (cf. Ivaldi 2006; Morel 2007; De Vries 2009). Other member-states explicitly prescribe referenda on basic European questions, like their own accession to the European Union or the introduction of a common currency. Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Lithuania, and Slovenia practiced those referenda and enacted them before joining the EU.

In those referenda, principally a short 'constitutional moment' emerged which signified one of the basic demands of radical democracy – namely the voluntary decision over the basic institutionalization of a common political reference point. Certainly the 'second-order' character of European referenda has to be taken into account: Mostly national governments or the opposition used the referenda to conduct a poll about national issues. Nevertheless, the referenda at least intentionally adopted the character of a symbolic manifestation of the will of the people: Citizens could express their sovereignty through the consent to – or the refusal of – a new political framework or regulatory power, and they created a common concern through their simultaneous political articulation. As long as the accession-states performed those referenda, the citizens received at least at one single point the opportunity to deliver a judgment about their accordance or their refusal to the new framework of their cooperative endeavors. However, once they had declared their consent to join the European Union, their disposition about the polity almost completely disappeared again.

With regard to the basic political character of the European Union, a real 'constitutional' moment only appeared once, when the draft of a supranational constitution (which later was cut back to the Lisbon Treaty) was left to national referenda in three member-states: in France and in Netherlands in May and June 2005, in Ireland in June 2008 (people voted 'no'), and in October 2009 (people voted 'yes'). These referenda partly sufficed the demands of radical democracy in several regards. Admittedly, they undeniably had also the character of 'second-order' elections whose issues did only partly pertain to the subject that was at stake in the poll. However, even under the condition of these restrictions and distractions from the supranational concern, those referenda facilitated to make 'radical' statements about the European Union in general. At least, those citizens who consciously and deliberatively voted about the supranational topic shared a clear distinction between their preferred and relevant and their rejected and obsolete frames for a common 'polity'. The public debates before the referenda in the member-states clearly demonstrated that very fundamental questions about supranational integration came to the fore: Does the European Union need a constitution? Does the European Union appear as institutionally balanced? Should the deepening or the enlargement of the European Union gain priority? Does the European Union need more political power in new policy areas? Basic and 'radical' political questions could be publicly and controversially debated. Those referenda opened the chance to articulate and to practice *political opposition*.

Moreover, European integration became a common reference point. Through the common European concern among the citizens of the referenda states, the European Union itself spontaneously was evaluated as a political 'entity', it temporarily delivered the coherent framework for a fundamental political 'community of communication' (Risse 2010: 162). The massive regulatory scope of the EU was suddenly realized among those national citizens who were allowed to express their preferences. This led to a surprising suspicion about the existing supranational political. Citizens recognized the voluntaristic lack of the existing EU. At the moment when the conventional supranational 'logic of effective problem solving', based upon the 'permissive consensus', had to be switched into a 'logic of participatory power legitimization' (Zürn 2006), the deficiencies of the EU relentlessly revealed. The suggestive democratic legitimacy of the EU was suddenly queried, the EU could become sceptically evaluated as a promising – or alleged – 'polity'.

The real political and democratic significance of these referenda is underlined by its surprising result, namely a majoritarian refusal of a constitutive deepening of supranational integration. In their negative results, the referenda in France, Netherlands, and the first one in Ireland demonstrated that – voluntarily – the national issues and problems were ranked much higher among the citizens than European developments. Citizens were more worried about the political problems in the scope of their national perception; the European Union in its current state was obviously settled outside of the citizens' horizons and desires. The important 'polity' was mostly identified with the national frame and not associated with the supranational system. European citizens rejected the predetermined 'finalité' of the EU.

Due to the fact that only one negative European referendum would suffice to skip the whole intended establishment of a real supranational constitution, the actual negative votes in these three countries symbolized some kind of *representative verdict* about the polity aspirations of the EU. They demonstrated that, as soon as the European people receive the chance to evaluate the current and future polity character of the EU, they tend to express an unexpected, massive dissatisfaction. Due to the 'yes' or 'no' alternative in these referenda, citizens remained unable to express their dissatisfaction in detail – they just were to endorse or to deny further political aspirations of the EU. There was no possibility to articulate any opposition with regard to certain supranational 'policies', but only the chance for an opposition that expressed complete accordance or total distrust (Mair 2007: 7; Tully 2009: 242). The citizens choose the alternative of complete distrust, and it can be assumed that in the case that other citizens, like the Germans, would have also had the chance to vote in a referendum, they would have followed this line of a resolute refusal. Thus, European citizenship only temporarily arises and is forced to articulate in binary options: yes or no. As soon as the European citizens are allowed to democratically decide about basic political developments of supranational integration, they cast off from their roles of pure supranational policy-consumers and suddenly take on the role of articulated actors – however, actors who tend to offensively reject the predetermined proposals of simply consenting another time with the prefigured supranational system. Instead of prolonging their 'permissive consensus', they slide into suspicion against the prefigurations themselves. The sudden confrontation of the existing supranational system with peoples' will might lead to a competitive assessment of 'polity'-preferences – and ends up in a refusal of respective efforts at the supranational level.

The implemented referenda demonstrate the possible dynamics of a 'negative' direct democracy, which leads to the expression of 'objections, vetoes, opposition and counter-mobilization' (Schiller 2005: 153). There might arise an, at least, partial European 'demos' – however, a demos who refuses the political frame to which its participatory expression is originally related. This transports an important democratic message: The practice of direct democracy by referenda could eventually create a European 'demos' without revealing any appropriate 'polity'. These negative impacts do not represent a problem for the model of direct democracy – but they represent a severe problem for the democratic legitimacy and for any future political aspirations of the current supranational system.

This revealing scepticism with elementary 'political' consequences is perpetuated during the current European crises. Faced with the systemic deficiencies of supranational integration, European citizens tend to express deeper than ever reservations and mistrust against current developments and any further strengthening of supranational power. Euro-sceptic movements and parties pop up and even invade – by gaining seats in the European Parliament – into the internal institutional framework to tackle it from inside. Euroscepticism is mostly populist and unmindful – but it aims at the core of a genuine political disposability, namely to decide over the acceptance or refusal of a very influential regulatory system.

The Lisbon Treaty established another feeble, but nevertheless dynamic option, namely a 'citizens' initiative', put into motion by article 11 of the Lisbon Treaty. Such an initiative has to be signed by one million citizens among a 'considerable number' of member-states (article 11). Through this initiative, citizens can 'request' the European Commission to deal with an issue that should be treated within the European Union. There are no following means of exerting pressure upon the Commission to definitely deal with that issue after a properly submitted initiative. There are also no instruments beyond the initiative to intervene in any existing legislative project or proceedings. The political dynamic of this initiative seems to remain humble: The quorum remains high, the commission cannot be forced to react, and results cannot juridically be claimed. The only chance seems to develop an instrument of 'agenda setting' (Plottka et al. 2012: 21). Amazingly, just this political purpose seems to work.

Remarkably, the 'citizens' initiative' activates a considerable amount of citizens (Hrbek 2012). First, the incorporation of a respective article into the Lisbon Treaty had itself been launched by European activists,

namely by the 'Initiative and Referendum Institute Europe' (IRI) (Hrbek 2012: 46). The supportive movement 'Citizens for Europe' connected pure participatory aims with an application of Art. 11: 'developing and promoting a new form of European citizenship in the EU with more political participation opportunities' (Citizens for Europe 2013). Interestingly, already six initiatives have been concluded since 2009, three of them fulfilled the necessary formal conditions, and ten others are currently claimed. The three 'successful' initiatives refer to the issues of European mobility, to the 'right of water', and against the practices in the native cells research (Knaut/Keller 2012).

Interestingly, the 'citizens' initiative' does not gain its primordial significance through the concrete issues that are claimed by the citizens, but through their activation as such. The initiative boosts some kind of *democratic exploration*: People perceive the EU as a decisive regulatory power, and they evaluate its desirable political capacities. Some active citizens, remarkably mostly younger Europeans, started intense transnational communication and cooperation, distributed information, organized political campaigns in different EU member-states, and collected the necessary number of signatures. These activities represent a basic citizenship stimulation: They encourage people to secure their existing or prospective political frames, to examine the capacity of new political entities, and to question certain political frames that seem unable to keep their political promises. A fundamental democratic dynamics is being activated: 'Subjects' demand for a deeper visibility of those who are affected by the cooperative mechanisms and institutions.

The current European crisis strengthens respective developments. Transnational movements arise which critically dispute the political detriments and benefits of the EU. For example, the protest movements 'Los Indignados' or '¡Democracia Real Ya!' in Spain and other member-states are classified as actors of a 'presentistic democracy'. They do not primarily fight for certain political aims and propositions or for more political influence within the existing mechanisms of decision-making. Instead, they represent the pure expression of dissatisfaction with and disappointment about the general social, political, and economic developments. They protest as citizens who are not sufficiently visible and 'present' in the public sphere as bearers of certain needs and desires (Mouffe 2014, S. 75). Through the continuing European crisis and an increasing number of unconventional protest movements, a remarkable, controversial recapitulation of the general aims and of the target compliance of the EU-system gets under way: A controversial dispute arises about the present character of the EU, but also about more general, desired future ways to practice European communication, cooperation, and integration. Never before has the intensity of the recapitulation of former dynamics and of future European political options been so high. Some kind of 'model competition' arises: Some refer to the traditional concept of a European federation, others interpret the whole system as a devastating aberration of capitalism and a reductionist implementation of neoliberal ideology, and some others regard the discrepancy between a few influential member states and a marginalized rest as the revitalization of the rivalry between a Germano-Anglo-Saxon, protestant hegemony which preaches austerity, and an 'Europe latin' which seeks for cultural evolvement, equal integration, and simply for the 'lust for life' (Richter 2015: 221ff). Beyond the ambiguous question for the plausibility of each of these interpretations, all of them indicate a fruitful, critical recapitulation of the general purposes of the extensive political frameworks in which people have to aspire for their political inclusion and to arrange their identity formation.

These efforts to ascertain everyone's civic status within the different political frames coincides with general developments at the European and even at the global level: citizens' interventions into political planning and decision-making increase. Civil society movements, nongovernmental organizations, procedures of citizens' participation in public administration and local or regional decision-making disseminate. 'Although there are significant differences from one country to the next, the social demand for broader supervisory powers exists everywhere, as does the tendency of supervisory agencies to escape to some extent from the control of their creators.' (Rosanvallon 2009a, S. 74) They very often appear in the shape of protest movements, private initiatives, or informal activities (Wöhl 2013: 256). With reference to the European level, Mary Kaldor also observes respective developments and classifies them as operators of 'subterranean politics': 'What we see in

all the public displays of subterranean politics are projects of collective re-imagining of democracy, of its practices and, importantly, of its relations to everyday life.' (Kaldor et al. 2012: II) As Kaldor observes, in many of the explicitly transnational movements the closer European institutional framework does not deliver the decisive reference point, although these movements deal with many European integration issues – put in motion either as a xenophobic or populist effort or as an emancipatory striving.

4. The European Union as space for an unlimited substantiation of citizenship

As has been stated, the EU in its current shape does not offer any substantial reference point for citizens' genuine political aspirations – namely to maintain their disposability about the aims, the shape, the dynamics and the limits of the frame for their common endeavours. Nevertheless, the EU is able to effectively implement its regulatory power as a technocratic regime that is legitimized by its beneficial output, supported by a 'permissive consensus' that provides public acceptance and trust into elitist governance. Under these conditions, there is not the slightest indication that the EU will gain any significance as object of a genuine 'political' examination that might end up either in a complete refusal due to its political deficiencies or in a voluntary confirmation that expresses its voluntary acceptance as a new political entity.

Apart from the current status of depoliticization, the question remains how the described European democratic developments, expressed in referenda votings and in citizens' activities around the 'citizens' initiative', have to be appraised. Do they have to be classified as an episode, as exceptions, as temporary trends, or as indications of a decisive future change? Sometimes the EU can still be identified as an important reference point for democratic activities. Particular social groups like the unemployed youth recognize transnational problems and concerns and make European developments accountable for their poor living conditions. Common problems like the water supply are identified and lead to a claim for coordinated solutions. And also: Specific characteristics of the closer EU system are revealed as technocratic dynamics which lead away from an equal inclusion, from a closer identification, or from an efficient dealing with common problems. However, very often the EU disappears as a target of political activities and aims behind more general transnational frames and options. Obviously, a transgression of national frames arises that refers to possible common European concerns, but not necessarily to the EU as such. The European financial crisis delivers an illustrative example: The original purpose of strengthening Europe's economic power and capacity and of welding together all Europeans turns into an instrument of augmenting disparities, of breeding discord, and of destroying solidary attitudes. The European actors do not seek a solution in an 'ever closer Union', but in policy oriented strategies that transgress the conventional frame of the EU system. European democratic movements might emerge which do no longer relate their political aspirations to the supranational institutions. Also the rising European movements and 'policy communities' which can be observed have to be considered. They act transnationally, but they do not refer to the EU in its closer institutional setting (Tully 2009: 242). There are several '*demoi*' who cannot easily be evaluated in their proximity to and significance for European integration. There seems to be a common political ground of a political reciprocity that creates *European* citizens who interact beyond the given institutional framework. The EU seems to be disqualified as a promising point of reference. It only represents the territorial space in which all these developments take place. The few appearances of a common political concern among European citizens might create a supranational 'demos' which remains in an ongoing search for its appropriate common 'polity'.

These tendencies go along with a general dynamic of European supranational integration: Through the Lisbon Treaty the dynamic of an *increase* of supranational authority is going to be refracted by a dynamic towards a *reduction* of supranational regulatory power, expressed by the 'limits of Union competences' and by the 'principle of conferral' and 'subsidiarity' and 'proportionality' expressed in Article 5 of the Lisbon Treaty. Consequently, the European 'people' do no longer have to constitute solely as the citizens of an already existing political and constitutional framework, but also as a community that counteracts against the authority of an existing political unity. They can comprehend themselves as a collective actor of a re-transition of state-

like institutional authority, directed at an opposition against the creation of expansive regulatory capacity. Citizens regain their capacity to become significant 'agents of construction', however in an unintended understanding: They possibly *construct* the common, coordinated *deconstruction* of an existing political order. Citizens become able to practice a 'deterritorialized' and a 'deterritorializing' democracy' (Besson 2006).

Analytically, the political activities of European citizens induce a general reconsideration of citizenship models. Citizenship seems to relinquish its ascription to a certain political unit and to a binding constitutional framework. Instead, political subjects appear who emphasize their common political concern, but who remain unable and unwilling to transfer their activities into a fixed, institutional reciprocal affiliation and into existing frames of membership. They intervene within, but not as members of existing political and legal frameworks. Although some kind of 'personhood' citizenship arises at the supranational level, it does not clearly relate to the established political unit. Consequently, the EU becomes even weaker in its already feeble representative character and will even more lose its democratic legitimacy.

As the EU problem demonstrates, citizenship models have to be reconfigured with regard to their inherent tensions between a general, resistive sovereignty of the people, between the emergence of 'the people' searching for a common political body, between a coherent democratic actor beyond any stable legal or political frame, and between formal memberships like the EU citizenship. The democratic dynamics more than ever refer to a basic, diffuse understanding of the sovereignty of the people which I initially introduced as an authentic model for the creation of citizenship. The political attitudes that can be observed in Europe express skepticism about the aims, the instruments, and the executive character of any existing political body. They remain spontaneous and volatile, but possibly constructivist in their interactive, collective performance and effects.

As Thomas C. Marshall has pointed out, the development of modern citizenship must be regarded as a gradual emanation that started with the concept of universal equality and equal legal status, went on to the creation of social equality through welfare policy, and ended with the reduction of discrimination induced by gender, race, or ethnic identity (Marshall 1992). Transferred to the European concerns and to the EU, the development of citizenship might also be bound to a dynamic that is far from its conclusion. It started with a legal attribution of coherence among citizens through the supranational authorities and decision-making, it went on to the ineffective ascription of an unintermediate citizenship status created by the European Union citizenship, and it might end in a transgression of the given frame of European institutions and the creation of a European demos that constitutes itself beyond the given institutional framework.

REFERENCES

Ackerman, Bruce, 1991: We the People. Vol. 1. Cambridge, MA: Harvard University Press

Balibar, Etienne, 2005: Europe, Constitution, Frontière. Bègles: Ēditions du Passant

Balibar, Etienne, 2012: Gleichfreiheit. Politische Essays. Berlin: Suhrkamp Verlag

Besson, Samantha, 2006: Deliberative *Demoi*-cracy in the European Union. Towards the Deterritorialization of Democracy, in: dies./José Luis Marti (Hg.), Deliberative Democracy and its Discontents. Aldershot, Burlington: Ashgate, S. 181-214

Celicates, Robin, 2010: Ziviler Ungehorsam und radikale Demokratie. Konstitutive vs. konstituierte Macht? In: Thomas Bedorf, Kurt Röttgers (Hg.) Das Politische und die Politik. Berlin: Suhrkamp Verlag, pp. 274-300

Citizens for Europe, 2013: Homepage of the movement (http://citizensforeurope.org), accessed October 24, 2013

De Vries, Catherine E., 2009: The Impact of EU Referenda on National Electoral Politics: The Dutch Case, in: West European Politics, Vol. 32, No. 1, January, 142-171

Habermas, Jürgen, 2011: Zur Verfassung Europas. Ein Essay. Berlin: Suhrkamp Verlag

Hrbek, Rudolf, 2012: Die Europäische Bürgerinitiative: Möglichkeiten und Grenzen eines neuen Elements im EU-Entscheidungssystems, in: Integration, H. 1, S. 35-50

Ivaldi, Gilles, 2006: Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia, in: West European Politics, Vol. 29, No. 1, January, 47-69

Kaldor, Mary/Selchow, Sabine/Deel, Sean/Murray-Leach, Tamsin, 2012: The 'bubbling up' of subterranean politics in Europe. London: London School of Economics Papers, e-print

Kalyvas, Andreas, 2008: Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt, and Hannah Arendt. Cambridge : Cambridge University Press

Karolewski, Ireneusz, 2014: Bürgerschaft, kollektive Identität und Identitätspolitik in der Europäischen Union, in: Gianni d'Amato/Ireneusz Paweł Karolewski (eds.), Bürgerschaft und demokratische Regierbarkeit in Deutschland und Europa. Festschrift für Heinz Kleger. Baden-Baden: Nomos Verlag, pp. 297-318

Keane, John, 2009: The Life and Death of Democracy. London, Sydney, New York, Toronto: Pocket Books

Keane, John, 2011: Monitoring Democracy? In: Sonia Alonso, John Keane, Wolfgang Merkel (Hg.), The Future of Representative Democracy. Cambridge: Cambridge University Press, pp. 212-235

Kielmansegg, Peter Graf, 2015: Wohin des Wegs, Europa? Beiträge zu einer überfälligen Debatte. Baden-Baden: Nomos Verlag

Knaut, Annette/Keller, Reiner, 2012: Die Entstehung transnationaler Diskussionsräume durch die Europäische Bürgerinitiative, in: Forschungsjournal Soziale Bewegungen, 25. Jg., Heft 4, S. 37-46

Lorey, Isabell, 2012: Occupy – Exodus der Beliebigkeit aus der juridischen Demokratie. www.igbildendekunst@bildpunkt/bildpunkt-2012, accessed January 31, 2015

Mair, Peter, 2007: Political Opposition and the European Union, in: Government and Opposition, Vol. 42, No. 1, 1-17

Marshall, Thomas H., 1992: Citizenship and Social Class. London: Pluto Press

Moravcsik, Andrew, 2002: In Defence of the ‚Democratic Deficit': Reassessing Legitimacy in the European Union, in: Journal of Common Market Studies, Vol. 40, No. 4, 603-624

Morel, Laurence, 2007: The Rise of 'Politically Obligatory' Referendums: The 2005 French Referendum in Comparative Perspective, in: West European Politics, Vol. 30, No. 5, November, 1041-1067

Mouffe, Chantal, 2014: Radikale Politik und die echte Linke. Plädoyer für eine agonistische Alternative, in: Blätter für deutsche und internationale Politik, 12, pp. 73-83

Ober, Josiah, 2008: The Original Meaning of 'Democracy': Capacity to Do Things, not Majority Rule, in: Constellations, Vol. 15, No. 1, pp. 3-9

Plottka, Julian/Böttger, Katrin/Knaut, Annette, 2012: Bürgerbeteiligung gegen die Krise? Möglichkeiten und Grenzen der Europäischen Bürgerinitiative, in: Forschungsjournal soziale Bewegungen, 25. Jg., Heft 4, S. 17-28

Přibáň, Jiří, 2009: The Juridification of European Identity, its Limitations and the Search of EU Democratic Politics, in: Constellations, Vol. 16, No. 1, 44-58

Rancière, Jacques, 1996: Demokratie und Postdemokratie, in: Alain Badiou/ders. Politik der Wahrheit. Herausgegeben und aus dem Französischen übersetzt von Rado Riha. Wien, Berlin: Verlag Turia + Kant, pp. 119-156

Rancière, Jacques, 2002: Das Unvernehmen. Politik und Philosophie. Frankfurt/Main: Suhrkamp Verlag

Rancière, Jacques, 2007: On the Shores of Politics. London, New York: Verso

Rancière, Jacques, 2010: Dissensus. On Politics and Aesthetics. Edited and Translated by Steven Corcoran. London, New York: Continuum

Rancière, Jacques, 2014: Hatred of Democracy. London, New York: Verso

Richter, Emanuel, 2015: Demokratische Gestaltungsmacht und europäische Integration – Die Potentiale demokratischer Einflussnahme auf die politische Ordnung der Europäischen Union, in: Nabila Abbas, Annette Förster, ders. (Hr.), Supranationalität und Demokratie. Die Europäische Union in Zeiten der Krise. Wiesbaden: Springer VS, pp. 207-235

Risse, Thomas, 2010: A Community of Europeans? Transnational Identities and Public Spheres. Ithaca, London: Cornell University Press

Rosanvallon, Pierre, 2009: Counter-Democracy. Politics in an Age of Distrust. Cambridge: Cambridge University Press

Scharpf, Fritz W., 2005: Legitimationskonzepte jenseits des Nationalstaats, in: Gunnar Folke Schuppert/Ingolf Pernice/Ulrich Haltern (eds.), Europawissenschaft, Baden-Baden: Nomos, 705-741

Schiller, Theo, 2005: 'Secondary Democracy' in the European Union and the Role of Direct Democracy, in: Norbert Kersting/Lasse Cronquist (Hrsg.), Democratization and Political Culture in Comparative Perspective. Wiesbaden: VS, 143-166

Seubert, Sandra, 2014: Dynamiken moderner Bürgerschaft. Demokratie und politische Zugehörigkeit im globalen Zeitalter, in: Gianni d'Amato/Ireneusz Paweł Karolewski (eds.), Bürgerschaft und demokratische Regierbarkeit in Deutschland und Europa. Festschrift für Heinz Kleger. Baden-Baden: Nomos Verlag, pp. 33-66

Streeck, Wolfgang, 2013: Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus. Berlin: Suhrkamp Verlag

Tully, James, 2009: Politische Philosophie als kritische Praxis. Frankfurt/Main, New York: Campus Verlag

Williams, Melissa, 2009: Citizenship as an Agency within Communities of Shared Fate, in: Steven Bernstein/William D. Coleman (eds.), Unsettled Legitimacy. Political Community, Power, and Authority in a Global Era. Vancouver: UBC Press, pp. 33-52

Wöhl, Stefanie, 2013: 'Occupy Wall Street' – Auswirkungen der Finanz- und Wirtschaftskrise auf demokratische Repräsentation und politische Partizipation, in: Dorothée de Nève/Tina Olteanu (Hg.), Politische Partizipation jenseits der Konventionen. Opladen, Berlin, Toronto: Barbara Budrich Verlag, pp. 255-279

Zürn, Michael, 2006: Zur Politisierung der Europäischen Union, in: Politische Vierteljahresschrift, Jg. 47, Heft 2, pp. 242-251.

DESUBSTANTIALISATION OF CITIZENSHIP IN THE NAME OF RADICAL EQUALITY

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European Union (EU) citizenship is in itself an ambivalent and exclusive concept. Regarding the Maastricht (and Lisbon) Treaty it includes only those who already possess the nationality of one of the EU-28.[1] However, more than 20 million citizens of non-EU countries legally live in the EU, together with at least 10 million so called undocumented migrants.[2] These people who are living in the EU, many of them stemming from one or more generations, and who are indispensable for global prosperity, culture and civility of Europe, are *de facto* second-class citizens in the service of 'fully-fledged Europeans'. Such a concept of organizing community is not political if we accept that politics implies recognition of equal individuals in a political community (as conceptualized by the long tradition of political philosophy from Aristotle, Spinoza, Immanuel Kant to Hannah Arendt, Jacques Rancière, Etienne Balibar, Alain Badiou), where equality is not created on the principle of exclusion/sacrifice of the minority in favour of the majority. Equality of EU members, therefore, should be understood in juxtaposition with the inequality of non-members.

1. CONCEPT OF CITIZENSHIP AS A CAPTIVE OF LIBERAL IDEOLOGY

The main problem is exclusivity of the concept of citizenship as such, even though it has arisen from an emancipatory idea (Declaration of the Rights of Man and of the Citizen, 1789). But, at least since Marshall's liberal triad of political, civil and social rights (Marshall, 1950), the concept of citizenship has been nationalised and thereby has been losing its political potential. It is constructed through affiliation to particular nation-state, it is applied only to its members as a set of rights, being equalised with the nationality (that has already been equalised with ethnicity and/or race). That generates the state as a national community which functions on exclusion as a rule.

That is mostly a consequence of dominance of liberal ideology that usually names itself a 'consensual, parliamentary, representative democracy', being presented as the only possible model of the ensuring and exercising of political equality in the name of a belief that the rule is better than stubbornness, and freedom is better than slavery. The fall of the Berlin wall has symbolically marked the final triumph of liberal democracy, that, under the slogan 'There is no alternative', introduced the imperative of opposition democracy/totalitarianism (the last should mark the socialist regimes, i.e. Marxist ideology, what Badiou names the 'Idea of Communism', cf. Badiou, 2010) as an ultimate confrontation of the good and the evil. The domination of liberal democracy has made possible the victory of the system of (state and supra-state) institutions, conceived in a manner that largely allows the functioning of capitalism as the only possible mode of production.

The 'democratic development' has thus become a 'civilizational' process with strictly outlined linear direction that introduces a norm to be aimed at in order to rip out 'totalitarianisms' of the non-capitalist type. Through

[1] Article 20 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union from 2012 states: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'

[2] Eurostat Report from 2014, Migration and migrant population statistics: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics (accesed on 1. 8. 2015).

the electoral ritual as a 'celebration of democracy', it represent itself as an ultimate carrier of politics, trying to establish a monopoly over the political through a policy of professionalism, especially personified in law and economics. Thus we are facing a situation where the true politics is switched with a system of 'objective' rules as well as provisions that justify and legitimise the ideology of objective urgency of exploitation for the sake of capital, that is being looked after by experts from the fields of state and civil society (shaped as a hostage of the state and its rules). Meanwhile, the concepts that camouflage those disastrous exploitations (of people, animals, nature, interpersonal relationships) are being strengthened, i.e. concepts of human rights, humanitarianism, tolerance, compassion, care, charity, and, nevertheless, multiculturalism. They are justified as virtually based on practices of inclusion of the marginalised, yet they never touch true reasons of inequality but rather leave them unchanged. They actually allow permanent preservation and reproduction of *status quo*, which is the condition of inequality.

As stressed by Badiou, liberal democracy actually means the terror of 'capital-parliamentarism' (2006: 239), i.e. 'too objectivistic pairing of market economy and electoral ritual' (ibid.), based on aestheticisation of social relations, idealisation of technocratic values and total commercialisation of living. However, the equalisation of democracy with capitalism, enabled by the rule of law, and equalisation of the rule of law with liberalism are not a guarantee for the power of the people. To mark what is being self-legitimised under the name of democracy, Rancière introduces the term postdemocracy (2005: 119). It operates as a practice of governance based on erasing forms of truly democratic operation, and abolishing the phenomenon of people. The current postdemocratic regime is based on the principle of an identitarian community that creates an illusion of community identical to itself. Along with abolition of the people it leads to the vanishing of politics. Such a situation of matches without residue between forms of the state and the state of social relations leads to the disappearance of the demos. Democracy then becomes a principle of the rule in the name of the people, but without it. This actually means the disappearance of politics as such (cf. Rancière, 2004: 46).

Thus we are facing the regime whose basic task is to distribute, designate and classify individuals/singularities on the basis of value that they possess for the purpose of maintaining the liberal-capitalist system and, based on that, to set whose words apply for comprehensible speaking (are important), and whose are noise (are unimportant). Rancière puts a name to that regime police. It is:

an order of bodies that defines the distribution between ways of operation, ways to be, and ways of speaking and taking care that those bodies are placed on that place and determined for that task, according to their names; it is an order of the visible and speakable that takes care that certain operation is visible, and the other one is not, that it is heard as a speaking, and the other one as a noise. (2005: 44)

The word 'police' personifies an image of community, where citizenship is identified with the feature of individuals who can be defined within a relation of larger or smaller closeness between their place and the place of public power. Politics, on the contrary, does not know the relation between the citizens and the state. It knows only specific 'dispositifs' that sometimes communicate citizenship which never belongs to individuals themselves. Sovereignty and governance, i.e. power relations, are not political but police-related. The politics, however, exists when there are forms and places for two heterogenous processes to meet, the police-related process and the process of equality, understood as an 'open plurality of practices relied on supposition of equality of any speaking being with any other speaking being, and seeking for verification of that equality' (ibid.: 46). To achieve the politics (equality of whoever with whoever) the police (denial of equality, i.e. anti-politics) should be fought.

The state or Rancièrian police thinks in terms of sub-multitudes; it counts (over and over), distributes and classifies various sub-multitudes (workers, women, men, children, students, employees, employers, eligible voters, population, citizens, nations, ethnicities, races, cultures and so forth). It thus contrasts with the true

emancipatory politics, in which no sub-multitude (identity) is more important than any other. Emancipatory politics knows only a multitude as the universal name for anyone, as an empty name that can be spoken and used by whomever.

Contrary to that, the meaning of sovereign national state is being strengthened in the name of liberal democracy, even though under the cover of international networking and opening. Also the importance of citizenship as an administrative category that prevents and criminalises free movement of people (producing illegality and hierarchical inclusion) is strengthened. Meanwhile the borders are becoming ever more present, even though not so much on the very crossings between states (they are in every police station, detention and asylum centres but also in health and social institutions, schools, universities and any other state institutions which distinguishes between citizens and non-citizens). Consequently the power of identitarian terror and systemic state-violence is rising, which makes physical and financial, *legal and legalised* exploitation of certain populations, communities and individuals possible. This reinforces nationalism, ethnicism, racism (under the euphemism of patriotism), neoimperialism and neocolonialism.

2. Imagined identities, imagined communities

The state as nation-state with its concepts of nation and national identity—defined by ethnical, historical and cultural presumptions—loyalty, borders and sovereignty 'devours' the idea of political community. Citizenship is, therefore, reduced to membership in a national community, which generates exclusion based on the separation between 'true' and 'false' members(hip). This transforms citizenship into a privilege, an honour, a surplus of rights. Inclusion in such a privileged group is selective and arbitrary (depending on the state provisions under the principles *ius soli* and *ius sanguinis*), while the contracting rules could never be influenced by the foreigner: 'Once a migrant, always a migrant'. Such a conception of citizenship signifies a failed attempt to establish a political community and political subject.

Étienne Balibar names this conception 'constructing of fictive ethnicity' (1991a: 96), to explain the way of generating societies and peoples to be established in a system of nation-states with a historical perspective, and, to clarify how that tendentious nationalisation of societies and peoples—hence cultures, languages and genealogies—influences its own representation and ways of giving meaning to its own 'identities', from its core. He uses the term, therefore, to mark the societies constructed by the nation-state. In that manner he shows the split of the term 'people' into two complementary terms, being marked throughout the tradition of political philosophy by the Greek terms *ethos*—i.e. people as an imaginary community of loyalty and kinship—and *démos*—people as a collective subject of representation, decision-making and rights.[3]

For that purposes the state needs specific structural and/or symbolic violence known under various names: 'assimilation', 'integration', 'naturalisation', 'adaptation', 'melting pot'. Its purpose is to equalise differences between groups in a way of adjusting 'minorities' to the 'majority'. This violence which is the main mechanism for assuring and reproducing the state of 'normality' is institutionalised and spontaneous, visible and invisible, structured and unstructured at the same time.[4] It is most successfully carried out by school (and other

[3] In that context Immanuel Wallerstein speaks of 'the construction of peoplehood', cf. Ibid., 71.

[4] As highlighted by Slavoj Žižek (referring also to Balibar), the structural violence is one of the key elements of establishing of contemporary (national) state Iit is legalised and normalised, being persistently hidden beyond subjective violence, which is prosecuted and criminalised. However, the subjective violence is actually always an answer to the systemic violence of the state, or: '[S]ubjective violence is only the most visible peak of the triangle that includes symbolic violence—the violence embodied in language that constructs our "house of being", as said by Heidegger—and systemic violence—often catastrophic implications of "smooth" functioning of our economic and political systems' (Žižek, 2007: 7). The subjective violence is usually presented as a sort of 'outburst', 'excess', 'deviation' from 'normal condition', but the state-based, objective violence is exactly the one that invisibly maintains that 'normal' condition. Actually, only the subjective violence makes the objective one visible, disclosing it throughout its brutality.

educational institutions) and family, but also by other Althusserian ideological apparatuses of the state (legal, political, trade-unionist, information, cultural, religious), or, the very set of state's tools that Foucault names 'discipline'.

As history shows, two more elements are very important in that process of ultimate normalisation—i.e. reconstruction of various primary identities into one collective, universal national identity: language and race. Both express an idea that the national character ('spirit' or 'substance') is inseparable from the people, that it is, therefore, immanent to them. Already the school traditionally produces ethnicity as a linguistic community. National language is not only the official language of a country, but also the basis for an essential differentiation between persons, being appropriated as an important part of identity, especially through the idea of so called 'mother tongue' implicating internal equalisation of those speaking the same language. The symbolic core within the idea of race—the genealogical scheme by which the idea of kinship among individuals is being transferred between generations, both biologically and spiritually—is also inscribed into the community known as kinship. Production of ethnicity is, therefore, 'racialisation of language and verbalisation of race' (Balibar, 1991a: 104).

When individuals are constructed as united fictive ethnicities and people are separated to different ethnical groups that potentially match the same number of nations (as 'homo nationalis', cf. Balibar, 2007: 22), then the national ideology is at its peak. It is not only a specific state's strategy of population control, but it also generates the demands and wishes, initiatives and needs of that population—under the dictate of the 'normality' it becomes biopolitics *par excellence*. It is clear that the creation of nation, national-affiliation awareness and formation of national identity is in fact an illusion. However, it is a convincing illusion, being created and sustained through national institutions and ideology; it is a fabrication. It is based on a belief that the generations, following one another on a certain territory through centuries, create unchangeable essence or substance, and that this process of development, of which we are a culmination, was the only one possible, was the fatal one. No single nation is based on pure ethnicity in itself, but rather: nationalised social formations through the long process of institutionalisation 'ethnicises' a population, which appears as a spontaneous act that generates naturally cohesive community, with its own identity and roots, culture and interests that exceed individual and social conditions and circumstances. We can conclude, therefore, that under certain conditions only imaginary (imagined) communities are real. This is what Benedict Anderson also stresses claiming that the socially constructed character of ethnical communities lies in founding the idea of nation as an imaginary political community. Anderson also analyses nationalism as a product of the phenomenon of imaginary communities and by that significantly justifies the constructivist theory of nation: 'nationalism is not the awakening of the nations and their self-esteem: nationalism rather *invents* nations at the places where they actually don't exist' (Anderson 1991: 15).

Indeed, those who 'fight nationalism' within such a constructed socio-political model of nation-state overlook the important fact that nationalism is a generic organic ideology of every nation-state (which does not mean that all nationalisms are state-based, neither that the nation-state functions on the basis of nationalism only). Nationalism is inscribed in the core of the nation, being realised in a form of nation-state which confers the status of national affiliation or citizenship, based on the principle of exclusion, of visible and invisible borders, materialised in laws and regulations or constructed in our minds. Exclusion—or at least unequal treatment and limiting access to certain goods and rights according to the citizenship of a specific nation-state or belonging to a certain group—is the essence of the national form. Even more, the very form of nation-state creates and maintains inequalities and differences that should be defended for the sake of 'national interest'.

3. HUMAN – CITIZEN

As Balibar stresses, the current exclusion of migrants/refugees/exiles is at the core of the citizenship disease. Understanding the attitude toward non-citizens is, therefore, a key to the understanding of citizenship.

Great equalisation between citizenship and nationality, introduced in the name of sovereignty of the modern states, therefore, acts against its democratic meaning. It enables permanent stigmatisation of a foreigner *as such*—a foreigner who does not want to be 'invisible' and whose presence in a particular national territory is not merely a concession that can be withdrawn at any time. The basic problem is that not only national affiliation (as a cultural category), but also citizenship (as an administrative category) emerge as an individual's essence, the contents of which depend on the state and time of birth. 'Wrong' nationality or citizenship and passport can destroy many lives. After all, despite the fact that each state is a mixture of different peoples, religious, cultural, linguistic, political and other relationships, it still functions only as a 'community of citizens/nationals'.

This leads to differentiation between universal human rights and social, economic, cultural, i.e. political rights in a state. On one hand, we have universal human rights defined by the 'transnational' Universal Declaration of Human Rights (1948)—the successor of the famous Declaration of the Rights of Man and of the Citizen (1789)—, and on the other hand its limitation by the sovereign nation-state, as the Declaration is not an obligatory document. The contemporary concept of citizenship that operates through institutions of the sovereign nation-state, therefore, goes together with an extensive system of social exclusion, appearing as normalisation and socialisation of anthropological differences. In this way, universal human rights that include rights to education, work, health and social protection, political expression and so forth are strictly tied to national affiliation/citizenship. Universal human rights (as for instance the right to emigrate and immigrate or right of free movement), valid for all and always on a declarative level, are in fact always profiled through particular national belonging and legislation.

As humankind since the French revolution assumes the image of a 'family of nations', the image of a human being is—as consequence of that—not an individual, but rather a projected image of the nation. For this reason, the impossibility of realising the 'universality' of human rights is radically revealed exactly in the cases of persons who do not have the status of citizen of a sovereign (national) state, or, who have lost the support and protection of their governments. As shown by Hannah Arendt, the paradox and difficulty of the human rights concept lies in the fact that the loss of all human rights matches the very moment when a person becomes 'just' a human being, without any other political and social attributes (Arendt, 1978: 383). The loss of citizenship rights *de facto* means the loss of human rights: 'Human rights, supposedly indefeasible, stand out as unfeasible (also in states with constitutions based on them) in all cases of appearance of people who were not citizens of any sovereign state' (373). A refugee, a migrant or a person without citizenship, the one who should be a subject of human rights *par excellence* (Agamben's *homo sacer*),[5] as they are the only ones left to refer to, in fact discloses the radical crisis of that term. As stressed by Arendt, such a person has no place in the world to exist as being erased from the order of politics is being erased from the norm of humanity.[6]

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[5] Agamben borrows the concept of *homo sacer* or 'the bare life' from Walter Benjamin, setting it as a crystallisation point of the mutation of modern politics, that he understands as a continuation and radicalisation of Foucault's thesis on biopolitics. Developing the idea of a new character of sovereign power that puts itself on a position of deciding on life outside any law, Agamben borrows Carl Schmitt's idea of 'the state of exception' to describe the hidden intersection between *zoe* and *bios*, or, 'between a/the juridical-institutional and a/the biopolitical model of power' (Agamben, 1995: 14). He stresses that 'the development and victory of capitalism could not be possible without a discipline control implemented by new biopower, that by using appropriate technologies creates for itself, if we can use the words, "docile bodies" that it needs' (11). Entering of *zoe* in the sphere of *polis*, i.e. politicisation of 'the bare life' as such, is, for him, a decisive event of moderna, the one that marks radical transformation of political-philosophical categories of critical thought. Consequently, *homo sacer* does not represent a simple exclusion, but a hierarchical inclusion, an inclusion through excluding.

[6] Both Arendt and Agamben highlight the visibility of 'the bare life' in the field of politics, however, their conclusions are radically different. While Arendt stresses the classical opposition between public (political) and private life, Agamben emphasizes the situation of modern

The same principle is currently applied in cases of migrants, asylum seekers, refugees (officially called 'illegal migrants') and *sans-papiers*. In Slovenia, for instance, they are erased residents who have been living without any official records for almost twenty years.[7] They are subjects of human rights, not citizen's rights. Immigrants, asylum and job seekers and *sans-papiers* mark the position where citizenship and nationality diverge. The natural 'bare life', therefore, appears as incompatible with the legal order of the nation-state: the people without state or citizenship are the people without existence.

This condition, as shown by Balibar, is the result of colonial heritage: the colonial subject is a 'citizen by birth', whilst the immigrant worker is not (there is a significant word for immigrant in the Anglo-American vocabulary: *alien*). Although more or less integrated in society and partly included in its system of rights and obligations, one can hardly escape from the minority status. In return for finding a job she/he can enjoy training and protection, being, therefore, *similar* to a citizen, but on condition of respecting provisions of 'contract' that can never be specified by her/himself, which is especially visible when it goes for issues of naturalisation or the residents right (cf. Balibar, 2007: 59). So today we are facing the process of 're-colonisation of social conditions' (ibid.) that started in the 1980's as a consequence of economic globalisation and new inequality, both on a local (national) and global level. For that transnational phenomenon of 'racism without races' Balibar introduces the term 'meta-racism' or 'neo-racism' (1991a: 17). It is characterised by two features: the first is that the place of race or biological heredity has been taken by the terms ethnicity, culture and invincibility of cultural differences. The second characteristic of that discourse is the transition from the notion of colonialism to the notion of immigration.

The first feature is apparent in ways that nationalism—in its official, state-, institutional usage—transforms the basic principles of racism into modern notions, attributing to them new ethnical or cultural verbal designations. The notion 'anti-Judaism', used to indicate a general genealogical exclusion based on 'blood purity', is in this sense modified to mean the opposition between cultures. Lately, the term 'immigration' primarily denotes

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democracy, based on a mix of those two lives, more exactly on a reduction of *bios* to bare *zoe*. Although Arendt also sees a radical novelty in the intrusion of biological life into the political scene, she interprets it, unlike Agamben, as a sign of decadence of political living in modern democracies and not as a paradigm of the modern power based on a state of exception. In this sense Arendt puts the idea of democracy opposite to totalitarianism, while Agamben supposes 'an inner solidarity between democracy and totalitarianism' (19).

[7] The erased residents of the Republic of Slovenia (the Erased) are the individuals who used to be citizens of the former common state of Yugoslavia that Slovenia used to be a part of, and at the same time of one of Yugoslavia's six republics, and who, for various subjective or objective reasons, did not apply for citizenship of the new state of Slovenia in 1991, on the basis of the new Act on Citizenship; or, they were refused after applying for it. These individuals consequently became subjects of the Act on Foreigners. The problem occurred when the Ministry of Interior—on its own initiative, without relevant legal basis, over the night and without any notice or warning—erased from the Registry of Permanent Residents (on 26th February 1992) individuals who already had legally confirmed status of permanent residence in Slovenia, even though they could not or did not want to ask for the citizenship of a newborn state. In short, as they did not ask for or did not obtain the citizenship of the new state of Slovenia, they were (also) deprived of the status of the permanent residence. By that act, more than 25600 persons (more than 1% of Slovenia's population in that time) lost the legal foundation of existence, as they were robbed of all the rights related to the status of permanent residence (work permit, social rights, health insurance, the right to housing etc.). Their documents, regardless of the expiration date, became invalid and in the majority of cases destroyed, most often at the local administrative units, mostly by fraud: they were invited to come to solve certain issue or they had to show their personal identity document for whatever reason—it would be then taken away and perforated. Some never get any explanation about the act, while some were re-directed to the Immigration Office to arrange the status of foreigner. But for numerous Erased getting even that status was virtually impossible, as, in order to get it, they needed certain documents from their 'home countries'; this was often non manageable due to the war conditions of that time in the area of ex-Yugoslavia. Even though the Constitution Court of Slovenia issued two decisions (in 1993 and 2003) where it clearly stated that the erasure was not in accordance with the Constitution, the legislative changes that regulate status of the Erased finally emerged in 2010; as they are restrictive, they are subject of criticism of many, at the first place of the Erased themselves; they do not return rights systematically and automatically, thus in the same manner as they were taken. Eleven Erased, with the help of activists, wrote lawsuit against the Republic of Slovenia to the European Court of Human Rights. After six years, the Court finally identified violations of the European Convention on Human Rights. During that time one of the complainants died, while the Court found rights violations in cases of only six of the ten remaining complainants. Slovenian authorities (both 'left' and 'right' oriented) have been continuously (and successfully) justifying the erasure by the hate speech and incitement to hatred and paranoia (authorities were talking about invaders, criminals and speculative opportunists, and at the same did not want to serve with the data on social structure of the Erased, i.e. sex, education, profession, criminal record, family status and so forth). There are a number of compelling publications on the subject of erasure, for instance: Dedić et al.2003; Kogovšek et al., 2010; Beznec, 2007; Lipovec Čebron and Zorn, 2011.

people who are coming from disrupted states and nations, or people whose nationality (in the postcolonial period) is not pure and clear (new 'dangerous class'). It is similar with the word 'immigrant' that almost certainly denotes somebody who originates from the East or the South, but definitely not from the West. Crucial generic preoccupation of racism, the obsession with purity of blood is, therefore, changed into a defence against the mixing of ('higher' and 'lower') cultures. Thus immigrants are not supposed to be unwelcome because of belonging to other races, but because of belonging to other (and in particular different) cultures. At first sight, in neoliberal discourse these cultures are not inferior, but irreducibly different ('different than ours'), which actually means less worthy (inferior). In this way the concept of culture acts as a mask or euphemism for the race, whilst racist arguments are hidden behind 'anthropological-cultural' (ibid.: 25) beliefs that it is all 'only' about the dangers of abolishing borders as well as the incompatibility of life styles and traditions.

The second feature is evident from the inverted process of movement in the age of 'decolonisation'. Whereas the colonial situation was generative of the socio-historical context of the classical racism, the context of the new racism is an immigrant situation, or 'functioning of the category of immigration as a surrogate for the category of race, and as a decomposer of "class awareness"' (ibid.: 26). In this way migrant workers are targets of xenophobic and discriminatory violence, where racist stereotypes play the key role. Racism is generically targeting populations of 'immigrated workers' and 'refugees', especially those from the South and the East, being excused by a sort of defence reaction of 'threatened national identity' and social security.[8]

Consequently, as stressed by Balibar, we can achieve the practical, true humanism, only if we conceptualise it as an effective antiracism. That means particularly endeavouring to achieve the trans-nationalistic politics of citizenship (anti-nationalistic ones). What we need is 'not a supranational, but a beyond-national viewing angle, a "distant view"—that is, however, within the historical movement—through which we can overcome mirror games with nationalism' (2004: 380).

4. CITIZENSHIP IN THE MAKING

I believe, in line with Arendt (1978), that the concept of citizenship has to be rethought as an operation in the public sphere, as *vita activa*: the concept of citizenship refers to thinking and acting as a public, not a private concern. It means acting sensitively to the world, and taking responsibility for future generations who will inherit its condition. In that sense practising citizenship is not a private activity of maximising happiness (already forced by the (neo)liberal principle), but an engagement based on the concern for all. Ethics of citizenship, therefore, requires common answers to common matters, arising from sameness (alikeness) and not otherness (differences) of individuals.

[8] If not before, today (in the middle of massive hysteria due to the migrants/refugees in the UK, France, Italy, Hungary, Greece and other countries of the EU, that selfishly overlook the 'migration crisis' concentrating only on its own interest) we can certainly claim that the migrants are the Jews of the 21st century. We can only hope that in this case the 'final solution' will not be used. However, the EU increasingly strengthens its other name Fortress Europe, declaring the total war to migrants. Since 2004, it maintains the system of surveillance, watch, and protection of its external borders against unwanted newcomers: system Frontex (headquarters in Warsaw, Poland) with slightly less than 90 million Euro budget in 2014. In 2013, an additional system Eurosur (European surveillance) has been established in order to control external borders by the newest technological means: drones, satellites, ships, helicopters, with the budget of 144 billion Euro till 2020. WikiLeaks has recently announced that the EU has verified two documents (on 18th May 2015) planning a military intervention against vessels on the way from Libya to Italy. The plan has been formally approved by representatives of all the 28 member states, to provide military interventions to destroy migrant/refugee transporting boats, preventing them to reach Europe. The plan of an openly violent fight against migrants is masked with the fight against organised criminals, thus disclosing the extreme hypocrisy of the EU, as one of the reasons for migrants to decide to go to such dangerous trips (having in mind that they can even die) is that the EU does not allow a secure and legal approach to the European territory, where asylum can be requested. Migrants/refugees who have no other options can therefore reach Europe almost only by the help of organised criminals.

As Balibar claims, to construct 'the citizenship in the world' means to enable rights and act in the world as a political community. It means inventing the concept of citizenship wherein the modes of belonging are founded on the development of it, not vice versa (Balibars's concepts *droit de cité* and 'constitution of citizenship' (*politeia*)) (cf. 2007: 66). More precisely, that means the liberated, expanded right to enter and stay, also the right to work, education, political engagement and so forth, in any state; i.e. the right to equal political rights for all inhabitants, regardless of their nationality, on a local, national and (any) community level. However, Balibar stresses that it is not the (neo)liberal principle of 'free choice', but the true extension and respect of human rights that requires actual equalising of rights of all inhabitants living together in a certain state (community), and, therefore, constitutes a genuine ethical request for radical political equality. The request for obtaining actual rights on a local, national and post-national level, emerging in a process of people's cooperation in identifying, defining and implementing those rights, is providing an emancipatory content and potential 'the absence of which means state as a merely ideological construct, cut off from the society and captured in its own abstractness' (ibid.: 67). Such de-substantialisation of citizenship announces that it is the process, practice and activity of a citizen—not a concluded form. It is always in progress, dependent on the activity of all, a set of practices that connect both poles, the attitude toward oneself and toward others (cooperation, recognition, solidarity), and so it is a process of constant re-invention (ibid.: 159).

The concept of 'democratisation of borders' (ibid.: 132-133) should be understood in the same context, as borders are—currently and more than ever before—labels for sovereignty. They are a non-democratic condition of democracy that operates mainly as a security control, social segregation, unequal access to resources for quality life, even as institutional distribution of livelihood and death and a basis for institutional violence. The demand for democratisation of borders, therefore, means the demand for freedom of movement for all individuals, usually treated as passive objects of arbitrariness of authorities within states. For a rich man from a rich state—a member of a 'dominant nation' (ibid.: 61), not to mention members of the 'international bourgeoisie' (ibid.)—the crossing of a border became a formality, a place of symbolic recognition of his social status; but for a poor resident of a poor state, a member of an 'inferior' or criminalised nation, asylum or job seeker, the border crossing is not a right, but rather a privilege, it is not only an obstacle which is hard to overcome, but also a place across which she/he goes again and again; after all it is a place of living: an upsetting 'space-time zone, almost a habitat' (Balibar, 2004: 406).[9] However, Balibar's demand does not mean a simple cancellation or abolition of borders, as in most cases that would certainly lead to renewed 'war of all against all' in the form of wild competition between economic forces, but particularly multilateral, mediated control of their operation by inhabitants. Balibar thus demands efficient 'de-fetishisation' (2007: 133) or 'de-sacralisation' (ibid.: 137) both of visible (physical) and invisible (symbolic) borders. For him democratising the institution of border means 'using it in favour of the people and subordinate it to their collective supervision' (ibid.: 132), as 'natural borders'—the big myth of foreign policy of nation-states—does not exist and have never existed' (ibid.).

Balibar emphasizes, that we have to recognise the real concept of human rights 'as a conflictual one, as it is always refers to postulates of democracy, but at the same time puts into question its existence' (1994: 205). Consequently, it cannot be established without internally unifying the 'human and citizen' concepts of rights,

[9] The position of migrants, as exposed by Sandro Mezzadra, is a privileged observation point that allows researching of a tendency to selective breakdown of citizenship typologies. He claims that we are facing real war with a huge number of victims. According to the organisation 'Fortress Europe', more than 20.000 persons (mostly from Africa and Asia) have died trying to cross borders since 1988, in the year 2014 alone around 4.000 persons (numbers are not precise, as they are not systematically monitored): some of them drowned in the Mediterranean Sea, others suffocated, froze to death, or died of starvation and dehydration, hidden in trucks, or, killed by border police. So called illegal migrants from so called third countries are, if they succeed to reach Europe, subjects of special regime of limiting personal freedom without doing any crime. They are closed in detention centres, usually not much different from common prisons. The basic task of those institutions is the removal of persons from a country they arrived to, and, in most cases, returning them to their so called home countries. It is a systematic and efficient constitution of inferior(ised) population, which is forced to permanently live on a border, not entirely within and not entirely outside.

which is a 'radical discursive procedure that deconstructs and reconstructs the politics' (ibid.: 212). It starts by pushing democracy to its limits, where it leaves the field of institutional policy (which is an initial meaning of referring to 'human nature' or 'natural law'), but only in order to show immediately that the human rights as such are not real, and have no value if not settled as the unlimited political right of all to citizenship.

This actually means unifying human and citizen's rights, as citizenship should again and again be identified in the dialectics of conflicts and solidarity, as a responsibility and active/activist operation. Balibar also calls that demand 'cosmopolitization of human rights' (2007: 137), where citizenship and society are correlated in a completely new context. Justification of exclusive right to live in a certain territory by a number of generations who used to live there continuously, or on a principle of 'the original settlement' seems to be a pretty outdated solution. Balibar, in contrast, speaks about 'citizenship of borders' (ibid.). The citizenship will either become more democratic—'social' (ibid.)—or, in the long run, it will become impossible.

5. Citizen as political subject origins at the borders of identity

Understanding the concept of citizenship as an unconditional access to fundamental equality is crucial, as it articulates the relation between the individual and the collective. Balibar insists that it is enough to be a human (without attributes) in order to be a citizen (a subject of politics). The struggle against the denial of citizenship is, therefore, the life of emancipatory politics (2004: 15–17). This concept of radical democracy:

far beyond exceeds a simple theme of "accepting the Foreign" (not to mention levels that start with inclusion and integration, but finish with assimilation). Because everybody, including "indigenous", must at least symbolically pledge their citizenship's identity that was obtained or inherited from the past, and reconstruct it in the present along with all others: with those who currently share the same "destiny" on a strip of the Earth, regardless of where they come from, how long they at a place, and irrespective of "legitimacy". That does not mean that the past does not exist or that it is of no use, but that it is not a heritage, that it does not provide a right of firstborn. That means that there are no "first residents" of a civic territory (Balibar, 2007: 161).

This explains why the emancipatory struggle is, according to Balibar, the ultimate struggle of those who are denied citizenship. It is clear that the aim of 'policies of immigration control' or 'migration management' is not an ending of so called illegal employment and immigration, neither of illegal labour trafficking which supplies that employment, nor the illegal conditions resulting therefrom. On the contrary, it is rather about the reproduction of illegality that indirectly justifies the urge for repressive measures. It is about producing illegality in advance to make it the reason later for a security apparatus' existence that causes the 'syndrome of insecurity' which affects the whole state. It is amongst institutional drives for the current production of racism, apartheid and maintenance of the condition where an immigrant always stays an immigrant. Consequently, the rebellions, struggles and demands for active political participation performed exactly by non-citizens themselves are, for Balibar, a paradigm of emancipatory politics. This notion is confirmed by various movements[10] that demand universality of life and being through the struggle for access to citizenship for all. By that they contribute to developing the notion of active citizenship, but also of activist solidarity that in the long term demonstrate surprising continuity, despite understandable fluctuations from the mobilisation to

[10] The movements devoted more of their attention and networking efforts to that subject in the time of global demonstrations against the governance of capitalist elites and fortifications of financial capital (IMF, World Bank, WTO), especially since Seattle 1999. Some of the key movements in this respect are *Global Project* and *Ya basta!* in Italy, *No one is illegal* in various countries, *Sans-papier* in France, *Dostje!* and later *Nevidni delavci sveta* (*Invisible Workers of the World (IWW)*) in Slovenia.

hopelessness. Such thinking of citizenship is precious also in terms of encouraging civil disobedience, which is, 'with all possible risks, a key component of citizenship that helps re-establish it during a crisis, or when its principles are questioned' (ibid.: 67).

However, emancipatory aspiration does not happen spontaneously, but always by 'different categories' of people' struggles (individual or groups) deprived from affiliation in the 'community of equals'. According to Rancière, those who are 'uncountable' or 'part of those who have no part' are those who create a reason for true emancipatory politics to exist.

Politics exists when the natural order of domination is interrupted by the institution of a part of those who have no part. This institution is the whole of politics as a specific form of connection. It defines the common of the community as a political community, in other words, as divided, as based on a wrong that escapes the arithmetic of exchange and reparation. Beyond this set-up there is no politics. There is only the order of domination or the disorder of revolt. (Rancière, 2005: 27)

The impossible request of the 'uncountable' for equality provokes the 'scandal of democracy'. By appropriating a part of the common, the 'part of those who have no part' discloses the scandalous fact that politics is based exactly on the absence of any *arche*. The 'scandal of democracy' is precisely in the proclamation that it cannot be anything else other than the absence of every reign. Such power is thus the political power, and, therefore, of those who have no natural, self-evident justification to govern, over those who have no natural, self-evident justification to be governed. Governance of the best, the wisest ones, has no bigger importance and is not any fairer unless it is a governance of equals. 'Democracy in particular means anarchical "governance" based on nothing but the absence of anyone who would be governed' (ibid.: 41). Politics, as an assumption of equality of whoever with whomever, is established as a declaration of 'the possibility of the impossible' and as negating self-evidence by legitimising 'governors of the only possible' (ibid.: 151). Politics of emancipation is, considerably, the re-politicisation of the part which is at the source of every wrong calculation: of those who are otherwise included in a community, although precisely because they do not have any quality, they do not form any sub-multitude, but are only bare, 'whoever' singularities.

In our attempt to re-invent citizenship we must, therefore, critically re-think the constitution of the subject as a political subject that goes along with the constitution of the community as a political community. At a time of crisis of the nation-state:

'the question is not only that of which community should be instituted as a priority and form the overall horizon of citizenship but that of knowing what the speculative concept of community means and how we should understand it.' (Balibar, 2007: 85)

If we try to snatch from the identitarian terror that determines which identities are more and which are less important (minorities that reinforce the majority, foreigners who confirm natives, non-citizens who verify citizens, 'they' who consolidate 'us'), we need to defend the construction of the community not founded as an identitarian one—based on a nation as a dominant and exclusive identity—, but as a political one, hence assuming radical equality of whoever with whomever, where the identities are understood as multilayered, changeable, and ambiguous. The only possible community that is based on radical equality is, therefore, a community co-constructed by singularities who are not referring to an identity, i.e. 'whoever', generic singularities deducted from any identity, any belonging to a community.

As outstandingly stressed by Rancière, true political subjectivisation, or, emancipation emerges not in a process of identification and fortification of self- (national) identity, but just the opposite, in a process of symbolic relativisation of it.

Process of subjectivization is a process of disidentification or declassification. More than construction of the identity or identification it is about crossing of identities, relying on a crossing of names: names that link the name of a group or class to the name of no group or no class, a being to a nonbeing or a not-yet-being (Rancière, 1995: 67).

It is always 'an impossible identification, an identification that cannot be embodied by he or she who utters it' (ibid.). At the same time, this is not to say that we stop being who we are, but we establish a certain distance from the signifiers that adhere to us or that are attributed to us. We develop an awareness that all identities are always transferable, changeable and ambiguous and that they are just a construct of a specific identification. Only then, when we have freed ourselves from all identity or identification restraints, can we become aware of the equality of anyone and everyone. A political subject, therefore, can begin to exist only within the split between two identities: the one we renounce and the one we symbolically appropriate. What is crucial is that neither of the two is completely 'ours'.

Thus we should build a community not committed to the question of acceptance, tolerance, and integration of non-citizens dependent on the respective arbitrary good will of 'natives', but to constructing the political community as a non-segregational community 'for all' or 'whoever'. In this way, not only is a self-identity, particular community, and belonging/affiliation to it being problematised and relativised, but also so is *any* difference, specificity, and otherness, opening a space for 'whoever', i.e. potentially for all. That sameness breaks the communitarian, identitarian, juridical, and humanitarian logic. In that case we have to understand that the status of citizen has no political meaning nor moral sense, if it does not apply equally to all.

REFERENCES

Agamben, Giorgio *1995* (1998): *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford

Althusser, Louis and Étienne Balibar *1968* (2009): *Reading Capital*, Verso, London
Anderson, Benedict *1983* (1991): *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London

Arendt, Hannah *1951* (1978): *The Origins of Totalitarianism*, Harcourt Brace and Co., New York

Arendt, Hannah. 1958 (1998): *The human condition*, The University of Chicago Press, Chicago, London
Badiou, Alain *1992* (2006): *Pogoji/ Conditions*, Založba ZRC, ZRC SAZU, Ljubljana

Badiou, Alain *2008* (2010): *The Communist Hypothesis*, Verso, London

Balibar, Étienne (1991): 'Citizen Subject' in *Who Comes After the Subject?*, ed. Jean-Luc
Nancy, Routledge, New York, London (pp. 33–57)

Balibar, Étienne and Immanuel Wallerstein *1988* (1991a): *Race, Nation, Class: Ambiguous Identities*, Verso, London

Balibar, Étienne (1994): *Masses, Classes, Ideas: Studies on Politics and Philosophy Before and After Marx*, Routledge, New York, London

Balibar, Étienne (1995): 'Culture and Identity (Working Notes)' in *Identity in Question*, ed. John Rajchman, Routledge, New York, London (pp. 173–199)

Balibar, Étienne *2001* (2007): *Mi, državljani Evrope?: meje, država, ljudstvo/ We, the People of Europe? : Borders, state, peoplehood*, Založba Sophia, Ljubljana

Balibar, Étienne (2004): 'Is a Philosophy of Human Civic Rights Possible? New Reflections on Equaliberty', in The South Atlantic Quarterly CIII/2-3 (pp. 311–322)

Beznec, Barbara, ed. (2007): 'Once Upon an Erasure: From Citizens to Illegal Residents in the Republic of Slovenia', Časopis za kritiko znanosti, domišljijo in novo antropologijo, XXXVI/228, Študentska založba, Ljubljana

Dedić, Jasminka, Vlasta Jalušič and Jelka Zorn (2003): *The Erased: Organised Innocence and the Politics of Exclusion*, Peace Institute, Ljubljana

Kogovšek, Neža, Jelka Zorn, Sara Pistotnik, Uršula Lipovec Čebron, Veronika Bajt, Brankica Petković and Lana Zdravković (2010): *The Scars of the Erasure*, Peace Institute, Ljubljana

Lipovec Čebron, Uršula and Jelka Zorn, ed. (2011): *Stories of the Erased*, Sanje, Ljubljana

Marshall, Thomas Humphrey. Citizenship and Social Class: And Other Essays. Cambridge: University Press, 1950.

Mezzadra, Sandro (2004): 'Državljanstvo v gibanju'/ 'Citizenship in the Motion' in Časopis za kritiko znanosti, domišljijo in novo antropologijo, XXXII/217-218 (pp. 59–66)

Mezzadra, Sandro (2008): 'Border as Method, or the Multiplication of Labor', European Institute for Progressive Cultural Policies, Accessible at: http://eipcp.net/transversal/0608/ mezzadraneilson/en (15. 9. 2012)

Rancière, Jacques (1995): 'Politics, Identification and Subjectivization' in Identity in Question, ed. John Rajhcman, Routledge, New York, London (pp. 63–73)

Rancière, Jacques (2004): 'Demokracija kot nujen škandal'/ 'Democracy as Inevitable Scandal', in Maska XIX/86-87 (str. 46-51), Maska, Ljubljana

Rancière, Jacques (2004a): 'Who is the Subject of the Rights of Man?', in South Atlantic Quarterly CIII/2-3 (pp. 297–310)

Rancière, Jacques *1995* (2005): *Nerazumevanje/ Disagreement*, Založba ZRC, ZRC SAZU, Ljubljana

Zdravković, Lana (2009): 'Paradoks koncepta človekovih pravic in boj zoper odrekanja državljanstva kot življenjske emancipacijske politike: primer Izbrisanih prebivalcev Slovenije'/ 'The Paradox of the Concepts of Human Rights and the Struggle against Citizenship Rejection as Life Emancipatory Politics: the Case of the Erased Inhabitants of Slovenia', in Časopis za kritiko znanosti, domišljijo in novo antropologijo, XXXVII/235-236 (pp. 289–294)

Zdravković, Lana (2010): 'The Struggle against the Denial of Citizenship as a Paradigm of Emancipatory Politics', in *The scars of the erasure: a contribution to the critical understanding of the erasure of people from the register of permanent residents of the Republic of Slovenia*, Peace Institute, Ljubljana (pp. 257–277)

Zdravković, Lana (2010a): 'Emancipatory Politics as a Process of Involving "Wrong" Names', in *The renaming machine*, Zavod P.A.R.A.S.I.T.E., Ljubljana (pp. 72–79)

Zdravković, Lana (2011): 'An Arche or Barbarism: the Responsibility of Being of/in the World', in Journal of visual arts practice X, 2 (pp. 113–123)

Zdravković, Lana (2014): 'Misliti nemogoče: onkraj predstavništva'/ 'To Think the Impossible: Beyond the Principle of Representation' in *Anarhizmem onkraj obstoječega*, Časopis za kritiko znanosti, domišljijo in novo antropologijo, XLII/257 (pp. 53–66)

Žižek, Slavoj (2007): *Nasilje/ Violence*, Društvo za teoretsko psihoanalizo, Analecta, Ljubljana

WHAT ROLE FOR NATIONALITY LINKS IN THE EU APPROACH TO PRISON AND PRISONERS?

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1. RESEARCH QUESTION AND PLAN OF THE ARTICLE

This paper raises the following question: are nationality links losing importance to the EU approach to prison and prisoners (with special regard to the execution of custodial sentences or detention order)?[11] In order to answer properly, I shall clarify context, scope and structure of my research. Firstly and foremost, in this paper I focus on criminal law detention. Though I acknowledge that administrative detention (such as immigration detention) is highly relevant to EU citizenship, in this paper I pay attention only to that kind of deprivation arising from criminal proceedings. Secondly, by the terms *power to imprison*/*detain*/*deprive of liberty*, I refer to: the choice to resort to detention made by the (EU or national) legislatures; the enforcement of a detention order or of a custodial sentence, especially in the context of judicial cooperation within the EU. Thirdly, I link my analysis to EU citizenship. This status rests on the right to move and reside freely across the EU without being discriminated on grounds of nationality. Needless to say, this has huge consequences on the importance of the nationality link, from the viewpoint of both states and individuals. On the one hand, every EU citizen can 'hang the hat' in a Member State other than that of nationality, and acquire a set of rights which blurs the boundaries between citizens and non-citizens of that Member State. On the other hand, EU citizenship brings with it the obligation, for the states concerned, to recognise those rights, without favoring their own nationals in the absence of a lawful justification.

An exhaustive response requires the analysis of two complementary scenarios, having to do with the possibility, for the detainee, to execute a custodial sentence or a detention order where s/he has the higher level of connection. The scenarios are shaped by interactions between EU criminal law and EU citizenship. More in detail, one can distinguish: actual interactions, represented by the *Kozlowski*, *Wolzenburg*, *Lopes Da Silva* and *I. B.* decisions of the Court of Justice of the European Union ('the ECJ' or the 'Court'); interactions which have not yet taken place, such as those involving the Framework Decisions (FDs) on the Transfer of Prisoners and on Probation Measures.

This article is structured into four parts. Firstly I contextualize the power to detain at EU level, by making reference to the evolution occurred in this respects over the last decades. In this part I show the growing interaction between detention and EU citizenship, with particular regard to the application of the principle of mutual recognition to judicial cooperation in criminal matters. Secondly, I focus on EU citizenship law: Treaty provisions and Directive 2004/38/EC (or 'the Citizenship Directive').[12] I hereby explain why integration and reintegration are key to answering my research question. Furthermore I underline how they, and the broader system of EU citizenship, have a centerpiece in the concept of residence. Thirdly, I analyse the two scenarios against the conceptual yardstick of integration and reintegration. I place my analysis in the broader context of the principle of mutual recognition in EU criminal law. By paying special attention to the case of the European Arrest Warrant (EAW) FD, I show how that principle has significantly diminished the importance of nationality to detention and criminal law at EU level. Then I hone in on the actual and potential interactions, by highlighting strengths and weaknesses of the relevant EU law from the perspective of detainees' rights. I conclude that the salience of nationality has significantly decreased, when it comes to detainees and EU citizenship, though some elements of resistance to this development can be seen.

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[11] I would like to thank all the participants to the stream 1-panel at the bEUcitizen confrence in Zagreb for their valuable comments and questions. The usual disclaimer applies.

[12] Directive 2004/38/CE of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30 April 2004.

2. THE POWER TO DETAIN AT EU LEVEL

Citizenship and the state's decision to detain an individual share a number of important features. Firstly, they historically represent two strongholds of national identity. Though different and interdisciplinary perspectives may be adopted to deal with citizenship, the legal approach usually looks upon it as a combination of two elements.[13] On the one hand citizenship as a status, linking the state to its citizens. On the other, citizenship as bearer of a complex of rights enjoyed by citizens.[14] Likewise, detaining individuals is inextricably linked to a cultural and societal context which takes a legal shape through the channel of sovereignty.[15] Deprivation of liberty perhaps represents the most 'classical' expression of state sovereignty over the individual, which in turn reveals its very nature in the use of the monopoly of force. As Max Weber put it,[16] a state is a community that successfully claims the monopoly of the legitimate use of physical force, the sole source of the 'right' to use violence. Since the Enlightenment reform, the role of national parliaments is key to the decision to deprive individuals of their liberty. Upon being expression of popular sovereignty, they mirror the social sensitiveness of a nation in a given historical moment. This aspect is particularly important when dealing with criminal law, the area which par excellence is seen as embodying the outcome of states' cultural development. The arguments backing such viewpoint are perfectly epitomised by the 2009 *Lisbon judgment* issued by the German Constitutional Court.[17]

A second aspect which is shared by citizenship and deprivation of liberty is that they found a first manifestation at EU level with the 1992 Maastricht Treaty, although incipient forms of such a framework had previously taken place.[18] Thirdly, and in connection to the second point, citizenship and decision on detention have been undergoing a groundbreaking change over the last decades.[19] The EU Treaty reforms, flanked by a conspicuous case-law of the Court of Justice, have resulted in unprecedented interactions between EU citizenship and detention (and criminal law more in general).

Therefore, the close connection between deprivation of liberty and state power is to be reconsidered. Such an evolution has been mainly triggered by the use of the principle of mutual recognition in judicial cooperation in criminal matters within the EU, adopted since the European Council of Tampere in 1998.[20] As known, the

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[13] D. Kochenov, Ius Tractum of Many Faces: European Citizenship And The Difficult Relationship Between Status And Rights, in The Columbia Journal of European Law (CJEL), V 15/no 2, p. 175-176.

[14] However Kochenov, op. cit., found that the relationship between status and rights may be flexible, and another distinction is possible to be drawn between '"formal" citizenship, resting on the status, and "informal" citizenship, emphasising the importance of the possibility of enjoying citizenship rights as opposed to the importance of possessing the formal legal status of a citizen.'

[15] As to the relationship between personal liberty and sovereignty, a fundamental contribution is represented by G. Amato, Individuo e autorità nella disciplina della libertà personale, Milano: Giuffré, 1967.

[16] M. Weber, Politics as a vocation, Munich, 1919.

[17] Judgment of 30 June 2009 - 2 BvR 1010/2008, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 5/08 e 2 BvR 182/09, available at www.bverfg.de/entscheidungen/es20090630. An analysis from this perspective, see M. Böse, La sentenza della Corte costituzionale tedesca sul Trattato di Lisbona e il suo significato per la europeizzazione del diritto penale, in Criminalia,2009, pp. 267-301.

18 As for pre-Maastricht citizenship, see in particular D. Kochenov and Sir R. Plender, EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text, in 37 Eur. L. Rev. 369 (2012), pp. 369-396. Member States started cooperating in the fields of criminal justice and law enforcement a long time before the adoption of the Maastricht Treaty. Such cooperation, mainly directed towards terrorism and drug trafficking, took place at a threefold level: United Nations (UN), Council of Europe (CoE). See M. Jachtenfuchs,J. Friedrichs, E. Herschinger, C. Kraft-Kasack, Policing Among Nations. Internationalizing the Monopoly of Force, Hertie School of Governance - working papers, No. 28, April 2008, pp. 8 onwards. See for instance the 1957 Convention on extradition (ETS 24), the 1959 Convention on mutual assistance (ETS 30) and the 1983 Convention on the transfer of prisoners (ETS 112). On these aspects, and for further bibliography, see S. Peers, Mutual recognition and Criminal Law in the European Union: Has the Council got it Wrong?, in Common Market Law Review, 41, 2004, pp. 6 onwards.

19 See among many D. Kochenov, EU Citizenship Without Duties, in European Law Journal, Volume 20, Issue 4, pp. 482–498, July 2014; M. Delmas-Marty, The European Union and Penal Law, in European Law Journal, Vol. 4, Issue 1, pp. 87-115; A. Bernardi, Principi di diritto e diritto penale europeo, in Ann. Univ. Ferrara - Sc. Giur. Nuova Serie, Vol. I1 (1988), pp. 77-213, available at http://giuri.unife.it/it/ricerca-1/allegati/annali/volume1988.pdf

20 Tampere European Council, 15 and 16 october 1999, Presidency Conclusions.

application of mutual recognition in criminal matters is a principle borrowed from the internal market law.[21] Introduced by the ECJ with the *Cassis de Dijon* judgment,[22] it requires that a product/economic activity that has been lawfully produced/marketed/exercised in one Member State, should be capable of being marketed into another Member State without further burdens or conditions. Such a principle finds a limit in the Treaty exceptions (e.g. public policy or public health) and the mandatory requirements/justifications as elaborated by the Court of Justice (the so called 'rule of reason').[23] Thereby, mutual recognition is mostly a sort of negative integration, which facilitates the enjoyment of Treaty rights by the free movements of products and persons under a de-regulatory logic.

The application of this logic to criminal law has caused a heated debate.[24] Indeed, in criminal matters each instrument of mutual recognition concerns one or more kinds of judicial decisions (arrest warrant, custodial sentence, probation measure) and abolishes the requirement of double criminality for a list of 32 offenses. According to such a requirement, the conduct at the basis of the judicial act at stake must constitute an offence in the jurisdictions of both the requesting and the requested states. Once that requirement has been removed, the balance in cooperation substantially changes. Indeed, when one of these judicial decisions is issued for one of the 32 conducts by the Member State A (the issuing Member State) to the Member State B (the executing Member State), the latter has to recognise and execute the decision automatically and without any further formality. For those offences not included in the mentioned list, the double criminality principle remains. However, though the executing Member State does not treat that conduct as a crime in its own legal order, it may surrender the person concerned all the same, once the issuing Member State has required it. The automaticity of mutual recognition in criminal matters is mitigated by mandatory and optional grounds for refusing the execution, as well as by specific rules leaving some discretion to the executing judge. Strictly connected to this application of mutual recognition is the legal approximation in substantive and procedural criminal matters, carried out through EU competences provided for in the Treaty.[25] For the purposes of the present discussion, Article 83(1) TFEU is worth mentioning, under which the Union can adopt criminal law directives in a number of areas of particularly serious criminality which have a cross-border dimension.

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21 C. Janssen, The Principle of Mutual Recognition in the EU Law, Oxford: Oxford University Press, 2013; J. Snell, The internal market and the philosophies of market integration, in C. Barnard and S. Peers (ed), European Union Law, Oxford: Oxford University Press, 2014, pp. 300-323.

22 Case C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), [1979] ECR 00649.

23 See A. Rosas, Life after Dassonville and Cassis: Evolution but No Revolution, in M. Poiares Maduro and L. Azoulai (ed), The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Oxford: Hart Publishing, 2010, pp. 433-446; C. Barnard, The Substantive Law of the EU. The Four Freedoms, Oxford: Oxford University Press, pp. 171-177, pp. 496 onwards; Ö. İnanılır, Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine, in Ankara Bar Review, 2008/2, pp. 106-113.

24 Among countless publications on the topic, see V. Mitsilegas, The constitutional implications of mutual recognition in criminal matters in the EU, in Common Market Law Review (43) 2006, pp. 1277-1311; S. Peers, Mutual recognition and criminal law in the European Union: has the Council got it wrong?, in Common Market Law Review (41) 2004, 5-36; S. Lavenex, Mutual recognition and the monopoly of force: limits of the single market analogy, in Journal of European Public Policy, 14:5 August 2007, pp. ; for a state-by-state overview of the application of mutual recognition across EU area, see G. Vernimmen-Vam Tiggelen, L. Surano, A. Weyembergh, The future of mutual recognition in criminal matters in the European Union, Bruxelles, Editions de l'université de Bruxelles, 2009; C. Jannsen, The Principle of Mutual Recognition, op. cit.; on mutual recognition and extraterritoriality, see Nicolaidis and Shaffer, Transnational Mutual Recognition Regimes: Governance without global government, in 68 Law and Contemporary Problems (2005), p. 267

25 Among the plethora of studies on approximation of EU criminal law, see A. Bernardi, L'armonizzazione delle sanzioni in Europa: linee ricostruttive, in G. Grasso, R. Sicurella (ed), Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale, Milano: Giuffrè, 2008, pp. 76-132; A. Klip, European Criminal Law, op. cit., p. 32; A. Weyembergh, L'harmonisation des législations pénales: condition de l'espace pénal européen et révélateur de ses tensions, Bruxelles: Editions de l'Université de Bruxelles, 2004, pp. 31–36. A. Weyembergh, The function of approximation of penal legislation within the European Union, in 12 Maastricht Journal of European and Comparative Law 2 (2005), pp. 149-172. A. Weyembergh, Approximation of criminal laws, the Constitutional Treaty and the Hague Programme, in Common Market Law Review, (42) 2005, pp. 1574 onwards. A similar stand is taken by A. Bernardi, Politiche di armonizzazione e sistema sanzionatorio penale, in T. Rafaraci (ed), L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia, Milano: Giuffrè, 2007, pp. 199 onwards. I tre volti del diritto penale comunitario, in Rivista Italiana di Diritto Pubblico Comunitario, 1999, pp. 333 onwards.

Having outlined the broader context in which the power to detain has been developing at EU level, now I move on to EU citizenship law, by paying special attention to the concept of residence. Then, I hone in on *integration* and *reintegration*, by highlighting why: they are inextricably related to residence; they are decisive to the analysis of the two scenarios considered.

3. Residence, integration and reintegration

I contend that the conceptual couple *integration*/*reintegration* is key to understanding the role of nationality links in the EU approach to detention. Before going into the detailed analysis, I have to elaborate on the key features which lie behind these concepts: namely, *the meaning of* and *the right to* residence of EU citizens in the host Member State.[26] By right to residence, I mean the right to permanent residence in the host Member State. It is important to draw a distinction between the concept of legal residence and the right to residence. They are inextricably linked, but the former is a logic *prior* to the latter. The having spent a given timeframe of legal residence in a host Member State allows the achievement of right to residence and many other rights. Furthermore, it outlines the scope of application of important provisions of EU law. This may hold true for those EU criminal law instruments discussed in this article, namely the EAW,[27] the transfer of prisoners and the probation measures FDs.[28] Residence is also essential to EU citizenship, and in particular the Citizenship Directive. As Kochenov argues, only a limited number of rights is uniquely associated with the status of citizenship as such. One of these is residence security, namely the unconditional right to enter and stay in the territory of a polity. 'Residence security is at the core of what the essential legal essence of the citizenship status is now about', which also explains why (even the mere possibility of) being deported and expelled 'play(s) an essential role in outlining with clarity the scope of those who are citizens of a polity, as opposed to merely residents'.[29]

Both *the definition of* and *the right to* residence are key to the law of EU citizenship in the following way. In a broad sense, such a status has been defined as granting every Union citizen the entitlement to move and reside freely within the Union regardless of their nationality,[30] and without requiring links to the performance of an economic activity.[31] More precisely, EU citizenship has been related to the principle of non-discrimination on grounds of nationality.[32] Such a link, established by the Court of Justice, is currently codified in Articles 18, 20

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[26] G. Davies'Any Place I Hang My Hat?' or: Residence is the New Nationality, in European Law Journal, Vol. 11, No. 1, January 2005, pp. 43–56.

[27] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002.

[28] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20, 11.11.2009; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102, 16.12.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L327/27, 5 December 2008.

[29] D. Kochenov and B. Pirker, Deporting the Citizens Within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v. Oberbürgermeisterin der Stadt Remscheid, in (2013) Columbia Journal of European Law 19:2, pp. 374 onwards.

[30] Case C-224/98, D'Hoop, [2002] ECR 6191, para 28; Case C-184/99, Grzelczyk, [2001] ECR I-6193, para 31; Case C-138/02, Collins, [2004] ECR I-2703, para 61 onwards.

[31] Grzelczyk, para 36-37; Case C-413/99, Baumbast, [2002] ECR I-7091, para 81. Furthermore, the possibility as to the self-standing status of EU citizenship came particularly to the fore lately, with the 'family reunification saga' fueling the debate in this respect (See Case C-34/09, Ruiz Zambrano [2011] ECR I-01177; Case C-256/11, Dereci [2011] ECR I-11315; Case C-434/09, McCarthy [2011] ECR I-03375). However, for the time being EU citizenship rights are relied upon with no regard to the exercise of free movement only when national measures would force individuals to leave EU territory (McCarthy, paras 50-55). For a commentary, see among many A. Hinarejos, Citizenship of the EU: clarifying 'Genuine enjoyment of the substance' of citizenship rights, in Cambridge Law Journal, Volume 71, Issue 02, July 2012, pp. 279-282.

[32] See Case C-76/05, Schwarz [2007] ECR I-6849, para 89. See also J. Shaw, Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism, EUI Working Papers RSCAS 2010/60, pp. 9 onwards.

and 21 of the TFEU, under the heading 'Non-Discrimination and Citizenship'. On the other side, the Treaty provisions are further implemented by Directive 2004/38/EC,[33] where the rights borne by EU citizenship are outlined, as well as the ways to achieve them. The Directive provides the conditions on which the right to free movement and residence across the EU is granted on the Union's citizens and their family members, independently of their nationality. The main purpose of the Directive is promoting social cohesion and giving Union citizens chances of integration throughout the EU. To this end, EU citizens and their family members are granted the unconditional right to residence in the host Member State for a period of up to three months. Should the staying be longer, the right is made subject to specific requirement.[34] The right to permanent residence, provided for in Article 16, is conferred upon Union citizens after they have legally resided for a continuous period (which is not affected by temporary absences) of five years in the host Member State. Once acquired, the right of permanent residence shall only be lost through absence from the host Member State for a period exceeding two consecutive years.

Moving on to the conceptual couple *integration*/*reintegration*, their relevance is transversal too. As shown, integration is an essential element of EU citizenship. Such a salience is heightened by the fact that function and nature of integration are far from straightforward. This uncertainty is confirmed when looking upon the *ways* in which EU citizenship is interpreted. In particular two issues arise, as far as the present discussion is concerned. Firstly, the extent to which (and with what consequences) prison time may show a lack of integration in the host Member on the part of the person concerned. Secondly, the relationship between integration and the right to residence. Whether the former is understood in relation to the latter as an aim, a requirement or both can make a huge difference.

Also reintegration is relevant for a number of reasons. In particular, it is traditionally considered a fundamental function of criminal sanctions. This proves to be true both at national and international levels, with rehabilitation being recognized by Member States' constitutions,[35] as well as by the EU[36] and the Council of Europe (CoE).[37] On the other hand, reintegration is a crucial element of EU mutual recognition instruments on detention. In the EAW FD reintegration founds an optional ground for refusal of execution; on the other hand, it is the inspiring principle which imbues other FDs on the whole.

As I show below, the *fil conducteur* between these two concepts is residence. In the following section I put in relief how they are central features to detention and citizenship at EU level (and not only), both from a legislative and judicial viewpoint.

4. Two scenarios

4.1 The surrender of nationals before and after the Tampere Program

In order to better present the following analysis, I locate the following analysis in the broader context of the surrender of nationals. As known, the EAW (and, more generally, the application of mutual recognition to criminal matters) have constituted an actual breakthrough in mutual legal assistance between Member

33 For a commentary, see E. Guild, S. Peers, J. Tomkin, The EU Citizenship Directive. A Commentary, Oxford: Oxford University Press, 2014.

34 Directive 2004/38/EC, Articles 6(1) and 7(1).

35 Concerning Germany, see Article 2 of the Law on the execution of sentences of imprisonment (Strafvollzugsgesetz). With regard to Spain and Italy Constitutions, see Article 25(2) and Article 27(3) respectively.

36 European Parliament Resolution on respect for human rights in the European Union (1997) (OJ 1999 C 98, p. 279), where it is stated that custodial sentences must have a corrective and reintegrative function (para 78).

37 See Recommendaiton No R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 12 February 1987 and replaced by Recommendation Rec(2006)2, adopted on 11 January 2006. See also the Convention of the Council of Europe on the Transfer of Sentenced Persons of 21 March 1983.

States.[38] The EAW is the first and most prominent instrument of mutual recognition in EU criminal law.[39] The stated purpose of the FD is that of replacing the extradition procedure with a smoother and swifter system of surrender between judicial authorities.[40] The introduction of the EAW FD has been groundbreaking for a number of reasons (among others, abolishing the principle of dual criminality, allocating the responsibility for the surrender on judicial rather than political authorities). One of the most important changes (and not only for the purposes of this article) is the (almost complete) drop of the prohibition for a state to extradite its own nationals (also referred to as 'nationality exception' or 'nationality ban'). Indeed, the latter can be considered 'a constant feature of extradition law in most civil law countries',[41] and is often accompanied in international law instruments by the rule *aut dedere aut judicare* (obligation either to extradite or to prosecute).[42]

The understanding of the non-extradition of nationals may vary. On the one hand, it is regarded as being based on 'a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment such prohibition constituted'.[43] On the other, according to some scholars the nationality exception has inherent guarantees. In particular, the following considerations should be borne in mind: the person has the right not to be withdrawn from his natural judge; the state owes its subject the protection of its law; it is impossible to trust foreign justice systems, especially when the treatment of foreigners is stake; it is disadvantageous to be tried in a foreign language separated from friends, resources and character witnesses.[44] However the objective of creating an ever closer Union, with mutual trust playing a major role in this respect, made such arguments hardly tenable. Coherently with this picture, the EAW FD did not come out of the blue. Firstly, one should mention Article 66 of the 1990 Convention implementing the Schengen Agreement, which refers to the possibility for Member States to extradite their nationals without extradition formalities (as long as the surrendered has agreed before a court and s/he has been informed on his/her right to the extradition procedure). Secondly, the 1996 EU Convention on Extradition between Member States must be referred to, which was aimed at limiting the possibility of application of the nationality ban. Such a gradual route was significantly stepped up by three main factors, so leading to the passing of the EAW: the adoption of the Rome Statute of the International Criminal Court (ICC), which distinguishes the state-to-state extradition from the surrender to the ICC, with the latter excluding the possibility of a nationality exception. The Tampere Council Meeting in 1998, where mutual recognition was set as the cornerstone of judicial cooperation in criminal matters within the EU; the terroristic attack to the World Trade Center on 9/11/2001, urging the Union to put into effect actual *EU* instruments to fight crime.

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[38] For an analysis also of the policy context, see N.Keijzer, The European Arrest Warrant Framework Decision between Past and Future, in E. Guild (ed.), Constitutional Challenges to the European Arrest Warrant, Nijmegen: Wolf Legal Publishers, 2006; V. Mitsilegas, The Constitutional Implications, op. cit; S. Peers, Mutual Recognition and Criminal Law, op. cit.; S. Alegre and M. Leaf, Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant, European Law Journal, Vol. 10, No. 2, March 2004, pp. 200–217.

[39] However, other instances of this kind can also be find outside the judicial cooperation within the EU. See in this respect the Nordic Arrest Warrant. G. Mathisen, Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond, in Nordic Journal of International Law 79 (2010), pp. 1–33.

[40] At the time of the adoption of the EAW FD, the instrument in force was the 1957 CoE Convention on Extradition CETS No.: 024, 18 April 1960.

[41] M. Fichera, The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?, in European Law Journal, Vol. 15, No. 1, January 2009, pp. 79.

[42] See, for a recent overview, the 2015 Final Report of the International Law Commission, The obligation to extradite or prosecute (aut dedere aut judicare). On the other had, common law systems usually authorize the extradition of their own nationals.

[43] M. Plachta, Non- extradition of nationals: A never-ending story?, in 13 Emory International Law Rev. (1999), p. 77.

[44] S. A. Williams, 'Nationality, Double Jeopardy, Prescription and the Death Sentence As Bases for Refusing Extradition', 62 International Review of Penal Law (1991) p. 259 at pp. 260-261, citing the findings of a 1878 British Royal Commission chaired by Lord Cockburn. For a helpful reconstruction of the debate on the extradition of nationals, see Z. Deen-Racsmány and R. Blekxtoon, The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant, in European Journal of Crime, Criminal Law and Criminal Justice, Vol. 13/3, pp. 317–363, 2005.

As to the foundation of the removal of the nationality exception, it is interesting to note that the Commission, in its EAW FD Proposal, explicitly established a link between the drop of the nationality exception and EU citizenship, with the latter status eroding the importance of nationality links even with regard to the surrender for detention purposes.[45] This nonetheless the implementation of the EAW FD at the national level, and the subsequent overcoming of the nationality ban, have been known to be a difficult path.[46] This can be traced back to two main circumstances. Firstly the heterogeneity, within the EU, of national constitutional 'attitudes' to the prohibition of extradition of nationals. In this respect, it is appropriate to highlight the different levels of 'protection' present at the time of adoption of the FD: Member States having no constitutional provisions on the subject matter (Belgium, Denmark, France, Greece, Ireland, Luxembourg, Spain and the United Kingdom); Member States explicitly or implicitly allowing for the surrender of nationals under extradition procedures (Malta, Hungary and Sweden); Member States prohibiting the extradition of nationals (Poland and Cyprus); Member States which have constitutional provisions prohibiting the extradition of nationals, but at the same authorise international treaties to limit it (Italy, Netherlands). The picture is tangled up by the fact that often Member States have also a constitutional provision obliging them to comply with duties stemming from EU or international law.

In order to adjust their legal framework to the surrender of their own nationals, some Member States have amended their constitutions (Germany, Portugal and Slovenia), or have carried out para-constitutional law revisions (Finland). Furthermore, more than one Constitutional Court has been faced with the task of reconciling the obligation to abide by EU law with its constitutional nationality ban.[47] By way of example, the Polish Constitutional Court reached a balance as follows: while annulling the national law implementing the EAW FD, the Court provided its decision with provisional effects, so as to allow the legislator to adopt the necessary amendments to the Constitution and subsequently reintroduce the annulled provision into the Polish legal system. At the same time, the annulled provision temporarily remained in force.[48] On the other hand, the German Constitutional Court declared the incompatibility of the German law implementing the EAW FD with the German Constitution. In particular, the German law had not implemented those optional grounds for refusal provided for in the EAW FD, which would have established a significant domestic factor.

The second circumstance which has endangered the correct implementation of the EAW FD has to do with the FD itself, and in particular the ways in which the Member States have incorporated Articles 4(6) and 5(3). As I show below, a heated debate flourished as to the compatibility of these national rules with EU law. Both of these provisions authorise national judges to refuse the execution of an EAW. According to Article 4(6), 'if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.[49] As one can easily notice, this provision does more than simply recalling the nationality exception. It added the

[45] However, this view has been strongly criticized. See in this respect F. Impalà, The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice, in 1 Utrecht Law Review (2005), pp. 56-78. See also the judgment of the Polish Constitutional Court on the EAW FD.

[46] For specific analysis on the English and Italian case, see: J. R. Spencer, Implementing the European Arrest Warrant: A Tale of How Not to Do it, in Statute Law Review 30(3), pp. 184–202; L. Marin, The European Arrest Warrant in the Italian Republic, European Constitutional Law Review / Volume 4 / Issue 02 / June 2008, pp. 251 - 273.

[47] See J. Komárek, European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles, in Common Market Law Review 44: 9–40, 2007; Z. Deen-Racsmány, The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges, in European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14/3, pp. 271–306, 2006.

[48] A similar outcome occurred in Cyprus, where the Supreme Court found the incompatibility between the implementing law and the national Constitution (prohibiting the extradition of nationals). In order to comply with EU obligation, the Constitution has been changed.

[49] For reflections on the principle of non-discrimination on the basis of nationality and the EAW L. Marin,'A Spectre Is Haunting Europe': European Citizenship in the Area of Freedom, Security, and Justice. Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant, in European Public Law, Vol. 17, Issue 4, pp. 705-728.

condition of 'residence' or 'staying in' to the nationality link. It is exactly this 'enlargement' which constituted the main ground for strengthening EU citizenship. Under Article 5(3), execution may be refused 'where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State'.

So far, I made it clear how the application of mutual recognition to EU criminal law has had the considerable effect of turning the nationality ban into an exception throughout the Member States legal systems. In the following paragraphs, I firstly analyse how the Court has understood the nationality link in relation to the execution of a EAW (actual interactions). In this sense, the rulings have regarded the interpretation of Articles 4(6) and 5(3) EAW FD. I hereby highlight: the initial inconsistency of this case-law, especially when looking at the first two rulings (*Kozlowski* and *Wolzenburg*); the recent improvement in the Court's approach (especially with regard to fundamental rights protection), as shown by the *Lopes Da Silva* and *I. B.* decisions. Thereafter, I present the second scenario, revolving around other mutual recognition instruments on detention. The latter, though not yet subject to a reference to the ECJ, are capable of actually affecting the role of nationality, when spending a period in detention is at stake.

4.2 Actual interactions

Kozlowski[50] and *Wolzenburg*[51] revolved around the interpretation of Article 4(6) of EAW FD. Such a provision allows the national judge to refuse the execution of a EAW, where 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'. Kozlowski regarded a Polish national who was convicted to a custodial sentence in Germany in 2006. In 2007 the Polish authorities issued an EAW against him for another conviction. The core of the reference regarded the function to be attached to Article 4(6) EAW FD and the meaning of the terms 'resident' and 'staying in'. The attorney general (AG) put in relief the relevant function of this rule, that is to say facilitating the reintegration of the convicted person at the end of his sentence. Though not expressly stated in the FD, such a function may be inferred from a number of elements. Generally speaking, both at EU and CoE levels it has been stated that prison sentences are intended to have a corrective and a social rehabilitation function, and that their main objective is the human and social reintegration of the prisoner. In these documents the Member States hold that imprisonment regime should not cause the detainee to feel excluded from the community. This is possible when detention conditions help the person concerned preserve his family life, as well as (re)acquire employment at the end of the sentence. Moreover, the AG highlighted that the reintegration of the person concerned should be a central interest of the Member States in preventing crime, as the prisoner will come back to society once the sentence has been served. The more the rehabilitative function works, the less the likelihood that the person concerned will re-offend.

Drawing the boundaries of the concepts of 'staying in' or being 'a resident of' is key to correctly interpreting Article 4(6). Firstly, those expressions have to be independently and uniformly defined at EU level. In particular, the concept of residence has been defined in a number of EU measures, but it has to be interpreted in light of the aim of the provision in which it is mentioned. In this case, the national judge should bear in mind the link

[50] Case C-66/08 Kozlowski, [2008] ECR I-6041.

[51] For comments see E. Herlin-Karnell, Case comment Wolzenburg C-123/08, The Modern Law Review, 73(5), p. 824; V. Mitsilegas, The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, in Yearbook of European Law, Vol. 31, No. 1 (2012), pp. 338 onwards; T. Marguery, EU citizenship and European Arrest Warrant: The Same Rights for All?, in Utrecht Journal of International and European Law, 2011, Volume 27, Issue 73, Case Note, pp. 84–91; C. Janssen, The Principle of Mutual Recognition, op. cit., pp. 207 onwards.

between the place where a person is serving a prison sentence and the chance to be reintegrated into the society. That being so, the executing judicial authority must examine all the facts relevant to the individual situation of the person concerned. On the one hand, elements are to be considered such as family and social links, use of the language, the availability of a place to live, having a job, and the length of residence in the State, together with the intention of the person concerned to stay there when he is no longer held in custody.

On the other, the circumstance that the requested person is being held in custody or that he systematically commits crimes in the executing State does not automatically exclude him from the scope of Article 4(6), provided that he is a citizen of the Union and/or has not been delivered an expulsion decision adopted in compliance with EU law.

The Court agreed with the AG, as to the reintegrative function of Article 4(6). Concerning the meaning of resident and staying in, the ECJ found that the former covers those situations in which the requested person has established his actual place of residence (intended as the main center of interests) in the executing Member State. On the other side, the same person is 'staying' when, following a stable period of presence in that State, he has acquired connections with it which are of a similar degree to those resulting from residence. In order to establish whether this is the case, the national court must take into consideration factors such as the length, nature and conditions of presence and the family and economic connections which that person has with the executing Member State .

A significant involution in the Court's approach can be seen in *Wolzenburg*. The case regarded a German national who moved from Germany to Netherlands in 2005 with his wife, and who was employed and then began an apprenticeship therein. In 2006, the German authorities issued a EAW against Mr Wolzenburg. The referring court asked for a preliminary ruling related to the compatibility of the Dutch law implementing the EAW FD with the latter EU instrument. The Dutch law distinguished between Dutch and other nationals. As for the first category, the refusal of the execution was automatic. However, should the warrant have involved a non-Dutch national, the domestic judge should have verified whether or not the person concerned was in possession of a residence permit of indefinite duration, achievable by virtue of Article 16 of the Citizenship Directive (namely after five years of residence therein). Therefore, at stake there was in particular the compatibility of such a distinction with Article 4(6) and/or the principle of non- discrimination. The AG regarded the national law as detrimental to the reintegrative function from a twofold perspective. For nationals of the executing State, since the judge could not consider whether the person concerned had with that state only a formal connection in terms of nationality. For nationals of other Member States, which are staying in or resident of the executing Member State, but have not acquired yet a residence permit of indefinite duration. Such an approach would exclude from the application of Article 4(6) all those individuals who are not yet (formally) resident, but who are 'staying' therein, having established familiar social and working links in the executing State. Furthermore, the national law would be contrary to the principle of non-discrimination, which requires that comparable situations must not be treated differently unless such treatment is objectively justified and proportionate. Lastly, it would manifestly sit at odds with the structure and objectives of Article 4(6), under which nationals of other Member States are to be treated in the same way as nationals of the executing State.

Unfortunately, the Court regarded such a difference of treatment as falling under the margin of discretion granted to Member States by Article 4(6). The Member State of execution is therefore entitled to pursue the reintegration objective only with those persons who have demonstrated a certain degree of integration in the society of that Member State. This allows the refusal of surrendering a Member State's nationals, as well as the requirement of a five-year period of residence in that state for other EU citizens. The Court stated that Article 4(6) precludes a Member State from making the application of that ground for refusal subject to the possession of a permanent residence permit. However, it found that the principle of non-discrimination does not preclude

the refusal of executing the EAW against its own nationals, while requiring other EU citizens to have lawfully resided therein for a continuous period of five years.

In *Lopes Da Silva,*[52] the ECJ was asked as to the compatibility of the French law implementing the EAW FD with the principle of non-discrimination. In particular, the national legal regime automatically excluded non-French nationals from the scope of Article 4(6). As a preliminary point, the AG referred to Article 1(3) EAW FD, where it is stated that the FD 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in European Union law'. Then, he opined that protecting dignity of the sentenced person should be the 'overriding concern' of Member States (when implementing/applying EU law) and the ECJ (when fulfilling its interpretative task).[53] In this sense, Article 4(6) clearly conveys the need to reach a balance between the smooth functioning of mutual recognition and the achievement of detainees' rehabilitation. The French law ran counter that objective, as was based on the assumption that only nationals of that state can have the connection required by Article 4(6). That argument could not be accepted for three main reasons: it was contradicted by the same wording of the FD; derogations from the principle of non-discrimination may be allowed where they comply with the principle of proportionality, which was not the case in *Lopes Da Silva*; freedom of movement and residence defies 'the presumption that a sentenced person has the best chance of reintegrating into society only in the State of which he is a national'.[54] The Court recognised the function underlying Article 4(6), and found that Member States must exercise their discretion consistently with the duty to respect fundamental rights laid down in the FD.[55] Furthermore, Member States cannot exclude a non-national from the scope of Article 4(6), without allowing an individual assessment.

A further improvement in the Court's approach is given by *I. B.,*[56] which revolved around the interpretation of Article 5(1)[57] and (3). Those provisions respectively allowed to make the surrender conditional to the possibility to apply for a retrial, where the EAW was based on a judgment delivered *in absentia* and/or the condition that the surrendered is returned to the executing state, when s/he is a national or resident of the latter. The EAW had been issued under Article 5(1), but *I. B.* was also a resident of the executing Member State. Therefore, the question arose as to what paragraph was applicable in that case. In order to solve the dilemma, the AG stated that the FD must be applied by balancing *the streamlining of judicial cooperation* with *the protection of fundamental rights*. The latter indeed was regarded as a precondition giving 'legitimacy to the existence and development of the area of freedom, security and justice'.[58] In particular, at stake there was the objective of 'enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'.[59] In the absence of an explicit say from the wording of the provision, an interpretation should be given so as not to conflict with the FD's aims just described. The ECJ espoused the AG's Opinion. Firstly it recognised that both Articles 4(6) and 5(3) have the function of increasing the chances for the person concerned to be reintegrated into the society. In this respect, nothing in the FD indicates that persons convicted *in absentia* – so falling under the scope of Article 5(1) - should be excluded from that objective. Nor the guarantee that the surrender is made

[52] Case C-42/11, Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge, 5 September 2012, para 49.

[53] Lopes Da Silva, AG's Opinion, para 28.

[54] Ibidem, para 51.

[55] Lopes Da Silva, Court's judgment, para 34.

[56] Case C- 306/09, I.B., ECR [2010] I-10341.

[57] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009.Article 5(1) has been deleted and substituted by the legal framework provided for in FD 2009/299/JHA. What is interesting for the purposes of this paper is the use of the argument related to fundamental rights.

[58] I. B., AG's Opinion, para 43.

[59] Kozlowski, para 45, and Wolzenburg, para 62.

conditional upon the possibility of a retrial can affect in any way the pursuit of that function. Quite the contrary, that guarantee would permit the case to be retried, so rendering that surrender a surrender for the purposes of criminal prosecution, which is the situation envisaged by Article 5(3).

4.3 Potential interactions

To examine the potential interactions between EU criminal law and EU citizenship, one has to consider specific instruments related to detention adopted by the EU, namely, the Framework Decisions on post-conviction supervision measures, on recognition of probation orders and alternative (non-custodial) sanctions, and on custodial sentences.[60] These instruments give rise to some considerations, as to their potential impact on EU citizenship. For instance, the FD on custodial sentences foresees, in certain cases, the transfer of prisoners from a Member State to another without requiring the consent of the sentenced person. The transfer may take place, *inter alia*, when the executing State is where the sentenced person lives. Such potential obligation is grounded in the presumption that the social rehabilitation will better take place in the executing State.[61] The system built on by the FD may attach to imprisonment drawbacks deemed too severe. Once the consent of the prisoner has been removed, the occurrence of a circumstance provided for in the FD would suffice to force the person out of the Member State where he/she is staying. In this respect, such a measure has been seen as resembling an expulsion from the Member State, but divested of the guarantees of the Directive 2004/38/EC.[62]

Admittedly, the FD allows for a compulsory transfer, e.g. to the Member State where the prisoner *lives*. There seems to be required a rather strong link with the State in question. It then might be difficult if, for instance, the person concerned has already acquired the right of residence in the host Member State, at the moment he/she is imprisoned therein. Nonetheless, the risk may be that the FD lends itself to abuses. First and foremost, it is not clear which is the meaning of 'living': whether it may be equated with 'residing' or not, and what follows from either cases. Articles 27 and 28 of the Citizenship Directive authorise expulsion of an EU citizen (namely, forcedly moving him/her from the host Member State) only when: an individual assessment has been carried out; the expulsion decision has been adopted on grounds of public policy, public security or public health. These two circumstances are always required, also when no right of residence has been reached by the EU citizen. Furthermore, pursuant to the Directive, previous criminal convictions per se may never constitute grounds for taking expulsion measures. In this context, the FD makes no helpful references to Directive 2004/38/EC, save where the preamble states that the FD should be applied in accordance with the Citizenship Directive.[63] Which may be the consequences of such a statement remains unclear, since one may object that the transfer of a EU citizen from a host Member State might run counter the requirements laid down in the Citizenship Directive.

Turning to the FD on probations decisions, it slightly increases the involvement of the detainee. The FD provides that the recognition of a probation measure is carried out as long as the sentenced person has returned or wants to return to the State in which he/she is 'lawfully and ordinarily residing' and the individual has opted for another Member State, with the latter having allowed for the execution.[64] Also in this case, the

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[60] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20, 11.11.2009; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102, 16.12.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L327/27, 5 December 2008.

[61] Framework Decision 2008/909/JHA, Article 6(2).

[62] See on these aspects V. Mitsilegas, The third wave of third pillar, in European Law Review, (2009) 34, pp. 541 onwards.

[63] Framework Decision 2008/909/JHA, recital 16.

[64] Framework Decision 2008/947/JHA, Article 5.

residence is put in the limelight. The concept at issue seems to fulfil a pivotal role, within the framework of the FD. The instrument discussed might significantly contribute to the social reintegration of the convicted person, with the latter being allowed to serve the sentence in the Member State where he/she is mainly linked. This appears even more true on considering that the detainee may express a preference, with regard to the Member State which should recognise the measure. On the other side, doubts arise as to which meaning is to be given to 'lawful and ordinary residence'. It should be noted that Directive 2004/38/EC is not mentioned at all. The same holds true for any other secondary law instruments. So as things stand at present, there are no legal references capable of clarifying how to interpret the FD: whether a relation of residence between the prisoner and the Member State in question may be triggered by the sole individual preference or whether the assessment must be grounded on objective factors, and if so, which such elements should be. One may hold the 'residence' as outlined by the ECJ in *Koslowski* or *Wolzenburg*, but no indications are supplied in this respect.

5. Concluding remarks

The (actual and potential) interactions between EU criminal law and EU citizenship reveal the importance of the concepts of residence, integration and reintegration to the research question of this paper. Under Article 4(6) EAW FD, the state undertakes the reintegration of prisoners on the basis of a link other than that of nationality, namely the residence or the staying in of the person concerned. The AG stated that *residence* is a manifold concept, which changes according to the function of the provision in which it is mentioned. The possibility for the person concerned to rely on the concept of staying in is groundbreaking. The residence has become a recurrent element and is referred to in many instruments of EU law. Whereas the 'staying in' factor testifies how the role of nationality links is being reshaped even in a nation-based area such as that of individuals' rehabilitation. This is confirmed by the FDs on transfer of prisoners and on probation measures, where for the purposes of facilitating the reintegration of the detainee, he/she may serve the sentence in the country where they *live/are lawfully and ordinarily residing*. As reintegration logically presupposes integration, the latter is the substantive link required with the state dealing with the rehabilitation. Such an approach based on the verification of the effective relation with the Member State concerned might ensure a higher protection to prisoners, rather than a formal perspective only grounded on the formal link constituted by nationality.

However one may not ignore a number of shadows hanging over this picture. The first aspect regards the uncertainty surrounding the reach of *residence*. On the one hand, the Court in *Kozlowski* did not explicitly embrace the manifold nature of residence proposed by the AG. On the other, there has not been so far the opportunity to clarify the meaning of *lawfully and ordinarily residing* and (mostly) *living*. As the purpose of these provisions is the personal rehabilitation, their interpretation in the sense of *Kozlowski* should naturally follow. However, the Court has not spent words on the relationship between the concept of residence and the aims of the provision in which it is alluded to. This need for clarity is further required by the removal of prisoners' consent as to his/her transfer. More precisely, the detainee has no role to play on his rehabilitation process, where one of the circumstances provided for in the concerned FD takes place.

Moreover, the concrete application of Article 4(6) in *Wolzenburg* represents a step back in EU prisoners protection. In *Kozlowski*, the Court distinguished between *resident* and *staying in*, by implicitly admitting that the provision in question may apply even to whom is not properly a resident in the host Member State. In *Wolzenburg* this commendable approach is forgotten. The irrefutable presumption of integration when it comes to nationality is legitimised. Concerning other EU citizens, the outcome of the judgment is even more paradoxical. Article 4(6) precludes the requirement of a residence permit of indefinite duration, but the principle of non-discrimination allows the condition of having resided for a continuous five-year period in the executing state: which is, however, the term provided for in the Citizenship Directive to acquire the right to permanent residence in the host Member State. This nonetheless, some commentators have welcomed the Court's approach in *Wolzenburg*, as '[t]o overcome the old system built on sovereignty and nationality and to

provide for equal treatment based on mutual recognition in a Union-wide area of justice, is a task to be pursued through thorough steps of EU legislation which also provides for the necessary preconditions (i.e. sufficient approximation) […] Once again we have to remember that mutual recognition which deprives citizens of rights they formerly had (here: the special protection as a national) cannot be boldly decreed by primary law but must be carefully provided for, step by step, by responsible legislation which guarantees a sufficient level of protection to the individual'.[65] In this respect, one should recall that since then two major changes has occurred, with regard to mutual trust, on the one hand, and protection of fundamental rights in relation to the EAW FD, on the other. As to the former, the Court has recognised that the presumption of respect of fundamental rights by all Member State, on which mutual trust and mutual recognition are based, is a refutable one. Concerning the latter, three Directives have been adopted, which approximate fundamental aspects of criminal procedure and also regard the execution of a EAW: namely, the Directives on the rights to interpretation and translation, to information and to access to a lawyer.[66]

Furthermore, *Wolzenburg* can be seen as an exception also in light of the subsequent ECJ's case-law on Articles 4(6) and 5(3). In *Lopes Da Silva*, the compatibility of an automatic exclusion of non-nationals from the scope of application of Article 4(6) was ruled out. Furthermore, the importance of applying and interpreting the EAW in compliance with fundamental rights was referred to. *I. B.* was issued in the wake of the same spirit.

In conclusion, one can see the relevance of nationality links has significantly diminished over the last years, especially with regard to the execution of custodial sentences and detention order. On the other side, there are elements of resistance in EU law, which limit a more advanced development in this respect.

[65] M. Möstl, Preconditions and Limits of Mutual Recognition, in (2010) 47 Common Market Law Review, Issue 2, p. 422.

[66] Directive 2010/64/EU of the European Parliament and of the of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 280/1, 26.10.2010; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1, 6.11.2013.

NATIONALS, CITIZENS, LONG-TERM RESIDENTS, SHORT-TERM RESIDENTS, PLAYING HAVOC WITH TRADITIONAL CATEGORIES OR BUILDING UP NEW ONES?

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The EU Citizenship was created in order to legitimize the action of the EU, aiming at building up a straight relation between the organization and the citizens of the Member Countries, a narrative intended to make way and gain support from the nationals of states not as mere addressees of the norms, but as political actors in the integration process. The acclaimed step taken in 1992 and its perspectives seem to have been a storm in a tea cup after 13 years of (under?) development and frustrated expectations, most of them provoked by the fact that the catalogue of rights supposed to make up the special status of EU citizens are, on closer inspection, far from being exclusive. One of the reasons pinpointed to justify the current position of EU citizenship is related to the historical development of this juridical figure, given that, as D. Kochenov has put it:

'While EU citizenship quite clearly pre-dates the Treaty of Maastricht, its pre-Maastricht emanation was necessarily and unquestionably driven by the logic of the internal market, as the proto-citizenship emerged directly from the economic free movement provisions coupled with the non-discrimination instruments directly connected to the functioning of the economic freedoms. This is not to say, though, that this meant that only strictly economic actors were covered. From its early days, market-based integration tended to outgrow the market –this is what spill-over is about after all. To put it differently, already before the entry into force of the treaty of Maastricht, the proto-citizenship of the EU-to-be was not co-extensive in its scope with the market freedoms sensu strict […] *Crucially, Part II TFEU does not define EU citizenship with reference to the internal market. More important still, it does not require the citizens to engage with the internal market in any way. The distinct nature of the concept is also confirmed by the preamble and Article 3 TEU, which refers to EU citizenship in the context of building an area of freedom, security and justice for the citizens, rather than the internal market'*[67]

In addition to this, the logic inherent to the integration process and the nature of competencies of the very Union do play a role.[68] The Union Citizenship is confined by the competencies of States, for instance, in matters of nationality attribution or deprivation,[69] and as a national competence subjected to international law, some decisions of EU Member States may pose problems in cases where the attribution or deprivation of nationality could respond to the political environment or aspirations of States and not to a real situation or nexus between the country and the person, such as the ICJ has highlighted for instance in the Nottebohm case.[70] By the same token other Member States have chosen to leave aside minorities and not to grant them the nationality of State, even raising the question of up to what extent a State could complicate the gaining of nationality of

[67] KOCHENOV, D., 'The Citizen Paradigm", *Cambridge YBELS,* 2012-2013, pp. 197-225, pp. 212 and 213; a more nuanced vision may be found in AMADEO, S., 'Il principio di eguaglianza e la cittadinanza dell'Unione: il trattamento del cittadino europeo 'inattivo", *Il Diritto dell'Unione Europea,* 2011, pp. 60-94.

[68] See CONDINANZI, M., LANG, A. and NASCIMBENE, B., *Cittadinanza dell'Unione e libera circolazione delle persone*, Second Edition, Giuffrè, Milan, 2006.

[69] Although they must respect EU law, see FORNI, F., 'Cittadinanza dell'Unione europea e condizione delle minoranze negli Stati membri", *Il Diritto dell'Union europea,* 4/2010, pp. 835-867.

[70] ICJ, Judgment 6 April 1955, *Nottebohm case (second phase) ICJ Reports, 1955,* p. 23:'On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States" http://www.icj-cij.org/docket/files/18/2674.pdf (30-5-2015).

persons pertaining to those minorities, as the doctrine has suggested concerning the status of the Russians in Latvia.[71]

Moreover, 'at the Tampere European Council on 15-16 October 1999, the EU countries have stressed the need to ensure fair treatment of third country nationals residing legally in the EU. In particular, all third-country nationals permanently resident in an EU country should be granted a set of uniform rights as close as possible to those enjoyed by citizens of the European Union (paragraph 21 of the Tampere conclusions).'[72] These kind of considerations have resulted in the Directive 2003/109 / EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, what creates a situation for these long-term residents in which they enjoy a series of rights common to those of citizens on the exclusive basis of residence, what to some extent could be even as hard as gaining nationality on account of naturalization. This coincidence of rights seems to blur the differences between citizens and long-term residents in a way that demands further comparison and explanation.

1. RIGHT TO VOTE IN EUROPEAN PARLIAMENT AND MUNICIPAL ELECTIONS, WHEN IN ROMA DO AS ROMANS

Certainly, the right to vote in European Parliament elections was conceived as a kind of gigantic step in the bridging the gap between EU and citizens, a direct and political relation that could allow a citizen to vote to the European parliament independently of the place where he or she ballots. This hopeful outset run short from the very moment the ECJ considered and proclaimed the following:

'74. Moreover, while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31), that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.'[73]

Therefore, the fundamental status foreseen by the Treaties and so declared by the very Court in its case-law appeared to have blurred in the way that it was made up by an array of rights that, conversely to what could be inferred at first sight, is not exclusive for EU citizens. This finding of the Court arises out of a Judgment that dealt with the inclusion or exclusion of Gibraltar population from EP elections, in the wake of the secular dispute between Spain and Britain, and concretely on the issue of the right to vote of the QCC (Qualifying Commonwealth Citizenship), who are not nationals of the UK but are conferred a special status, in the case, enabling them to vote in EP elections.[74] The Court was blunt in assessing the question:

'76.While that provision, like Article 19(1) EC relating to the right of Union citizens to vote and to stand as a candidate at municipal elections, implies that nationals of a Member State have the right to vote and to stand

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[71] FORNI, F., 'Cittadinanza dell'Unione europea e condizione...", *op.cit.,* pp. 851-857.

[72] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment /* COM/2003/0336 final , http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0336 (30-5-2015).

[73] ECJ, Judgment of the Court, 12-9-2006, C-154/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=63873&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=104358, 26-5-2015)

[74] GONZÁLEZ GARCÍA, I., 'TJCE- Sentencia de 12-09-2006, España/Reino Unido, C-145/04, Parlamento Europeo-Elecciones-Derecho de voto-Ciudadanos de la Commonwealth residentes en Gibraltar que no poseen la ciudadanía de la Unión", *RDCE,* 2008, 213-232; JARABO COLOMER, D., 'Por una interpretación pacífica de Matthews c. Reino Unido", *ADI,* 2002, 229-252; SÁNCHEZ RODRÍGUEZ, L. I., 'Sobre el Derecho internacional de los derechos humanos y Comunitario Europeo (a propósito de las Sentencia Matthews)", *RDCE,* 1999, pp. 95-108; SANZ CABALLERO, S., 'El control de los actos comunitarios por el TEDH", pp. 473-513.

as a candidate in their own country and requires the Member States to accord those rights to citizens of the Union residing in their territory, it does not follow that a Member State in a position such as that of the United Kingdom is prevented from granting the right to vote and to stand for election to certain persons who have a close link with it without however being nationals of that State or another Member State.'[75]

Words leave no room for doubt, non-nationals may be endowed with this right so far they have a close link with the residence country, thus, residence seems to be the salient factor as far as this political right is concerned. Therefore, EU law respects the competence of States to attribute this political right to a larger category of people, what seems to be backed also by Directive 93/109/EC, 6 December 1993, which lays down detailed arrangements for the exercise of the right to vote and to stand as a candidate in Elections to European Parliament for citizens of the Union residing in a Member State of which they are not nationals:

'Article 3 Any person who, on the reference date: (a) is a citizen of the Union within the meaning of the second subparagraph of Article 8 (1) of the Treaty ; (b) is not a national of the Member State of residence, but satisfies the same conditions in respect of the right to vote and to stand as a candidate as that State imposes by law on its own nationals, shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence unless deprived of those rights pursuant to Articles 6 and 7.

Where, in order to stand as a candidate, nationals of the Member State of residence must have been nationals for a certain minimum period, citizens of the Union shall be deemed to have met this condition when they have been nationals of a Member State for the same period.'[76]

The second paragraph of article three seems to cling the right to vote to nationals and allows Member States to require of new nationals a certain time of enjoyment of this status in order to vote and stand as candidate, what expressly gives the State the opportunity to introduce a difference between nationals admitted by secondary law.

The explanation is perhaps outside EU law and is to be found in the impact of human rights on EU legislation and the position of the ECHR in *Matthews v. UK* Judgment:

'34. In determining to what extent the United Kingdom is responsible for "securing" the rights in Article 3 of Protocol No. 1 in respect of elections to the European Parliament in Gibraltar, the Court recalls that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, for example, the above-mentioned United Communist Party of Turkey and Others judgment, pp. 18-19, § 33). It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the EC Treaty, the United Kingdom chose, by virtue of

[75] ECJ, Judgment of the Court, 12-9-2006, C-154/04, *Spain v United Kingdom.*

[76] *Official Journal of the Eurpean Communities, L329/34,* 30-12-1993, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0109&from=ES (25-5-2015)

Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar (see paragraphs 11 to 14 above).'[77]

And given that the ECHR is firmly convinced that the EP is a legislature from Maastricht treaty on,

'64. The Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the "first-past-the-post" system or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation. However, in the present case the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament. The position is not analogous to that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction. In the present case, as the Court has found (see paragraph 34 above), the legislation which emanates from the European Community forms part of the legislation in Gibraltar, and the applicant is directly affected by it.'[78]

The point is clear, the European Convention applies to the territory of member States, Gibraltar is party of UK territory, so the rights of the Convention are not to be neglected. The leap of faith comes here when the ECJ adds that those qualifying as QCC, and any other non-national who possess a 'close link' must be considered the beneficiaries of the right to vote in EP elections, given that the rationale of *Matthews case* was one of the territorial scope of treaties, basically whether Gibraltar was part of the territory of UK as far as the ECHR is concerned, and the Court delves into the treacherous waters of personal scope, perhaps against a background of other considerations likely to be related to a kind of civic citizenship, not based on a political relation but on material links which resembles the traditional concept of 'subject.'

In any event, the truth is that this position of the ECJ breaks up the exclusivity of the rights that altogether form the Citizenship, as far as the Court allows States to grant the same rights to long-term residents or qualified-status citizens and even admits of nationality as non-unique ground, not even in the domestic realm, but also in EU law by the grace of the re-envoi foreseen in article 20 of TFEU:

'In that regard, in its judgment in Kaur, the Court, which noted the importance of the United Kingdom Government's Declaration on the meaning of the term "nationals" for the other Contracting Parties to the Treaty concerning the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities, states, in paragraph 24 of that judgment, that that declaration delimits the scope ratione personae of the Community provisions which were the subject of that Treaty. Read in its context, […] that sentence refers to the scope of the provisions of the EC Treaty which refer to the concept of "national", such as the provisions relating to the freedom of movement of persons, at issue in the main proceedings which gave rise to that judgment, and not to all the provisions of the Treaty, as the Kingdom of Spain submits.'[79]

In the case of municipal elections, the question is similar, given that this right can be conferred upon third-country nationals by way of treaty, as the practice of some States shows up, for instances, in Spain, those who come from Norway, Equador, New Zealand, Columbia, Chile, Peru, Paraguay, Iceland, Bolivia, Cape Verde,

[77] ECHR, *Case of Matthews v. The United Kingdom,* 18 February 1999, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910#{'itemid':['001-58910']} (25-5-2015)

[78] Ibid.

[79] ECJ, Judgment of the Court, C-154/04, *Kingdom of Spain v. United Kingdom,* para. 75.

Korean Republic, Trinidad and Tobago, have the right to vote under the condition of having spent five years in Spain, have the legal permit to reside, and be registered within the electoral authority.[80]

2. RIGHT TO COMPLAIN FOR MALADMINISTRATION: CRYING OVER SPILT MILK

This right according to Article 2 of the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties states that 'any citizen of the Union or any natural or legal person residing or having his registered office in a Member State of the Union may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman'[81] The European Court of Justice has found in the same vein:

'In fact, while Article 17(2) EC provides that citizens of the Union are to enjoy the rights conferred by the Treaty and be subject to the duties imposed by it, the Treaty recognises rights which are linked neither to citizenship of the Union nor even to nationality of a Member State. Thus, for example, Articles 194 EC and 195 EC stipulate that the rights to present a petition to the European Parliament or to make a complaint to the Ombudsman are not limited to citizens of the Union, but may be exercised by any natural or legal person residing or having its registered office in a Member State.'[82]

Therefore, this right proclaimed as a party to the fundamental status of EU Citizenship is not exclusive, so far persons residing legally in a Member State or those who possess a legally registered office in a Member State of the Union may also refer a complaint to the European Ombudsman, what clearly points out that residence and its legality are crucial to permitting the enjoyment of this right. Even the practice of the Ombudsman has clearly included the legal residents whenever their rights were the object of maladministration, as it was clearly claimed in the Decision of the European Ombudsman closing the enquiry into complaint 1148/2013/TN. This complaint was raised against the European Police Office in as much as it denied access to documents, on account of the nature and relevance of the case, which involved the exchange of information with US on security matters.[83] The Ombudsman mentioned his own competence to act when residents' rights were at stake:

'The Ombudsman also pointed out that, once the Commission takes a decision, or if its decision were to be unduly delayed, citizens and residents could submit complaints to him if they considered that there had been an instance of maladministration on the part of the Commission.'[84]

The same can be affirmed when it comes to dwell upon the right to petition,

'the Ombudsman recalls that Article 227 of the Treaty on the Functioning of the EU gives citizens and residents of the EU the right to submit a petition to the European Parliament on a subject which comes within the European Union's fields of activity and which affects them directly.'[85]

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[80] See the web of the very Home Affairs of Spain, http://www.infoelectoral.mir.es/el-derecho-de-voto-o-sufragio-activo/-/asset_publisher/cHaHRW1HGFg7/content/preguntas_derecho_voto_quien_puede?_101_crumb=%C2%BFQui%C3%A9n+puede+votar%3F (1-6-2015).

[81] http://www.ombudsman.europa.eu/es/resources/statute.faces/en/372/html.bookmark#def1 (23-5-2015)

[82] ECJ, Judgment of the Court, C-154/04, *Kingdom of Spain v. United Kingdom,* para. 73.

[83] See para. 8 http://www.ombudsman.europa.eu/cases/decision.faces/en/54678/html.bookmark#top (23-5-2015).

[84] See Summary of decision following own-initiative inquiry OI/2/2006/JMA, http://www.ombudsman.europa.eu/cases/summary.faces/en/4573/html.bookmark (26-5-2015)

The practice is conclusive, EU citizens enjoy this right on equal footing with legal residents.

3. Right to diplomatic and consular protection: biting off more than can be chewed

The TFEU grants EU citizens the right to diplomatic and consular protection. This is not a genuine development insofar as it is a classic possibility offered to States.[86] It is a well-known figure of public international law and has been used in many occasions, provided, as it happens in the case of EU Citizenship, the limits set by international law are met, then this right has a limited scope, by the fact that the mere invocation in the TFEU is not enough, then the principle of nationality is basic in this area and the host state is not obliged to accept an EU Member State exercising diplomatic or consular protection on behalf of another State's national.[87] The very Commission has stressed this in the Green Paper on Consular Protection, what made this institution suggest inserting a clause on the issue in 'mixed agreements' and searching the consent of third States to permit European Commission act,[88] what the recent developments highlight, as may be corroborated in Council Directive (EU) 2015/637:[89]

'Article 1. Subject Matter. 1. This Directive lays down the coordination and cooperation measures necessary to facilitate the exercise of the right set out in point (c) of Article 20(2) TFEU, of citizens of the Union to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that Member State, also taking into account the role of Union delegations in contributing to the implementation of that right. 2. This Directive does not concern consular relations between Member States and third countries.'

This also reminds of the provisional character of this protection, pending the assumption of consular protection by the state of the nationality of the person concerned. Then this right is not clung to EU citizens, but open to the state's own decisions in Foreign Policy.[90]

4. Freedom of movement and residence: a wolf in sheep's clothing

This is perhaps the most tackled of the rights appertaining to the EU Citizenship in the ECJ's case-law, where, as it is to be seen, the scope of the rights ebb and flow. The very enjoyment of this right has been controversial concerning EU Citizens, given that the Court shifted from a purely economic vision to a kind of 'political' or 'citizen-based' one, as it is clearly to realize in the Court's case-law:

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[85] Decision of the European Ombudsman closing his inquiry into complaint 1271/2012/BEH against the European Commission, http://www.ombudsman.europa.eu/cases/decision.faces/en/49422/html.bookmark (26-5-2015).

[86] Véase ANDRÉS SÁENZ DE SANTA MARÍA, P., 'La protección diplomática y consular de los ciudadanos de la Unión en el Exterior", *RDUE,* 2006, pp. 11-25; JIMÉNEZ PIERNAS, C., 'La protección diplomática y consular del ciudadano de la Unión Europea", *RIE,* pp. 1993, 9-51.

[87] The canonical quotation is ICJ, Judgment 5 February 1970, *Barcelona Traction, Light and Power Company Limited, ICJ Reports, 1970,* (http://www.icj-cij.org/docket/files/50/5387.pdf) (30-6-2015).

[88] Commission of the European Communities, *Green Paper. Diplomatic and Consular Protection of Union Citizens in Third Countries,* COM (2006) 712, Brussels, 28-11-2006 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0712&rid=2 (30-5-2015).

[89] Council Directive (EU) 2015/637, 20 April 2015, on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decisions 95/553/EC, *Official Journal EU, L 106/1,* 24 April 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0637&from=FR (29-5-2015).

[90] For instance the Treaty on good Neighbourhood, Friendship and Cooperation, the Kingdom of Spain, the Republic of France and the Principality of Andorra, expressly foresees that both the French Republic and Spain would represent Andorra wherever she lacks consulates or embassies and they so agree, see the text in *Official Journal of State, nº 155,* 30-6-1993 http://www.boe.es/diario_boe/txt.php?id=BOE-A-1993-16868 (30-6-2015).

'81. Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty (…), it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member State […]

83. Moreover, the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the EC Treaty by virtue of that citizenship. 84 As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.'[91]

The magnitude of this statement wants restraint yet, so far citizens must move and reside always under certain conditions settled by Directive 2004/38/EC and complemented by national law. In this vein, the right of movement is only subjected to legal travel documents, whereas the right of residence is conditioned by certain personal conditions:

a) Being a worker or a self-employed person.
b) 'having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.'[92]
c) Entering the territory of the host-State for the principal purpose of following a course of study, including vocational training; and having comprehensive sickness insurance and resources for themselves and their family in order not to become a burden.
d) Being a family member of the EU who abides by those conditions.
e) Being someone immediately posterior to losing a job phase or injured.

Provided these conditions are met, the entrance and stay is legal and national legislation cannot be invoked for its refusal. The Court has had the occasion to examine these requirements and the limits in the treaties. The first point is that the general formulation of article 20 TFEU is developed by several secondary norms, being the most important Directive 2004/38, whose tenor restricts the scope of this freedom of movement and residence, first of all, by laying down a narrower determination of the general principle of non-discrimination, enshrined in article 18 TFEU:

'57. It should be observed first of all that Article 20 (1) TFUE confers on any persona holding the nationality of a Member State the Status of citizen of the Union […]

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[91] ECJ, Judgment 17 September 2002, C-413/99, *Baumbast/Secretary of State for the Home Department* http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=289581 (25-5-2015)

[92] The Court has interpreted this in a very favourable way, as can be seen in ECJ, Judgment 10 October 2013, C-86/12, *Adzo Demoenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v. Ministre du travail de l'Emploi et de l'immigration,* para.27.

58. As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope ratione materiae *of the FEU Treaty the same treatment in law irrespective of their nationality, subject such exceptions as are expressly provided for in that regard […] Those situations include those relation to the exercise of the right to move and reside within the territory of the Member States […]*

60. In this connection, it is to be noted that Article 18 (1) TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein." The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by measures adopted thereunder." Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" (see judgment in Brey, *C-140/12, EU:C:2013:565, paragraph 46 and the case law cited).*

61. Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation nº 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation. […]

77. As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.'[93]

This admitted difference in treatment allows States to restrict access to social assistance and services sorting out nationals and EU citizens holding another EU Member's nationality,[94] beginning with the first three months of stay:

'65. Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.'[95]

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[93] ECJ, Judgment 11 November 2014, C-333/13, *Elisabeta Dano, Florin Dano v. Jobcenter Leipzig,* paras. 57-61 and 77.

[94] Germany's legislation has also been under inspection in Vatsouras case, see RAIMONDI, L., 'Cittadini dell'Union Europe in cerca di lavoro e principio di non discriminazione: osservazioni in margine alla sentenza *Vatsouras*", *Il Diritto dell'Unione europea,* 2010, pp.443-462, pp. 450-452 and also 457, where the author points out that the Court has not yet conferred a full right to equal treatment in the Union when he/she is in search of a job.

[95] ECJ, Judgment 11 November 2014, C-333/13, para. 65.

For longer periods the Court considers that:

'… the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under article 14 (2) that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State. […]

74. To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State. […]

78. A member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.'[96]

Therefore, the right to freely move and reside is curtailed by the fact that no social-assistance is available over the first three-months and, for longer periods, by the material demonstration of possessing sufficient resources and sickness insurance in order not to be a burden for the host state. Other causes may be invoked by states to restrict this freedom,[97] for instance public order, given that the action of states is proportionate and given that the useful effect of the provisions is respected, as the Court has proclaimed this in general terms:

'42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann*, paragraph 42).'*[98]

Furthermore, the Court has pinpointed some of the manifestations of this useful effect, being the first that third country nationals who are the primary carers of children bearing EU Citizenship have a right to reside in the Union, whenever the expulsion of the third country national concerned from the host Country would result in a deprivation of the citizen's enjoyment of such condition:

'44. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

45. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his

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[96] ECJ, Judgment 11 November 2014, C-333/13, *Elisabeta Dano.*

[97] The doctrine has remarked that this is a very casuistic question, see AMADEO, S., 'Il principio de egualianza…", *op.cit.,* pp. 78-79.

[98] ECJ Judgment 8 March 2011, C-34/09, *Gerardo Ruiz Zambrano v Office National de l'Emploi,* http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de620e2f817e574a2d9b34e34627a8f523.e34KaxiLc3eQc40LaxqMbN4ObxuKe0?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=112065 (30-5-2015).

family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.'[99]

The useful effect is also the basis for the extension of this right when it comes to family members holding a third country nationality, be this on cause of dependence from the EU citizen, be it on cause of being primary carer:

'25. It is clear from the case-law of the Court that the status of "dependent" family member of a Union citizen holding a right of residence is the result of factual situation characterized by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a "dependent" relative in the ascending line of that tight-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State […]

28. Consequently, it has been held that a refusal to allow a parent, whether national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.'[100]

The Court has delved into this array of problems, remembering that denying an EU citizen the right to be accompanied by his/her family when moving from one Member State to another may be detrimental for the useful effect EU Citizenship:

'62. The same requirement of accompanying or joining the Union citizen is furthermore repeated in Articles 6(2) and 7(2) of Directive 2004/38 for family members of Union citizens, as otherwise the fact of its being impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.'[101]

Quite similar to this rationale is the one underlying the right to have a citizen's children study in the host country:

'52. In circumstances such as those in the Baumbast case, to prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty.'[102]

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[99] ECJ, Judgment 8 March 2011, C-34/09, previously quoted.

[100] ECJ, Judgment 10 October 2013, C-86/12, Adzo Demoenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v. Ministre du travail de l'Emploi et de l'immigration. See also ECJ. Judgment 8 November 2012, C-40/11, Yoshikazu Iida v. Stadt Ulm, para. 55.

[101] ECJ, Judgment 8 November 2012, C-40/11, Yoshikazu Iida v. Stadt Ulm, para. 62.

[102] ECJ, Judgment 17 September 2002, C-413/99, already quoted.

It even seems to be the background against which the position of the Court on the inscription of surnames must be judged:

'36. As the Advocate General has pointed out in paragraph 56 of his Opinion, it is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. As has been established in paragraph 33 of the present judgment, the solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid. […]

45. Having regard to all of the foregoing, the answer to the question submitted must be that Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.'[103]

However, it still must be observed that citizens lacking sufficient resources are not to be consented becoming burdens for the host State, as it was highlighted in the *Dano* case previously transcribed. Therefore it is for the ECJ and national Court to balance the useful effect, especially when it comes to citizens who are economically inactive,[104] and the risk of imposing economic and social 'burdens' on host States creating new costs and threatening to be the last straw.

The situation of long-term residents is different,[105] beginning with the necessary role to be played by national legislations as a correlate of the provisions of Directive 2003/109/EC:

'36. In accordance with article 3(1) of Directive 2003/109, the directive applies to third-country nationals residing legally in the territory of a Member State. Unlike Directive 2004/38 […], Directive 2003/109 does not lay down the conditions which the residence of those national must satisfy for them to be regarded as legally resident in the territory of a Member State. It follows that those conditions are governed by national law alone.'[106]

Furthermore, the Court has expressly reminded that

'71. In that regard, it must be noted that, when the European Union legislature has made an express reference to national law, as in Article 11 (1) (d) of Directive 2003/109, it is not for the Court to give the terms concerned an autonomous and uniform definition under European Union Law […] Such a reference means that the

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[103] ECJ, Judgment 2 October 2003, C-148/02, *García Avello/État belge* http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de157fb325c46d48a9ade3d43a15916b44.e34KaxiLc3eQc40LaxqMbN4ObxuKe0?text=&docid=48670&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=182350 (28-5-2015)

[104] LIROLA DELGADO, I., 'La Sentencia Dano: ¿El punto final de los 'malabarismos" del TJUE en materia de libre circulación de los ciudadanos de la Unión económicamente inactivos?", *RGDE,* nº 36, May 2015, www.iustel.com.

[105] In spite of the fact that sometimes it may seem not to be so, see NASCIMBEN, B., 'Le droit de la nationalité et le droit des organisations dintégration régionales. Vers de nouveaux statuts de résidents?", *Recueil des cours*, vol. 367 / 2014, pp. 350 and 351.

[106] ECJ, Judgment 8 November 2012, C-40/11, *Yoshikazu Iida v. Stadt Ulm.*

European Union legislature wished to respect the differences between the member States concerning the meaning and exact scope of the concepts in question.'[107]

Therefore, third country nationals can move and reside within the limits set forth by Article 14 of the Directive, once they have achieved the status of long-term residents:[108]

'1. A long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met.

2. A long-term resident may reside in a second Member State on the following grounds:

(a) exercise of an economic activity in an employed or self-employed capacity;
(b) pursuit of studies or vocational training;
(c) other purposes.'[109]

In the light of the foregoing, it appears that this right is tied to economic activities, but in addition, the case-law of the Court has brought about new grounds enabling the third-country nationals to reside in other Member States different from the one where he/she gained the condition of long-term resident. All of them are ancillary to an EU citizen's right, given that they are the corollary of the exercise or the useful effect of the right to move and reside of the citizen and not autonomous rights:

'50. Under Article 2(2)(a) and (d) of Directive 2004/38, the persons to be regarded as a "family member" of a Union citizen for the purpose of that directive are the spouse and the dependent direct relatives in the ascending line and those of the spouse or partner as defined in Article 2(2)(b).

51. Thus not all third-country nationals derive rights of entry into and residence in a member State from Directive 2004/38, but only those who are a "family member" within the meaning of Article 2 (2) of that directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is national.'[110]

Of course, Directive 2004/38 allows dependents on EU citizens and members of the family of the EU citizen to enjoy this right, irrespectively of being third-country nationals, whether long-term residents or not. Finally, the useful effect of EU citizenship may depend on a permit be granted to a third-country national who is in charge of the citizen, what immediately confers the right of residence to a third-country national:

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[107] ECJ, Judgment 24 April 2012, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale de lla Provincia autonoma di Bolzano (IPES) et al.* The Advocate General came to the same conclusion in paras. 75-80, expressly referring to the debates between the Commission and EU Council.

[108] In order to get it, they have to reside legally in a Member State, what refers again to their competencies, see BOLAERT-SUOMINEN, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back" (2005) 42 *Common Market Law Review*, Issue 4, pp. 1011–1052; IGLESIAS SÁNCHEZ, S., 'La aplicación directa de la Directiva 2003/109/CE a los nacionales de terceros Estados que acrediten ser titulares del Estatuto de los residentes de larga duración en otros Estados miembros de la Unión Europea", *Revista de derecho migratorio y extranjería*, Nº. 19, 2008, págs. 81-98.

[109] Council Directive 2003/109/EC, of 25 November 2003, concerning the status of third-country nationals who are long-term residents, *Official Journal EU, L16/44,* 23-1-2004 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0109&from=ES (28-5-2015).

[110] ECJ, Judgment 8 November 2012, C-40/11, *Yoshikazu Iida v. Stadt Ulm.*

'71. Finally, there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status […]

77. It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions.'[111]

The Court has conceived of this right as an exception, up to such degree that it does not guarantee a right to move from one Member State to another or to choose amongst the possible destinations:

'33. Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally –if the effectiveness of the Union citizenship that her children enjoy is not to be undermined- in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying the, the genuine enjoyment of the substance of the rights conferred by virtue of that status.'[112]

This restrictive interpretation leads to the common points of both categories of bearers of the right to move and reside in the EU. The first thing to be borne in mind is that both categories, long-term residents and nationals, have been insufflated life by EU Law, then, their regime enjoys primacy, direct effect, and useful effect that cannot be nullified by attitude of national authorities, even when they legislate within the limits of their exclusive competencies:

'23. Likewise, it must be pointed out that there are situations characterized by the fact that, although they are governed by legislation which falls a priori *within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of provisions of secondary legislation which, under certain conditions, provide freedom of movement of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom.'*[113]

Even more concretely on the provisions of the Directive on long-term residents, the Court found as follows:

'78. However, the absence of such an autonomous and uniform definition under European Union law of the concepts of social security, social assistance and social protection and the reference to national law in Article 11(1)(d) of Directive 2003/109 concerning those concepts do not mean that the member States may undermine

[111] ECJ, Judgment 8 November 2012, C-40/11, *Yoshikazu Iida v. Stadt Ulm.*

[112] ECJ, Judgment 10 October 2013, C-86/12, *Alokpa*.

[113] ECJ, Judgment 10 October 2013, C-86/12, *Alokpa.*

the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision.'[114]

Then, the guarantees provided by these general principles set on equal footing both the rights of citizens and long-term residents. In addition, the Charter of fundamental rights even shortens this distance, insofar as both categories enjoy the protection dispensed by this instrument:

'80. It follows that, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11 (1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. Under Article 34 (3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law) "recognizes and respects, the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices.'[115]

In the view of the foregoing, concerning third-country nationals Member States are to rule the question of the legality of residence and of course of their becoming nationals based on the following:

'40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (…). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (…), they undeniably enjoy that status (see, to that effect, Garcia Avello*, paragraph 21, and* Zhu and Chen*, paragraph 20).'*[116]

But the same is also true for EU citizens, whenever they exceed the limits set forth by secondary and primary EU law. Nevertheless, according to the ECJ, there is a significant difference between long-term residents and EU citizens:

'22. In that regard, it should be recalled that any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights, in particular rights of entry and residence of family members of a Union citizen, are based on the fact that a refusal to allow them would be such as to interfere with the freedom of movement by discouraging that citizen from exercising his rights of entry into a residence in the host Member State […]

23. Likewise, it must be pointed out that there are situations characterized by the fact that, although they are governed by legislation which falls a priori *within the competence of the Member States, namely legislation on the right of entry and stay of third-country national outside the scope of provisions of secondary legislation which, under certain conditions, provide for the attribution of such right, they none the less have an intrinsic connection with the freedom of movement of a Union citizen, which prevents the right of entry and residence*

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[114] ECJ, Judgement 24 April 2014, C-571/10, *Kamberaj.*

[115] ECJ, Judgment 24 April 2014, C-571/10, *Kamberaj,* even though the Charter is confined to the enforcement of EU law, as the Court point out in para. 78.

[116] ECJ, Judgment 8 March 2011, C-34/09, *Gerardo Ruiz Zambrano v. Office Nationale de l'empoi* http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=289479 (25-5-2015).

being refused to those nationals in the Member States of residence of that citizen, in order not to interfere with that freedom.'[117]

In the end, the legality of the stay and the possibility of an eventual expulsion is a question of migration acts of the different countries, in other words, the competences of States that may act under the exclusive limits of useful effect, direct effect and primacy, as the practice of states shows up, for instance, with the expulsion of EU citizens from Belgium.[118] Therefore, the citizen of EU and the position of long-term residents seems to merge in many aspects.[119]

5. NON-DISCRIMINATION: TWO PEAS IN A POT OR CHALK AND CHEESE?

The principle of non-discrimination, endowed with a general scope and subject to concrete developments in different sectors, has turned out to have external developments, as may be seen concerning the practice of the European Ombudsman on occasion of the recruitment of EU Commission Delegation's personnel before third countries. The European Ombudsman inquired into a case where a double-national, French and Bulgarian, was rejected by the EU Commission on the basis of being both national and resident in Bulgaria, what was contrary to Commission's practice. The claimant put forward interesting arguments:

'The complainant refers to Article 12 of the EC Treaty which provides that any discrimination on grounds of nationality shall be prohibited. The complainant in particular refers to a Court judgment according to which, if the law of a Member State authorises double nationality, the Community nationality should prevail for the application of Community law. According to the case-law of the Court, the sole circumstance that a national of the Member State also has the nationality of a third country in which he resides, which is not the complainant's case, does not impede him or her from invoking, as a national of a Member State, the prohibition of discrimination on the basis of nationality.'[120]

Then, the rationale underlying is crystal clear: EU Citizenship is nullified by the effect of the Commission criteria, which consists of utterly outweighing the fact of the French nationality. The Commission relied on article 37.2 of the Vienna Convention on Diplomatic Relations to back its position, given that the interpretation of the DG External Relations considered that 'agent local d'assistance administrative et technique' (ALAT) positions are not to be enjoyed by nationals of the receiving country nor by its residents, in order to preserve them from eventual pressure of the local authorities. The position of the Ombudsman as far as the merits are concerned is as follows:

'The Ombudsman does not understand how this provision could be considered to justify the exclusion of Bulgarian nationals from eligibility for the post in question. On the contrary, it appears to foresee the possibility that administrative and technical staff may have the nationality of the host state, in this case Bulgaria.'[121]

In addition, the Ombudsman agrees with the claimant on the question of discrimination:

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[117] ECJ, Judgment 10 October 2013, C-86/12, Adzo Demoenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v. Ministre du travail de l'Emploi et de l'immigration.

[118] http://internacional.elpais.com/internacional/2014/01/12/actualidad/1389559237_314818.html

[119] See NASCIMBENE, B.,

[120] http://www.ombudsman.europa.eu/en/cases/decision.faces/en/1950/html.bookmark (26-5-2015)

[121] Ibid.

'2.9 In the light of the above, the Ombudsman concludes that the Commission has failed to provide an objective justification for its decision to reject the complainant's application because of his Bulgarian nationality. The Commission thus infringed the principle of non-discrimination or equal treatment, which applies when comparable situations are treated in an unequal way and the discrimination is not objectively justified. This constitutes an instance of maladministration. The Ombudsman will therefore make a critical remark below.'[122]

Then, the possession of two nationalities must not result in a discrimination, even in the case that the third-country nationality was the dominant, due to the fact that this would end in denying the useful effect of citizenship, especially in the light of the Micheletti doctrine:

'11. Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.'[123]

Leaving aside the discrimination of double nationals amongst the EU citizens and turning to long-term residents, the Court has traced lines between citizens and long-term residents. The most salient case is Kamberaj, concerning the right of an Albanian to get provincial housing benefit in Italy in which the Court found that, even though Directive 2003/109 has expressly foreseen the equality between citizens and long-term residents in the enjoyment of certain rights,

'91. Article 11 (4) of Directive 2003/19 must be understood as allowing Member States to limit the equal treatment enjoyed by holders of status conferred by Directive 2003/109, with the exception of social assistance or social protections benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health. […]

93. In the light of the foregoing considerations, the answer to the third question is that Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding a national or regional law, such as that at issue in the main proceedings, which provides, with regard to the grant of housing benefit, for different treatment for third-country nationals enjoying the status of long-term resident conferred pursuant to the provision of that directive compared to that accorded to nationals residing in the same province or region when the funds for the benefit are allocated, in so far as such a benefit falls within one of the three categories referred to in that provision and Articles 11 (4) of that directive does not apply.'[124]

Then there is room for different treatment when EU law provides specifically for it, even if national law is called up or left certain areas to its own determinations, always, on condition that the EU Charter of Fundamental Rights, primacy and direct effect are respected, as previously seen.

6. Conclusion

The rights making up EU Citizenship are to be frequently enjoyed on equal footing with third-country nationals, especially when they have acquired the status of long-term residents.

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[122] Ibid.

[123] ECJ, Judgment, 7 July 1993, C-360/90, Mario Vicente Micheletti and Others/Delegación del Gobierno en Cantabria http://eur-lex.europa.eu/resource.html?uri=cellar:5285e429-5c52-460a-a376-1b9235db3074.0002.03/DOC_2&format=PDF (30-5-2015).

[124] ECJ, Judgment 24 April 2014, C-571/10, *Kamberaj.*

The effect of the EU Fundamental Rights Charter even contributes to the blurring of the limits between both figures, insofar as they have to be borne in mind when enforcing EU law. It also merges with the political commitment of the Union to human rights and integration of foreign population.

The differences concerning the right to freely move and reside tend to reduce between both categories, safe the case when the third-country national is not the bearer off the right, but a mere beneficiary of the right of a European citizen.

Both categories are exposed and the object of national immigration laws and subject to eventual expulsion to the extent that the EU law does not cover their rights or they do not meet the requirements set forth by EU primary and secondary law.

The current status of EU Citizenship casts doubts on how this ensemble of rights may help legitimizing EU or even establish a political relationship between nationals and the EU, given that the political rights foreseen are not exclusive and, moreover, some third country nationals may enjoy them on the basis of residence and the material links so brought about.

It is high time the citizens of EU Member States want renewing and vigorous innovations that may help recovering the original narrative that tried to focus on citizens in order to get their political feedback and support. It is time to create a political and exclusive content that encourages citizens to be citizens and detaches them from residents. It is time to call a spade a spade or to turn swords into ploughshares and let citizenship at the mercy of the raking waves.

STREAM 2: EU CITIZENSHIP RIGHTS IN LAW AND PRACTICE – COMPARATIVE PERSPECTIVES

STREAM COORDINATORS: MARTIN SEELEIB-KAISER (UNIVERSITY OF OXFORD) AND SYBE DE VRIES (UTRECHT UNIVERSITY)

The rights that citizens have on the basis of the free movement of goods, workers, services, the freedom of establishment and the free movement of capital, as set out in the original Treaty of Rome, have been expanded and transformed through various rulings of the European Court of Justice (ECJ). This culminated in the Treaty of Maastricht, which formally introduced the concept of EU citizenship granting also non-economically active citizens' rights.

EU citizenship is not only defined by the Treaty and EU legislation, but also through the implementation, application and day-to-day practices in the Member States. A mapping of citizenship rights and practices in the Member States enables us to obtain a more refined and nuanced understanding of the concept of EU Citizenship and of the extent to which the realization of citizenship rights varies in and among the Member States. Relevant questions in this respect, are, for instance: Has EU citizenship over the years developed into more than a bundle of economic, political, fundamental (civil) and social rights, into a coherent and holistic concept? Or are we witnessing increased segmentation? Are certain dimensions of citizenship, for instance economic rights, more developed than fundamental (civil) or social rights? Is the current citizenship regime in the EU strengthening a market-related model of citizenship? To what extent does the realization of citizenship rights vary in and among Member States? If the realization of citizenship rights varies, what are the causal mechanisms?

The following papers address these questions from different perspectives. ***Pauline Phoa*** adopted a law and literature approach to the concept of EU citizenship. This approach allowed her to carefully analyse the concept of EU citizenship as developed in the case law of the ECJ. She used the cases of Grzelczyk (access to study maintenance grants) and Dano (access to social security) as examples, showing how a Law and Literature analysis can be helpful to make the tension between a concept of 'deserving citizenship' (market-citizenship) or 'citizenship as a fundamental status' more sharp, so as to see more clearly where the actual tension resides.

The paper of ***Katarina Hyltén-Cavallius*** focuses on personal identity numbers in Sweden and Denmark. This paper looks into formal and informal structures, which organise society in a host member state and which can make it difficult for a non-national Union citizen to, in practice, access public and private services on equal terms with resident nationals. It appears that although a personal identity number is of significant practical importance for residing in and taking part of society in Sweden and Denmark, the fact that the possession of a personal identity number is widely required by both public and private organisations, leads to indirect discrimination on grounds of nationality, which is incompatible with the key principle of non-discrimination underlying the free movement of persons, and thus a restriction on the exercise of freedom of movement.

Angelika Schenk looks into the emergence of the concept of social citizenship, and how social citizenship rights and duties are matched. She holds that the less a system relies on redistributive mechanisms, the less it will be hampered by ECJ case law provisions on mobility of non-economically active persons. In other words, in a more liberal market economy, like in the United Kingdom, the reception of EU law is easier than in systems that rely on redistributive models, where the nexus between rights and duties is looser.

EU CITIZENSHIP: REALITY OR FICTION? A LAW & LITERATURE APPROACH TO EU CITIZENSHIP

PAULINE PHOA (UTRECHT UNIVERSITY)

1. INTRODUCTION

Ulysses:
O noble youth! and worthy of thy sire!
When I like thee was young, like thee of strength
And courage boastful, little did I deem
Of human policy; but long experience
Hath taught me, son, 'tis not the powerful arm,
But soft enchanting tongue that governs all.[125]

It may be a cliché, but we legal professionals use a lot of words. Is our choice of terms irrelevant? Is our vocabulary 'normatively innocent'? What does it mean to use a certain word? How do we interact with our texts, and how do our (legal) texts shape reality?

The Law and Literature approach in legal theory teaches us that the law is not just a set of rules or institutions; it is a dialogical and literary activity, and it can be analyzed and criticized as such.[126] In Law and Literature methodologies, law is seen as an institution based on the idea of recognizing and understanding the other, a process in which one can tell her own story and be heard, thus, 'law is a method of integration'[127] or even 'an artifact that reveals a culture'.[128] In that sense, law is also symbolic: it plays a role in creating identity, and it can strengthen social cohesion.

EU law can thus be viewed as a normative and narrative corridor in which stories and values meet, and culture and communities are constituted. What happens if you take the aforementioned literary-legal point of view, and 'unpack' or deconstruct landmark cases on EU citizenship such as the *Grzelczyk*[129] and the *Dano*[130] judgments? What narrative(s) of EU citizenship may we find? What are its central terms of meanings and value? Is the notion (or narrative) of EU citizenship stable and determinate? If not, should we strive for that stability and determinacy, or should we keep re-imagining the EU citizen, ever-evolving, never reaching an end-point? What can we learn about narratives of in- and exclusion from classic works of literature, such as *Philoctetes*, by Sophocles? In this paper, the author argues how a Law and Literature approach to EU citizenship helps to understand and critically assess the way in which legal narratives shape EU citizenship rights.

2. CONVENTIONAL AND NEW APPROACHES TO EU CITIZENSHIP

One could say that the protection of fundamental rights in Europe developed in the slipstream of the internal market. Over time, the EU evolved into a mature, coherent legal order, in which the protection of general

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[125] *Philoctetes*, by Sophocles (409 B.C.), translated by T. Francklin, available at: http://classics.mit.edu/Sophocles/philoct.html

[126] D. Watkins and M. Burton, *Research methods in law* (Routledge, 2013) p. 74. See also: K. Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007) p. 20-29.

[127] J.B. White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press, 1985) p. x-xi. A.M.P. Gaakeer, *Hope Springs Eternal – An Introduction to the Work of James Boyd White* (Amsterdam University Press, 1998) p. 10.

[128] P. Gewirtz, 'Narratives and rhetoric in the law", in: P. Brooks and P. Gewirtz (eds.), *Law's stories* (Yale University Press, 1996) p. 3.

[129] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458.

[130] Case C-333/13 *Dano* ECLI:EU:C:2014:2358

principles of EU law, the ECHR, and the EU Charter of Fundamental Rights acquired primary law status. In the same vein, the recognition of the 'human' as something broader than just a worker can also be described as a maturing, civilizing trend in EU law,[131] culminating in the establishment of EU citizenship in the Maastricht Treaty of 1992.[132]

EU citizenship is evocative of many types of rights and duties and it seems to hold many promises.[133] The migration encouraged by the EU Internal Market's economic integration, has on the one hand been economically beneficial to the Member States. On the other hand, the migration of EU citizens is time and again also perceived as problematic. By opening their borders, EU Member States have not only welcomed economically productive workers, but in their wake also students, family members, job-seekers, retirees, and other people who did not in any sense fit the original EEC Treaty's 'worker' standard.[134] For instance, the CJEU ruled in *Martinez Sala* that EU citizens are entitled to have equal access to social benefits if they are lawfully residing within a Member State.[135]

The CJEU took the opportunity to emphasize the autonomous importance of EU citizenship in the landmark judgment in *Grzelczyk.*[136] The *Grzelczyk* judgment is the first of a series of cases where the CJEU famously stated that *'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*'.[137] Various commentators at that time concluded that it seemed that European citizenship was slowly becoming a direct and autonomous source of rights outside the economic context.[138]

In the years after *Grzelczyk*, the CJEU handed down several judgments in which it continued its expansive interpretation and protection of EU citizenship rights, for instance in *Collins,*[139] *Bidar,*[140] and *Ruiz Zambrano.*[141]After *Bidar* the new Residence Directive 2004/38 came into force, codifying the idea of 'a certain level of solidarity', but also that of avoiding 'unreasonable burdens' on the social security systems of Member States, requiring a 'degree of integration'[142] or a 'real link' with the host Member State.[143]

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[131] See for example case 2/74 *Reyners* ECLI:EU:C:1974:68; Joined cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160, para. 7. For indirect discrimination, see case 152/73 *Sotgiu* ECLI:EU:C:1974:13; case C-350/96 *Clean Car* ECLI:EU:C:1998:205; case 379/87 *Groener* ECLI:EU:C:1989:599. In some cases different treatment may be objectively justified: see for instance CJEU case C-224/00 *Commission v Italy* ECLI:EU:C:2002:185, paras. 20-24. See also: K. Lenaerts and P. van Nuffel, *Constitutional law of the European Union* (Sweet & Maxwell, 2005) p. 123-124; Kapteyn/VerLoren van Themaat, *Het recht van de Europese Unie en van de Europese Gemeenschappen*, 6th ed., (Kluwer, 2003) p. 133; and T. Trimidas, *The General Principles of Community Law*, 2nd edn, (OUP, 2006) p. 61, 119-120 and 132.

[132] P. Craig and G. de Búrca, *EU law, text, cases, and materials*, 4th ed., (OUP, 2007) p. 847.

[133] N. Nic Shuibhne, 'The Resilience of EU Market Citizenship", 47 *Common Market Law Review* (2010) p. 1600, referring to S. O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship* (Kluwer Law International, 1996) p. 4-13.

[134] See for instance case 48/75 *Royer* ECLI:EU:C:1976:57; case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284; case 196/87 *Steymann* ECLI:EU:C:1988:475; case C-188/00 *Kurz* ECLI:EU:C:2002:694; case C-415/93 *Bosman* ECLI:EU:C:1995:463. See generally: F.G. Jacobs, 'Citizenship of the European Union – A Legal Analysis", 13 *European Law Journal* (2007) p. 591-593.

[135] Case C-85/96 *Martinez Sala* ECLI:EU:C:1998:217, para. 63.

[136] Case C-184/99 Grzelczyk ECLI:EU:C:2001:458.

[137] Grzelczyk, point 31.

[138] S. Prechal, 'Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?", 45 Common Market Law Review (2008), p. 1-11. S. Besson and A. Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box", 13 European Law Journal (2007) p. 574.

[139] Case C–138/02 Collins ECLI:EU:C:2004:172.

[140] Case C-209/03 Bidar ECLI:EU:C:2005:169.

[141] Case C-34/09 Ruiz Zambrano ECLI:EU:C:2011:124. More recently, the CJEU seems to have limited the reach of the Zambrano case, see case C-434/09 McCarthy ECLI:EU:C:2011:277 and C-256/11 Dereci ECLI:EU:C:2011:626.

[142] See for instance case C-158/07, Förster, ECLI:EU:C:2008:630, para 54.

The enlargement of the EU in 2004 and 2007, and the widespread economic distress caused by the 2008 Eurocrisis, however, seemed to have significantly impacted upon the EU citizenship debate.[144] At the time of the Grzelczyk case, the completion of the Internal Market was still high on the agenda, and overall, the EU's economy was doing well. In recent years, however, there has been an increasing fear of 'welfare tourism' in the EU, and populist, Eurosceptic political parties are on the rise.[145] The Dano case presented an opportunity for the Court to clarify its line of reasoning in the cases from Martinez Sala, via Grzelczyk, up to Brey[146], and to reflect upon the changing circumstances in the EU citizenship debate. The outcome of the Dano case, as we shall see later on, presents a sharp contrast with the Grzelczyk case.

As is apparent from these cases, the CJEU is time and time again called upon to decide cases in which EU citizens rely on EU rights, and in which national authorities invoke usually national interests as a justification not to grant these rights. In these types of cases, the judges at hand have to undertake a precarious balancing act, carefully weighing national interests and sensitivities with the rights of the individual and with the interest of the EU Internal Market.

In this paper, I am going to dig deep into this process of balancing, but the spade I will be using is slightly different from those offered by classic legal doctrinal research, because I apply a so-called 'Law and Literature' approach. In the following paragraphs, I shall firstly explain what such a Law and Literature approach means and what it may add to existing scholarly debates. I will then perform such a narrative analysis on the Grzelczyk and Dano judgments as two outlier examples of the CJEU's approach to the judicial protection of EU citizens. Lastly, on the basis of Sophocles' Philoctetes, I will reflect on the further avenues of research that the Law and Literature approach may open.

3. LAW AND LITERATURE

'Law as science', the positivist approach that dominated legal theory in the 19th century, lost terrain from the 1950s onwards. Most authors agree that the Law and Literature 'movement' really started with the publication in 1973 of James Boyd White's The Legal Imagination.[147] The Legal Imagination was the first of many books to advocate a humanistic approach to law based on the centrality of reading and writing in the work of the legal profession. White argues that language is used in law, as in literature, to constitute a community of writers and readers, to build a rhetorical community. Since the publication of The Legal Imagination, 'Law and Literature' has become an umbrella term for a kaleidoscope of approaches. These approaches can be divided into roughly two categories, often referred to as Law-in-Literature, and Law-as-Literature.

Law-in-Literature analyzes how the law, related themes and the legal profession are portrayed in literary works.[148] It uses literary works as a mirror for the legal profession and as an external view of law in action.[149] Research within this branch may expand into discussions of the normative aspects of the law. Law-in-Literature

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[143] See for instance case C-138/02, Collins, ECLI:EU:C:2004:172, paras. 67–69 and cases C-22 & 23/08, Vatsouras and Koupatantze, ECLI:EU:C:2009:344, paras. 38 and 39.

[144] See for instance J. Thomassen and H. Baeck, European citizenship and identity after enlargement, EUI Working Papers SPS 2008/02.

[145] See H. Verschueren, 'Preventing 'Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?" 52 Common Market Law Review (2015) p. 363-364. See also E. Chase and M. Seeleib-Kaiser, 'Migration, EU Citizenship and Social Europe", 14 January 2014, available at: http://www.socialeurope.eu/2014/01/eu-citizenship-social-europe/

[146] Case C-140/12 Brey ECLI:EU:C:2013:565.

[147] J.B. White, The Legal Imagination (University of Chicago Press 1973). See, for a very comprehensive overview of the Law and Literature movement, J. Gaakeer, De waarde van het woord (Gouda Quint, 1995) p. 2. See also K. Dolin, A Critical Introduction to Law and Literature (Cambridge University Press, 2007) p. 22.

[148] See for the seminal article on this branch of Law and Literature: J. Wigmore, 'A List of Legal Novels", 2 *Illinois Law Review*, 1908, pp. 574-593; and the updated 'A List of One Hundred Legal Novels", 17 *Illinois Law Review*, 1922, pp. 26-41.

[149] Jeanne Gaakeer, *Hope Springs Eternal*, Amsterdam University Press 1998, p. 33-36. Proponents of this branch are, among others: Martha Nussbaum, Robin West, James Boyd White, Jeanne Gaakeer. See also Richard Weisberg's *Poethics*.

can be used on a meta-level to challenge the legitimacy of the legal approach so far: what alternative narratives and vocabularies does literature offer? What different perspectives and how do they inform the law?[150]

Law-as-Literature focuses on the rhetorical and textual elements of the law and legal texts,[151] and emphasizes the narrative aspects of law: what kind of story is being told by the law, and what kind of story is left untold?[152] This branch of the Law and Literature movement is closely related to, and borrows from, literary and philosophical theories on hermeneutics, rhetoric and semiotics.[153]

Although the output of the Law and Literature movement is very diverse, one can conclude that all Law and Literature approaches are roughly based on the following premises:

- Language is law's only tool;
- Law and literature are both producers and products of a culture, so they reflect, as much as critique the prevailing societal convictions and conventions.;[154] Anan investigation of the literary creation of human experience may help us understand the way in which narratives (re)construct reality;[155]
- Law's instrument is an institutional language that imposes its conceptual framework on its users. Analysed as such, legal language may lose its finality and stability of meaning and become open to reinterpretation and critique.[156]

4. Law and Literature in European legal theory

The Law and Literature approach has by now become an established part of the legal theoretic debate in Europe, with scholars such as Jeanne Gaakeer, Greta Olson, Ian Ward, Helle Porsdam, and Daniela Carpi (to name but a few) contributing to a diverse academic debate.[157] However, Law and Literature methodologies are rarely applied in EU substantive law analysis. One can only guess at the reasons for this. One reason might be that the case law of the CJEU, compared to, say, the case law of the US Supreme Court, does not seem to be a rich source for imaginative legal drafting that is suitable for a subsequent Law and Literature analysis. Rather, because of its formalist and even minimalist style of reasoning, CJEU judgments usually make for dry reading. However, this does not mean that the Law and Literature approach cannot be applied to CJEU case law. Quite the contrary, in the relatively new legal order of the EU, that is characterized by pluralities of language, cultures and legal traditions, there is much to gain in taking a legal-literary approach to law. EU legal practitioners (judges, law-makers, lawyers) have to operate within a multi-cultural and multi-lingual reality, and specifically in the area of EU fundamental and social rights protection, they have to balance competing interests, while

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[150] Watkins, D., & Burton, M. (2013). *Research methods in law*. New York: Routledge, p. 73.

[151] B. Cardozo, 'Law as Literature", *Yale Review* 1925, reprinted in B. Cardozo, *Cardozo on the Law*, The Legal Classics Library, Birmingham, 1982. See also Jeanne Gaakeer, *Law and literature Redux*.

[152] See for instance: Cover, R. M., 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative", 1983 *Harvard Law Review*, *97*, p. 4–68. See also publications by Robin West, James Elkins and Greta Olson.

[153] Watkins, D., & Burton, M. (2013). *Research methods in law*. New York: Routledge, p. 74. See also: K. Dolin, *A Critical Introduction to Law and Literature*, Cambridge University Press 2007, p. 20-29.

[154] J. Gaakeer, 'Control, Alt, and/or Delete? Some observations on new technologies and the human', in: M. Hildebrandt, M. and J. Gaakeer (eds),.), *Human Law and Computer Law*, (Springer, 2013, pp) p. 135-157.

[155] See, among others, J. Gaakeer, 'Law and Literature Redux? Some Remarks on the Importance of the Legal Imagination", in J. Etxabe and G. Watt (eds.), *Living in a Law Transformed: Encounters with the Work of James Boyd White*, (University Michigan Publishing, 2014), and J. Gaakeer, *De waarde van het woord* (Gouda Quint, 1995) p. 74.

[156] K. Dolin, A Critical Introduction to Law and Literature (Cambridge University Press, 2007) p. 21. See also: D. Watkins and M. Burton, Research methods in law (Routledge, 2013) p. 78-79.

[157] See also the European Network for Law and Literature www.eurnll.org ; the Nordic Network for Law and Literature http://littrett.uib.no and the Italian Network for Law and Literature AIDEL http://www.aidel.it .

keeping the aim of a shared future in mind.[158] This multi-layered legal reality requires a practice of everyday interpretation, translation and storytelling - literally and figuratively speaking, that is.[159]

For instance, if – as some Law and Literature scholars claim – a text is revelatory of a narrative, then EU law and legal texts can be revelatory of EU legal narrative(s): EU judgments and legislation may reveal what rights or interests are of prevailing importance in the EU, what the underlying norms are of this nascent legal culture.[160] The narratives of EU law are also narratives about the EU's self, for example when the CJEU refers to the EU as an 'autonomous legal order'.

Furthermore, applying Law and Literature methodologies may give a better understanding of this discursive practice in EU law, its products, i.e., European judgments and legislation, and their effect upon the communities they constitute. A starting point for such an understanding and critical inquiry may be the close reading of CJEU case law by making use of narrative analysis.

Studying law in this way creates awareness of the openness of the law and of legal texts, but also of their normative determinacy. In that sense, Law and Literature analysis destabilizes what is thought of, or presented as, stable and objective, revealing that seemingly objective judgments or legislation may carry certain presumptions and prejudices, or normative 'grand narratives'.[161] On a more abstract level, the Law and Literature perspective creates an awareness of the constitutive effect of the law as a community of readers and writers, which may be compared to and contrasted with communities constituted in works of literature, such as Sophocles' *Philoctetes*.[162]

Consequently, the application of Law and Literature methodologies such as narrative analysis to EU substantive law can contribute to a better understanding of the tensions inherent in the concept of EU citizenship, and provide a starting point for a critical assessment of these legal narratives and vocabularies.

I therefore attempt to fill the 'EU Law and Literature'-gap described above, by developing a way of applying Law and Literature methodologies to EU law. I feel that a Law and Literature approach offers a theory of jurisprudence beyond interpretive techniques, a theory that explores the community founded by the narratives in law. In this paper, I will illustrate this different way of reading EU (case) law by applying James Boyd White's way of reading to the *Grzelczyk* and *Dano* cases as two opposite ends of the spectrum in EU citizenship case law.

5. EU LAW NARRATIVE ANALYSIS: JAMES BOYD WHITE

'Narrative' means literally something that is narrated, a story or account. Narrative is a way of ordering experience, in order to claim meaning. It is a form of human communication by which we try to make sense of the world around us. Law is also a form of communication and (inter-)action, as it seeks to present 'sequence

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[158] S.A. de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for more Harmony", in: S.A. de Vries. X. Groussot and G.T. Petursson, Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'Tightrope' Walker (Eleven International Publishing, 2012) p. 9-42.

[159] B. Cardozo, 'Law as Literature" Yale Review (1925), reprinted in B. Cardozo, Cardozo on the Law (The Legal Classics Library, 1982).

[160] Cf. G. Raitt, 'Insights for Legal Reasoning from Studies of Literary Adaptation and Intertextuality", Deakin Law Review, Vol. 18(1), p. 196. See also T. Morawetz, 'Law and Literature", in D. Patterson (ed.), A Companion to Philosophy of Law and Legal Theory, 2nd edn., Malden, MA: Wiley-Blackwell 2010, p. 451.

[160] James Boyd White, Heracles' bow: essays on the rhetoric and poetics of the law, Madison, Wisc.: University of Wisconsin Press 1985, p. 4.

[161] Borrowing, appropriately, from literary and philosophical theories on hermeneutics, rhetoric and semiotics. See D. Watkins and M. Burton, *Research methods in law* (Routledge, 2013) p. 74. See also: K. Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007) p. 20-29.

[162] J.B. White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press, 1985) p. 4.

and context', and in itself a way of ordering life and claiming meaning.[163] Law seen in this way, is narrative, and can therefore be studied as such, and it may reveal something about the narrator: a worldview and a self-understanding.[164]

Literary theory and social sciences provide many ways to analyse narratives.[165] I have found guidance in the works James Boyd White. In *When Words Lose Their Meaning*, he suggested a way of reading the law, centred around four questions:

'1. How is the world of nature defined and presented in this language? (…)
2. What social universe is constituted in this discourse, and how can it be understood? Who are the characters in the texts (including the speaker)? (…)
3. What are the central terms of meaning and value in this discourse, and how do they function with one another to create patterns of motive and significance? (…)
4. What forms and methods of reasoning are held out here as valid? What shifts or transitions does a particular text assume will pass unquestioned, and what does it recognize the need to defend. What kinds of argument does it advance as authoritative? What is the place here, for example, of analogy, deduction, of reasoning from general probability or from particular example? What is unanswerable, what is unanswered?'[166]

These questions require a (critical) inquiry into the description of the facts and the legal framework, and into the reasoning employed by the CJEU. By asking how the natural and social world is presented and who the characters are, James Boyd White urges us to explore what the text considers as normal, regular. In other words: what is the normative starting point of the reasoning? Once we know the normative starting point of the narrative, we then can understand more clearly what constitutes the conflict and how the text reacts to this complication in the ensuing reasoning. Is it a clash of conflicting norms (rules of law) or is it a matter of facts or persons that do not fit the norm? Who or what conforms to the norm, and who does not? Does he/she have to adapt or will the norm change or accommodate a deviation? How does the text present the final transformation or accommodation in its conclusion? What is left untold?[167]

These questions can be answered by looking at the general reasoning of the CJEU, the paragraphs or sentences of a judgment as narrative units, but also by analyzing the concepts and vocabulary used and critically exploring their meaning(s).[168] As such, they are not a strict checklist to be ticked off, but rather a new lens through which to read the *Grzelczyk* and *Dano* cases.

6. Narrative Assessment: Comparing Grzelczyk *and* Dano

In the following paragraphs, I will present my observations from reading the *Grzelczyk* and *Dano* judgments through James Boyd White's lens. The narrative analysis will be structured along his questions, focusing first on

[163] The analysis of narrative is related to, but also distinct from, discourse analysis. The narrative can be seen as the underlying story that a discourse (language use) is 'about". Cf. M. Galdia, *Legal Discourses* (Peter Lang GmbH 2014), p. 265.

[164] J.R. Elkins, 'On the Emergence of Narrative Jurisprudence : The Humanistic Perspective Finds a New Path", 9 *Legal Studies Forum* (1985), p. 135.

[165] Such as the works of Paul Ricoeur, William Labov and Vladimir Propp.

[166] J.B. White, *When Words Lose Their Meaning* (University of Chicago Press, 1984) p. 10-12.

[167] See also A.G. Amsterdam and J. Bruner, Minding the Law (Harvard University Press, 2000) p. 113.

[168] For the present article, I will have to leave several important other factors out of the assessment: the legal framework, precedent, general principles of EU law and procedural constraints and requirements. Furthermore, the specific setting of the preliminary reference procedure, and the institutional set-up of the CJEU in 'chambers", with an Advocate–general, a juge-rapporteur, and a unitary decision (no dissenting opinions). Also important but not elaborately discussed here are the effects of the working language (French) and the subsequent translation in 23 official languages.

the introduction of the protagonists (6.2), then on the forms and methods of reasoning (6.3), and finally, on the central terms of meaning and value in these judgments (6.4).

To facilitate the understanding of this close reading, I start by giving a brief summary of both cases.[169] However, I do highly recommend the reader to keep a copy of these two judgments ready, as I will guide you through a close reading of these texts and refer to specific paragraph numbers, without quoting the paragraphs extensively.

6.1 Summary of Grzelczyk and Dano

6.1.1 Grzelczyk

Rudy Grzelczyk was a French national who began university studies in physical education in 1995 in Belgium. During his first three years in Belgium he supported himself financially by taking up minor jobs and by obtaining credit facilities. In his fourth and final year, he applied for the Belgian 'minimex', a minimum subsistence allowance. The CPAS (Public Social Assistance Centre) initially granted the allowance, but after a refusal of reimbursement of the sum paid to Grzelczyk by the competent federal minister it withdrew the allowance, based on the French nationality of Grzelczyk and the fact that he was not considered a 'worker', but was enrolled as a student.

The CJEU broadly interpreted the right to equal treatment enjoyed by students by linking the prohibition of discrimination, enshrined in Article 18 TFEU, to the citizenship provisions of Article 20 TFEU and onwards, without referring to the free movement of workers. The CJEU also stated that a certain degree of financial solidarity could be expected of the Member States. It concluded therefore, that although EU citizenship does not create an autonomous and absolute right of residence, when a person is lawfully resident, there can be no discrimination as to the access to a social advantage.

6.1.2 Dano

Elisabeta Dano and her son Florin are both Romanian nationals, who entered Germany in 2010, and lived with Elisabeta's sister in the city of Leipzig, where she was issued a residence certificate of unlimited duration. Ms Dano had no diplomas, nor professional training or work experience and her command of German was very limited. She received child benefit and an advance on maintenance payments, but she also applied for the grant of benefits under the German Social Code. These benefits were refused because they were not intended for foreign nationals who are not workers or self-employed and who do not enjoy the right to free movement under the German law on the free movement of Union citizens, for the first three months of their residence in Germany.

Although the CJEU repeated its *Grzelczyk* statement that EU citizenship '*is destined to be the fundamental status of nationals of the Member States…'* at the beginning of its answer to the preliminary questions, it actually answered the questions by reference to the specific Directives 2004/38 and 883/2004, as 'more specific expressions' of the prohibition of discrimination on grounds of nationality of Article 18 TFEU. The Court concluded that Ms Dano and her son did not have sufficient resources and thus cannot claim a right of residence under Directive 2004/38. In such circumstances, the Court ruled that EU law allows Member States to exclude them from entitlement to certain benefits. Furthermore, the Court decided that Elisabeta and Florin

[169] For a fuller discussion of the Dano case, see for instance D. Thym, 'The Elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens," 52 Common Market Law Review (2015) p. 17-5 and H. Verschueren, 'Preventing 'Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?" 52 Common Market Law Review (2015), p. 363-364

Dano could not rely on the Charter of Fundamental Rights, since Member States are not implementing EU law when determining the conditions for the right to such benefits.

6.2 The CJEU's social universe: who are the characters?

James Boyd White's inquiry after the social universe and the characters can be understood as an inquiry after the protagonists and the normative starting point of a story, which we can partly find in the CJEU's account of the facts. Although in preliminary reference proceedings the establishment of the facts is a matter for the referring court, the Court may, in its summary of the facts, discard some facts or emphasize others, which may affect the way the case is subsequently decided.[170]

6.2.1 Introducing the protagonist: Grzelczyk

The first factual paragraph (point 10) presents the following information about Rudy Grzelczyk to the reader: he is male, French, and he pursues a university education. The second sentence of point 10 mentions that during the first three years of his studies, he took up various jobs and credit facilities to pay for his maintenance, accommodation and studies. This is apparently essential information about 'the Person' Grzelczyk.

In point 11, the Court refers to the findings of the CPAS that 'Mr Grzelczyk had worked hard to finance his studies, but that his final academic year, involving the writing of a dissertation and the completion of a qualifying period of practical training, would be more demanding than the previous years'. This background information may create a feeling of sympathy for a hard-working student. Furthermore, it is important to note that the CPAS initially granted Grzelczyk the minimex, so it was not even his real opponent.

This positive framing of Grzelczyk's position is reinforced by point 14, in which the Court notes that during the legal proceedings before the Belgian Labour Tribunal, that court granted Grzelczyk a flat-rate monthly allowance by way of interim measure because it recognized 'the urgency of Mr Grzelczyk situation'.

Under the separate heading 'Preliminary remarks', the Court (point 15) notes that during the proceedings considerable attention has been paid to the relevance of the fact that Grzelczyk has taken on various jobs during the first three years of his studies. Even though the Court announces that it will only answer the questions as they have been asked by the national court (i.e., pertaining to the last year of his studies during which he did not work), and will leave the factual assessment whether Grzelczyk actually qualifies as a worker to the national court (point 18), this repeated emphasis on the fact that Grzelczyk has worked and done his best to support himself financially, frames the decision of the CJEU as to the character, the 'deservingness' of Rudy Grzelczyk.

6.2.2 Introducing the protagonist(s): Elisabeta (and Florin) Dano

In point 35 the Court introduces Elisabeta Dano and her son Florin: Dano was born in 1989, her son Florin was born in Germany in 2009. They are both Romanian nationals. In the second sentence of point 35, the Court refers to the fact that according to the findings of the national court, Dano last entered Germany on 10 November 2010. However, as the Court continues in point 36, the city of Leipzig issued Dano a residence certificate with unlimited duration for EU nationals, on 19 July 2011, with 27 June 2011 as date of entry into Germany. How this relates to the previous date of 10 November 2010 is a mystery. It could be taken to imply

[170] See for critical comments on this 'manipulation" of facts J. Bengoetxea, 'Legal Reasoning and the Hermeneutic Turn in the Law – Remarks on the European Court of Justice", in: U. Neergaard, R. Nielsen and L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model* (DJOF Publishing, 2010) p. 294.

illegal residence between 10 November 2010 and 27 June 2011. The Court also adds that the city of Leipzig issued Dano a duplicate residence certificate in 2013. Why is this information relevant? Is it a confirmation of her right of residence in 2013, which would make the outcome of the CJEU's decision (that she did not have a right of residence) wrong in the light of the *Martinez Sala* judgment? Or is it mentioned as an illustration of the fact that Dano is careless, because she apparently needed a duplicate – a reason for needing a duplicate is that you lost the original?

In point 37, it is stated that Dano and her son have been living with her sister since their arrival in Leipzig, and that she 'provides for them materially'. The Court includes these facts in its summary, but they seem to have not been of any relevance in the actual judgment. What is the effect of mentioning these facts? On the one hand, it would be a reason not to consider Elisabeta and Florin a burden to the German society, since her sister is taking care of her. On the other hand, these facts could also be seen as framing the case in such a way that Elisabeta uses her sister like she is trying to use the German system of social benefits.

While point 38 enumerates the benefits that Dano already receives, the Court also remarks that the identity of Florin's father is unknown. Again, one could ask what the relevance is of this remark? The identity or nationality of Florin's father has apparently not been used as an argument to claim the benefit in Germany. As a matter of fact, the rights of Florin as an EU citizen are hardly at issue, unlike the *Zambrano* case. One of the possible effects of the comment about the unknown father, is that it adds to the stereotyping of a Romanian, uneducated young woman whose (sexual) behaviour is irresponsible.

In point 39 the Court gives some information about Dano's education and language skills, which are very limited: she attended school for three years in Romania, but she has no leaving certificate, no higher education, nor professional training. She understands spoken German, and speaks it on a simple level, but she cannot write German and has limited reading skills. To date, the Court remarks, she has not worked in Germany or Romania. 'Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job' Again, the framing effect of this information may be that her not working is a choice, or even stronger: that she is lazy.

6.3 COMPARISON

The statement of the facts can be appreciated in their normative context, also when we fast-forward to the reasoning of the CJEU (which I will discuss in more detail in the following paragraphs). The EU's 'social universe' is governed by a clear norm, as is apparent from the *Grzelczyk* and *Dano* judgments: i.e., the classic EU notion of the 'worker'. The fact that Grzelczyk has had various jobs to support himself financially is emphasized over and over again. Rudy Grzelczyk embodies the 'good' or ' deserving' citizen: he is highly educated, holding the promise to become economically active in the future.[171]

In *Dano*, the normative starting point is actually *Grzelczyk*: the repetition of the general statement 'Union citizenship is destined to be the fundamental status…etc.' in point 58 brings the *Grzelczyk* case into the *Dano* case as a normative point of reference (i.e., a precedent in legal terms, intertextuality in literary terms).[172] From a narrative point of view, the economically non-active, uneducated Elisabeta Dano is the deviation from the norm set by 'good citizen' Rudy Grzelczyk. The general picture that the Court paints of Elisabeta Dano is not favourable: unlike Rudy Grzelczyk, she is not educated, does not really speak, read or write the language of the country, has had a child at a young age (of an unknown father, even!), has not worked before, and – according

[171] L. Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law", *EUI Department of Law Research Paper* 14/2014.

[172] P. Brooks, 'Literature as Law's Other", 22 *Yale Journal of Law & the Humanities,* 2010, p. 360. See also J. Kristeva's notion of intertextuality as a theory of a text as a network of sign systems related to other sign systems or practices in a culture, see I.R. Makaryk (ed.), *Encyclopedia of Contemporary Literary Theory: Approaches, Scholars, Terms* (University of Toronto Press, 1993) p. 568-569.

to the national court and which the CJEU all too readily repeats – she appears to have come to Germany with the sole intention of applying for benefits. No reference to her sister, to the importance of family, to consequences of the fact that her son was born in Germany, that her son is dependent on her, nor of any hardship that could have driven her to leave her home country.[173]

6.4 Forms and methods of reasoning

Having assessed the way in which the CJEU describes the protagonists of the cases, I will now look at the form and methods of the CJEU's reasoning in these cases. This is familiar territory to the 'classic' legal scholar. At this point, however, I want to emphasize the legal reasoning in relation to and interaction with the overall narrative.[174]

6.4.1 Grzelczyk: lex generalis derogat lex specialis?

The CJEU initially discusses *Grzelczyk*'s case in the context of Regulation 1612/68 (points 27-29). However, in point 30, the Court takes off from its basis in secondary law, to the level of primary law, by referring to Article 6 EC (now article 18 TFEU), i.e., the general prohibition of discrimination based on nationality, which 'must be read in conjunction with the provisions [...] concerning citizenship of the Union.'

The Court then goes on, in point 31, to make its now famous statement: 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'

After this bold statement, the Court refers in point 32 to the case *Martinez Sala*. Again, this precedent (intertext) embeds the *Grzelczyk* case in a legitimate line of case law, according to which the a lawfully resident EU citizen can rely on the general provision on equal treatment of Article 6 EC in all situations which fall within the scope *ratione materiae* of Community law.

In point 33, the Court adds that those situations include 'the exercise of fundamental freedoms guaranteed by the Treaty', i.e., the four freedoms and the citizen's right to move and reside in other Member States. The effect of repeating 'fundamental' for the four economic freedoms is that it emphasizes the importance of the free movement provisions, and it seems to semantically tie the 'fundamental status/EU citizenship'-formula of point 31 to the longer established free movement provisions.

In points 34, 35 and 39, the Court has a remarkable line of legal reasoning: it refers to older case law and the content of Directive 93/96, and it then concludes that there is 'nothing in the amended text…to suggest' that students lose their EU citizenship rights, and also that there are 'no provisions…that preclude [students] from receiving social security benefits.' It is interesting that the Court consciously looks for interpretive space here: there is nothing to exclude students, so it must be possible for them to have a right to social benefits. This expansive legal reasoning is in stark contrast with traditional legal reasoning that is usually more conservative and looks for legal obligations, not possibilities.

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[173] L. Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law", *EUI Department of Law Research Paper* 14/2014, p. 13-15 (on the 'bad citizen')

[174] For a full and critical assessment of the legal reasoning in the Dano judgment, see N. Nic Shuibne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 *Common Market Law Review* (2015) p. 889-937.

6.4.2 DANO: LEX SPECIALIS DEROGAT LEX GENERALIS?

In the *Dano* judgment, the CJEU starts its decision by referring to the principle of non-discrimination and EU citizenship (Articles 18, 20 and 21 TFEU) in point 56-57. In point 58, it repeats its landmark statement from *Grzelczyk*: '*As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope ratione materiae of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard.*'

However, in the subsequent paragraphs, the CJEU moves from this broad, general Treaty footing to the lower level of specific secondary legislation, i.e. Directive 2004/38 (points 60-62), which, according to the CJEU, gives 'specific expression' to the principle of non-discrimination.

In point 69 the CJEU argues that '*so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38*.' The CJEU considers that equal treatment of persons without a right of residence under Directive 2004/38 would create an unreasonable burden on the social assistance system of the host Member State, (point 74). The CJEU points out that the Directive makes a clear distinction between persons who are working and those who are not (point 75), and that the Directive '*seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence*.' The CJEU concludes that '*economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance*' may be excluded from social benefits (point 78), and the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Directive 2004/38.

Remarkably, with regard to the preliminary question related to the applicability of the Charter of Fundamental Rights, the CJEU denies jurisdiction, because the case apparently only concerns the conditions for creating such a right to benefits based in German law, and those conditions do not result from the Directive or Regulation, so they do not involve 'implementing EU law' (points 85-92). The CJEU thus decided the *Dano* case on a very detailed and strict interpretation of Directive 2004/38.

6.4.3 COMPARISON

In *Grzelczyk* the CJEU took the step above and beyond the secondary legislation and referred to the broad Treaty provisions as 'fundamental status' and 'fundamental freedoms', making the rights of *Grzelczyk* more fundamental and at the same time abstract. *Grzelczyk* was presented as a sympathetic good citizen, with a promising future as an economically active citizen who would contribute to society, so resolving the conflict in his favour was arguably not a hard decision.[175] In *Grzelczyk*, the law had to accommodate Rudy Grzelczyk's situation.

It is interesting to note how the *Dano* case is in a way the mirror image of the reasoning of the CJEU in *Grzelczyk*. Where the Court had ruled in that latter judgment that there is nothing to preclude students from receiving benefits (point 39), it states in *Dano* that it must be possible to exclude economically inactive Union citizens from receiving benefits (point 78). In *Grzelczyk*, the Court found interpretive space and used it

[175] Cf. R. West, *Narrative, Authority and Law* (University of Michigan Press, 1993) p. 359. In this work, West applied Northrop Frye's classical work of structuralist literary criticism (Anatomy of Criticism) to legal theory.

expansively (inclusion of more EU citizens), in *Dano* it equally enjoyed such interpretive space, but used it narrowly (exclusion of EU citizens, denial of jurisdiction under the Charter of Fundamental Rights).

The same movement of inclusion and exclusion can be found in the way the protagonists of these cases are described, as analyzed above. The positive framing of *Grzelczyk* as the 'good citizen' is reflected in the movement of the CJEU towards him: an expansive, broad interpretation of EU citizenship rights. Conversely, the negative framing of *Dano* as the outsider who is a threat to the social assistance system of Germany, finds another layer of emphasis in the CJEU's narrow interpretation of the Directive, and thus the move away from the 'EU citizenship as fundamental status'-narrative.

7. Central terms of meaning and value

As we have seen, the different methods of legal reasoning employed by the CJEU reinforce the way the judgments in *Grzelczyk* and *Dano* introduce the characters. Within this legal reasoning, the concepts and vocabulary used by the CJEU may harbour another layer of meaning that may be found to reinforce, or contradict the outcome of its cases.

The landmark *Grzelczyk* statement, repeated in all other subsequent EU citizenship cases, and in *Dano*, seems to hold many of what James Boyd White would call the central terms of meaning and value in this discourse:

'Union citizenship *is destined to be the* fundamental status *of nationals of the Member States, enabling those who find themselves in the* same situation to enjoy the same treatment in law irrespective of their nationality*, subject to such exceptions as are expressly provided for.' [Italics PP]*

In the following paragraphs, I will provide a first exploration, an 'unpacking' of the regular meaning and, conversely a 'deconstructing' [176] of some of these terms, drawing upon a variety of sources, without however intending to be exhaustive in any way. The exploration of these central terms of meaning and value is not a scientific, analytical exercise, but rather an intuitive, self-reflexive and, at times, critical meditation that may open up avenues for further research.

7.1 'Citizenship'

In its classic definition, the term 'citizenship' is closely linked to the narrative of the state, and consequently to the concept of nationality. Also, as the Greek and Roman roots of the term show, 'citizenship' has been exclusive rather than inclusive, to be deserved or bestowed as a privilege. The *Grzelczyk* formula, however, seems to suggest that EU citizenship is more than this narrow definition.

The legal literature on European citizenship often quotes the British sociologist T.H. Marshall.[177] In the context of state citizenship he identified three types of citizens' rights –civil, political and social rights. *Civil rights* concern individual freedom, such as free speech, freedom of thought, or religion, and the right to justice. With the classification of *political rights*, Marshall meant democratic rights of participation. Finally, *social rights*

[176] Deconstructionist techniques in law can be helpful by exposing the sensitivity of law's meaning to changes in interpretive context, and by uncovering competing interests and policies buried in the words and expressions of legal texts. Generally, deconstruction revolves around the analysis of conceptual opposition. See also J.M. Balkin, 'Deconstruction's Legal Career", 27 Cardozo Law Review (2005) p. 101-102, 114; S. Duncan, 'Law as Literature: Deconstructing the Legal Texts", V Law and Critique (1994), p. 3-17. J. Bryan, 'Reading Beyond the Ratio: Searching for the Subtext in the 'Enforced Caesarian" cases", in: D. Carpi (ed.), Bioethics and Biolaw through Literature (De Gruyter, 2011) p. 116.

[177] See for instance H. Oosterom-Staples and A. Vazquez Munoz, 'Burgerschap van de Unie', SEW (2004) p. 82, S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (Kluwer Law International, 1996) and H. van Eijken, EU Citizenship and the Constitutionalisation of the European Union (Europa Law Publishing, 2015) p. 34.

concern economic and welfare rights, such as a minimum standard of income and welfare. According to Marshall, civil, political and social rights of citizenship – when given force of law – can provide a counterbalance to the inequalities provoked by, for instance, a capitalist market economy.[178] The notion of equality is central to Marshall's theory and he conceived the third category of rights (social rights) to allow as allowing citizens to fully participate as members of a community, and to fully enjoy their other (civil and political) rights. As Marshall put it: 'the right to freedom of speech has little real substance if, from lack of education, you have nothing to say that is worth saying, and no means of making yourself heard if you say it.'[179] How does Marshall's notion of (emancipatory) citizenship rights relate to the CJEU's case law on EU citizenship? How emancipatory and empowering is the notion of EU citizenship in the case of Elisabeta and Florin Dano?

When we attempt to deconstruct a term like EU citizenship, we may look for opposition, i.e., citizenship as opposed to what? Statelessness? Otherness? What if you're not an EU citizen? Is it absence of (the right) nationality? How important is economic activity still? Do you have to deserve citizenship? Is the person who is relevant under EU law (i.e., the EU citizen) a 'market citizen' or something more expansive and inclusive?[180] Who is 'in' and who is 'out'?

On a broader plane, one may take the notion of citizenship as referring to an idea of the Human: what is (wo)man?[181] How does the EU see humanity? Does it conceive of the human as a social (cooperative, solidary) or individualistic (self-interested) creature? Is the human in EU law inherently good or inherently evil, inherently strong or weak? Who or what is the EU's Other? What can EU legal practitioners and academics learn from the works on Self and Other, on identity, by Paul Ricoeur, Emmanuel Levinas and Charles Taylor, to name but a few?

7.2 'Fundamental'

What does it mean that EU citizenship is a 'fundamental status'? What does it mean if something is fundamental? It usually relates to a basic, foundational, primary quality, something that is inherent, ingrained in a person's humanity.[182] Coining a legal status as 'fundamental' implies a normative intent.[183] Furthermore, how does the 'fundamentality' of EU citizenship relate to the four 'fundamental' economic freedoms of the internal market, and to fundamental rights as enshrined in the EU Charter of Fundamental Rights (which is deemed not to apply in the *Dano* case)?[184]

Moreover, the different type of movement that we noticed in the reasoning of the CJEU in the *Grzelczyk* and the *Dano* cases, i.e., from equal treatment of EU citizens as a primary law principle in *Grzelczyk,* towards a

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[178] T.H. Marshall and Tom Bottomore, Citizenship and Social Class (Pluto Perspectives, 1992) p. 8.

[179] T.H. Marshall and Tom Bottomore, Citizenship and Social Class (Pluto Perspectives, 1992) p. 6 and 21. See also S. O'Leary, The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship (Kluwer Law International, 1996) p. 14-15.

[180] B. Anderson, I. Shutes and S. Walker, Report on the rights and obligations of citizens and non-citizens in selected countries, bEUcitizen Report D10.1, p. 7, available at: http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf ; N. Nic Shuibhne, 'The Resilience of EU Market Citizenship," 47 Common Market Law Review (2010) p. 1597-1628.

[181] Cf. C. O'Brien, 'I trade, therefore I am: Legal personhood in the European Union", 50 Common Market Law Review (2013) p. 1645: 'How we define the person has a concrete bearing upon how we structure society, and define and allocate welfare."

[182] See for instance http://www.merriam-webster.com/dictionary/fundamental .

[183] However, one may also note the cynical comment on the 'human rights paradox" by Hannah Arendt 'The conception of human rights, based upon the assumed existence of a human being as such, broke down the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human" (in: The Origins of Totalitarianism).

[184] See for instance N.J. de Boer's exploration: 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms?", 9 Utrecht Law Review (2013) p. 148–168. L. Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law", EUI Department of Law Research Paper 14/2014, p. 14.

narrow right to equal treatment within the sole context of Directive 2004/38 in *Dano*, casts serious doubts about the 'fundamentality' of EU citizenship.[185]

Terms that are the opposite of 'fundamental' are for instance 'superficial' and 'conditional'. How can EU citizenship be a fundamental status when it is clear from the framing of the *Grzelczyk* and *Dano* cases that you have to earn most rights/benefits by being a 'good', productive citizen? This seems not a fundamental, but rather a thin, conditional status that is still tied to the notion of market-citizenship.[186]

7.3 'Equal treatment'

Furthermore, equal treatment is also a crucial concept in the CJEU's reasoning in the *Grzelczyk* and *Dano* cases. In both cases the tension lies in the fear of having an (unreasonable) burden on the social assistance system, caused by (intra-EU) migration. How much solidarity can be expected between (nationals of) Member States? The CJEU seems to be ambiguous and inconsistent in the application of the principle of equal treatment. How equal are EU citizens? What does it mean to treat someone equally, as an equal? How do we view unequal treatment? What idea of (social) justice is implicit in the CJEU's case law?[187] There are many philosophical theories about equality, which may be useful to explore in further research on EU citizenship.[188]

In this regard, what is most notably left unsaid in *Dano* are precisely terms like solidarity, or even the classic EU law principle of proportionality, which could have been used to flesh out the intention to avoid an 'unreasonable' burden on national social assistance systems. It is highly interesting (and worrying) that the *Dano* case does not mention the words 'solidarity' or 'proportionality' at all.[189]

8. Law-in-Literature excursus: Sophocles' Philoctetes

The narrative analysis of *Grzelczyk* and *Dano* cases and the reflection on the central terms of meaning and value in these examples of EU citizenship legal discourse have unearthed many questions. A further exploration of these terms and concepts is needed. However, the analysis above also illustrates another aspect of the Law and Literature approach, a more self-reflective one. As James Boyd White put it:

'The central question it teaches us to ask is who we become, individually and collectively – who we can become – in our conversations with one another. What kind of selves, what kind of communities do we establish with each other in our speech, especially in our persuasive speech?'[190]

The Greek author Sophocles addressed these questions in his play *Philoctetes*. Philoctetes was a Greek warrior who possessed the invincible bow of Heracles. He was, however, abandoned by Ulysses and the other Greeks on the uninhabited island Lemnos because of a stinking, festering wound on his foot. During the unsuccessful siege of Troy, the seer Helenus predicted that the Greeks would never win the war without the bow of Heracles. In order to retrieve it, Ulysses sailed back to Lemnos with Neoptolemus, the son of Achilles. Ulysses

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[185] N. Nic Shuibne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship" 52 Common Market Law Review (2015) p. 908-909.

[186] See N. Nic Shuibhne, 'The Resilience of EU Market Citizenship" 47 Common Market Law Review (2010) p. 1613 and more recently: N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship" 52 Common Market Law Review (2015) p. 926.

[187] 'Editorial Comments: The Critical Turn in EU Legal Studies" 52 Common Market Law Review (2015) p. 885-886.

[188] See for a starting point: http://plato.stanford.edu/entries/equality/

[189] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 *Common Market Law Review* (2015) p. 913.

[190] J.B. White, *Heracles' bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press, 1985) p. 4.

explained to Neoptolemus that he must trick Philoctetes with a false story into giving him the bow. Neoptolemus was an honourable young man and objected to this approach. Although he first consented to follow Ulysses' plan, he eventually felt ashamed of himself and empathized with the wounded warrior, and he confessed the deceit to Philoctetes. However, it was only with the help from the gods (deus ex machina) that he finally managed to persuade Philoctetes to come to Troy to help the Greeks win the war.

Sophocles' *Philoctetes* offers several themes such as trust, belonging to a community (or, conversely, 'Otherness'), and justice. The play starts with a scene in which Ulysses and Neoptolemus talk about the best way to get Philoctetes and his invincible bow to Troy. Ulysses tries to persuade Neoptolemus to go along in his strategy to deceive Philoctetes, whereas Neoptolemus prefers to convince Philoctetes by honest arguments. The difference in their points of view and their use of language shows that they have a different vision of community, of the social texture in which they function and in which they establish relations with other persons.[191]

The play contrasts Ulysses' instrumental approach of other persons as means to an end, with Neoptolemus' approach of persons as 'ends in themselves', as autonomous human beings who deserve respect.[192] Ulysses reasons from an instrumental means-ends perspective, but with the goal of winning the Trojan War in mind. How valid is this goal as a justification for deceiving Philoctetes and using young Neoptolemus as his instrument? Conversely, how are we to make sense of the fact that despite Neoptolemus' honesty and respect, arguing from a moral right-wrong perspective, Philoctetes refuses to be persuaded and only consents to come to Troy after the intervention of the gods? Why is the audience let to despise Ulysses and admire Neoptolemus, while Neoptolemus' honest way is least successful?[193]

To come back to the *Grzelczyk* and *Dano* cases: in what respect does the CJEU's case law on EU citizenship have a means-ends rationality? How are we to understand this Kantian imperative? What does it actually mean to 'treat another person as an end in himself' in 21st century Europe? Is this moral imperative absolute, or is it subject to qualifications or limitations? In what way is the CJEU's use of concepts, legal reasoning and framing constitutive of a community? How are we to narrate the past development of EU citizenship in EU (case) law, and its future? Usually, the account of EU citizenship's development as a legal concept argues that early on in the European economic integration project, the European judiciary felt uncomfortable with the narrow approach of citizens as mere production factors. In various ways the CJEU (at least in cases such as *Grzelczyk*) has empowered the European citizen: by giving a broad interpretation of the requirement of economic activity, by ensuring access to social benefits and by actively protecting fundamental rights.

However, especially after the close reading of the *Dano* case, how empowering is the CJEU's case law, how true to the imperative of treating other persons as ends in themselves? Are not young Elisabeta Dano and her son Florin exactly the kind of vulnerable human beings that a social assistance system should protect? Conversely, how is the CJEU to deal with the paradox of EU citizenship, i.e., trying to encourage free movement and ensure equal treatment (equal opportunities) for all EU citizens, while by doing so, (allegedly) putting strains on national social assistance systems?

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[191] J. Biancalana, 'The Politics and Law of Philoctetes" 17 Law and Literature (2005) p. 156. J.B. White, Heracles' bow: essays on the rhetoric and poetics of the law (University of Wisconsin Press, 1985) p. 4 and 6, 7.

[192] J.B. White, Heracles' bow: essays on the rhetoric and poetics of the law (University of Wisconsin Press, 1985) p. 3-5. This idea is thus an 'intertext", a text in text, the same idea floating from context to context, sharing the same 'discursive space", more than just a comparison or continuation. See R.A. Ferguson, The trial in American life (University of Chicago Press, 2007) p. 25-26.

[193] J.B. White, Heracles' bow: essays on the rhetoric and poetics of the law (University of Wisconsin Press, 1985) p. 4-7.

9. CONCLUSION: AVENUES FOR FURTHER RESEARCH

As shown in this paper, Law and Literature can be useful as a new way of doing legal research into EU law. Law and Literature research can operate on different levels, proposing a different way of reading (case) law and looking into questions such as why a certain text is more persuasive than others. It allows us to take a closer look at techniques of adjudication: rules like *lex specialis derogat lex generalis*, precedent, and interpretive techniques (grammatical, historical, teleological etc), and how these techniques are used and interact. Furthermore, narrative analysis can reveal the emplotment of a judgment and its framing, for instance in the way the parties are described or in the weight that is attached to certain norms or concepts in the legal reasoning.

Narrative analysis of EU case law identifies the initial state (normative starting point), the conflict/complication, and the ensuing denouement: accommodation or transformation. As we have seen, within the narrative of a judgment, adjudicative techniques function to deal with the conflict/complication in order to come to a conclusion. These techniques and, more specifically, the vocabulary and conceptual framework they employ, should be looked into more closely because they (in)form the framing and outcome of a case. The Law and Literature approach suggested in this paper can also be used to take a step beyond this analysis and to reflect upon the bigger picture: what does it mean if the CJEU uses a certain word or concept?[194] More philosophically, Law and Literature provides legal professionals a framework to think about how they as writers interact with a text, how their reader interacts with a text, and how their text interacts with, or shapes reality.[195]

The example of *Grzelczyk* and *Dano* shows how this kind of analysis can be helpful to make the tension between a concept of 'deserving citizenship' (market-citizenship) or 'citizenship as a fundamental status' more sharp, so as to see more clearly where the actual tension resides. It is apparent from the analysis that Rudy Grzelczyk is framed as the hero who – after facing difficulties – changes the status quo and who is an example of moral virtue. This narrative is revealed by the selection and ordering (repetition) of the facts. Furthermore, one can see the narrative at play in the way in which the CJEU applies and interprets the law: the CJEU moves towards Grzelczyk, he is welcomed, included into the community, so to speak.

The same type of analysis of the *Dano* case reveals that the CJEU moved in the opposite direction. Elisabeta Dano is framed as an unsympathetic welfare tourist, and the CJEU adopts a legal reasoning that constantly broadens the distance between her and EU citizenship rights, between Dano and the community, by focusing on the intricate details of secondary case law instead of operationalizing its reference to the normative grand narrative of EU citizenship as a fundamental status. Also, the lack of any reference to solidarity or the principle of proportionality and the denial of application of the Charter is astonishing.

The framing of these cases and the methods used to decide them show how important the text and vocabulary of the CJEU is. In *Grzelczyk*, the statement '*EU citizenship is destined to be the fundamental status…etc*' seemed right. This sentence has been taken up as precedent, and it has often been repeated in subsequent cases. The use of precedent is a part of legal professionalism: referring to precedent in order to tie the new case to a line of earlier case law is just was we do, often, and it increases legal certainty and legitimacy. However, as I have tried to show in this paper, a statement like this contains many layers of meaning, and it raises a broad spectrum of questions, if not expectations. What does it mean if the CJEU repeats such a statement as precedent in *Dano*, but the actual framing and outcome of the case proves that EU citizenship rights are not so fundamental, but rather conditional? What sense does this statement make in this case?

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[194] As one author notes: 'Market citizenship is not only problematic because it blocks a more social alternative, but also because it contributes to an ideological linguistic capture – a fixing of politically loaded meanings to ostensibly objective, neutral words; 'the market" and 'economic" are associated with rationality while being pre-loaded with patriarchal leanings." C. O'Brien, 'I trade, therefore I am: Legal personhood in the European Union", 50 Common Market Law Review (2013) p. 1646.

[195] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 Common Market Law Review (2015) p. 935-936.

In the EU citizenship debate, legal professionals (judges, law-makers, academics) constantly have to deal with the tension within EU citizenship between its aspirations and its concrete rights and duties. As I have tried to show with this first exercise in narrative analysis of CJEU case law, Law and Literature methodologies can help to 'unpack' or deconstruct the concepts and vocabulary used. Concepts like 'citizenship', 'fundamental' and 'equality' harbour more meanings that need to be carefully and critically explored.

As a poet and playwright, Sophocles had the artistic liberty of solving *Philoctetes*'s impasse through a *deus ex machina* intervention. EU legal professionals, however, do not have this particular instrument at their disposal, but they can keep asking themselves what communities their writings - *the soft enchanting tongue that governs all* - create. If we project our hopes and our fears in law,[196] and if the construction of EU citizenship can be seen as an expression of the Self-understanding of the EU, then we must be both careful and imaginative at the same time with the words and vocabulary we use.[197]

[196] R. West, Narrative, Authority and Law (University of Michigan Press, 1993) p. 346.

[197] Cf. C. O'Brien, 'I trade, therefore I am: Legal personhood in the European Union", 50 Common Market Law Review (2013) p. 1683; and the recent 'Editorial Comments: The Critical Turn in EU Legal Studies", 52 Common Market Law Review (2015) p. 884-886, 888.

THE USE OF PERSONAL IDENTITY NUMBERS IN SWEDEN AND DENMARK: A BARRIER TO UNION CITIZENS' ENJOYMENT OF FREE MOVEMENT RIGHTS?

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1. INTRODUCTION

1.1 FREE MOVEMENT AND NON-DISCRIMINATION ON GROUNDS OF NATIONALITY[198]

All nationals of the European Union member states are Union citizens – a status which grants them the right to exercise freedom of movement for both economic and non-economic purposes, as workers and self-employed persons, job-seekers, students, and so forth.[199] For the sake of efficiency of the fundamental freedoms, and as an individual right tied to the status of Union citizenship, the principle of non-discrimination on grounds of nationality applies to any lawful exercise of freedom of movement.[200] The member states are under the obligation to ensure that Union citizens may exercise freedom of movement without encountering unjustified discriminatory treatment or restrictions.[201] Whether private parties are also directly obligated under Union law to respect the ban on nationality discrimination in their contractual agreements with one another is a more contested issue.[202]

1.2 RESIDENCE REGISTRATION IN SWEDEN AND DENMARK

Sweden and Denmark have respective systems in place for registration of each natural person who are considered to be a resident in the state according to the respective national legal definitions. A person who is registered in either the Swedish or Danish national population registry is subsequently granted a national personal identity number (*personnummer*) unique for each individual, and linked to his or her personal data in the registry.[203] The number consists of ten digits, of which the first six indicate the date of birth of the individual, followed by four additional digits.[204] The personal identity number is extensively required for a

[198] A working draft of this paper was presented at the bEUcitizen Conference in Zagreb on 29 June 2015 and I am very grateful for the helpful comments and suggestions received from the other participants at the conference. Thank you to Catherine Jacqueson, Silvia Adamo and Graham Butler for helpful comments on an earlier draft. The author takes full responsibility for the final version of the paper for the bEUcitizen collection of papers for Deliverable 2.2, Sep 2015.

[199] Articles 20-21, 45, 49 and 56 Treaty on the Functioning of the European Union, TFEU.

[200] Catherine Barnard, The Substantive Law of the EU: The Four Freedoms (Oxford University Press, 2013), p. 244 f. DO 'A' have a full name? Alina Tryfonidou, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to One of (Almost Complete) Independence', Yearbook of European Law 33, no. 1 (2014): 385–416, p. 402 f.

[201] The extent of this obligation vis-à-vis both non-national and national Union citizens exercising freedom of movement has been seen in cases like Case C-186/87, Cowan v Trésor public [1989] ECR 0195, Case C-148/02, Garcia Avello [2003] ECR I-11613, Case C-138/02, Collins [2004] ECR I-02703, Case C-403/03, Schempp [2005] ECR I-06421, C-424/10, Case C-353/06, Grunkin and Paul [2008] ECR I-07639 and Ziolkowski and Szeja [2011] ECR I-14035.

[202] See discussions by Marek Safjan and Przemyslaw Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private law', European Review of Private Law 18, no. 3 (2010): 475. Sacha Prechal and Sybe de Vries, 'Seamless Web of Judicial Protection in the Internal Market', European Law Review 34, no. 1 (2009): 5–24. Gareth Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law' in Leczykiewicz, D. and Weatherill, S. (eds.) The Involvement of EU Law in Private Law Relationships (Studies of the Oxford Institute of European and Comparative Law), Hart Publishing, 2013.

[203] In Denmark the number is also referred to as a CPR-number. CPR is the abbreviation for Det Centrale Personregister, which is the centralised State authority that administers the personal identity numbers in Denmark. Other Nordic states of Norway, Finland and Iceland also have similar administrative systems for population registration linked to the use of personal identity numbers. For the purpose of this short paper, only the examples of Sweden and Denmark, the two Scandinavian Union member states, are studied.

[204] Sweden: Folkbokföringslag (1991:481) 18 §. Denmark: Bekendtgørelse om folkeregistrering m.v. Folkeregistreringsloven § 1.

person's access to both public and private assistance and services in the state where he or she is registered, which is where the number is valid as a means of identification and a proof of entitlement.[205] This paper analyses whether the way these numbers are used nationally in Swedish and Danish society and the practical problems a Union citizen without a personal identity number might face in contacts with both public and private actors are compatible with the principle of non-discrimination on grounds of nationality and the right to exercise freedom of movement without unjustified obstacles.

Being considered a resident, as defined in national law, and thereby being registered in the population registry, has rights-bearing effects. In both Sweden and Denmark, the entitlement to public health care services and certain social benefits are based on the individual being a national resident.[206] For contacts with public authorities and the health care system, it is therefore usually required that a person shows his or her personal identity number, as a means of identification and a proof of entitlement. In both states, to have a national personal identity number is also often a requirement as a means of identification in an individual's contacts with private actors such as, but not limited to, banks, potential employers, landlords, and utilities, internet and telecommunication providers.[207] As a consequence, to live in Sweden or Denmark without having a personal identity number will pose daily practical problems with regards to access to public as well as many private services.[208] Union citizens have petitioned the European Parliament to object to the practical problems they have encountered due to not being registered in the Swedish Population Registry and the Swedish law and administrative practices in this regard have been put under review.[209] It is therefore relevant to analyse the systematic use of personal identity numbers in Sweden and Denmark in the light of EU citizenship and free movement law.

The paper firstly describes the legal requirements for obtaining a personal identity number and the practical importance of having such a number in Sweden and Denmark respectively (section 2) followed by a consideration of the binding effect on public and private parties of the Union law principle of non-discrimination on grounds of nationality and the obligation not to restrict the fundamental freedoms (section 3). Lastly is an analysis of the compatibility of the Swedish and Danish systems of personal identity numbers to EU free movement law (section 4) followed by concluding remarks and reflections on the implications that the Swedish and Danish systems of residence registration and personal identity numbers may have on freedom of movement (section 5).

2. Personal identity numbers – a gateway to Scandinavian society

2.1 National population registries and personal identity numbers

The respective Swedish and Danish national population registries are centralised, digitised registries, administered by the Swedish Tax Authority (*Skatteverket*) in Sweden and the Danish Central Office of Civil Registration (*Det Centrale Personregister, CPR*) in Denmark.

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[205] A Swedish personal identity number is not valid in Denmark and vice versa.

[206] Sweden: Hälso- och sjukvårdslag (1982:763) 3 and 3 a §§. Socialförsäkringsbalken 5 kap. See also the considerations made in an Official Report of the Swedish Government SOU 2009:75 p.175 f. Denmark: Lovbekendtgørelse nr. 913 af 13. Juli 2010 om sundhed med senere ændringer, Sundhedsloven, § 7.

[207] Sweden, see report by the Swedish National Board of Trade, Kommerskollegium 2014:2, 'Moving to Sweden – Obstacles to the Free Movement of EU Citizens'. On the usage of personal identity numbers in society, see also the Swedish preparatory work prop. 2008/09:111 p. 15. Denmark: See http://denmark.angloinfo.com/moving/residency/cpr-number, accessed 30 May 2015.

[208] The vital practical importance of having a personal identity number in Swedish society is recognised by the Swedish legislature, see prop. 2008/09:111 p. 18.

[209] The European Commission raised an infringement procedure against Sweden in 2009 for the denial of a right of residence of a Danish national with a child, by denying them registration in the population registry. Infringement number 20074081 decision on 20 November 2009. See also Notice to Members on Petition 1098/2010 and Petition 1183/2010, European Parliament, 30.3.2015.

For each registered individual, the population registry will normally contain personal information such as full name, address, marital status and date and place of birth.[210] On a national basis, state and municipal authorities retrieve and rely on information from the registry as a means of updating and verifying a person's place of residence and personal circumstances.[211] In both Sweden and Denmark, some private actors also use the personal information registered in the national population registry. For example, banks and credit institutions and insurance providers verify and update the personal information of their clients against the respective national population registries.[212] The personal data information contained in these population registries, which is linked to the unique personal identity number of a person, also makes the use of a person's number a sensitive matter from the point of view of data protection.[213]

The following two sub-sections describe the respective national formal requirements for residence registration and the problems Union citizens might have to get registered, although they are lawfully exercising freedom of movement to either of the two member states. There is also an account of some of the practical problems it entails for a Union citizen to not be registered as a resident, and thereby not have a personal identity number.

2.2 Sweden

2.2.1 Formal requirements for registration in the Swedish population registry

The Swedish Tax Authority assesses a person's eligibility for registration in the national population registry and will issue a personal identity number for each individual who is registered. After a Union citizen's immigration to Sweden, registration as a resident depends on whether he or she intends to reside at a given address in a municipality for at least one year and can prove that he or she will continuously fulfil, for the year to come, the requirements for lawful residence, stemming from the Free Movement Directive 2004/38,[214] and as implemented in Swedish law.[215] Accordingly, after the first initial three months of unconditional right of residence, a Union citizen may retain a right of residence in Sweden if he or she is a worker, a service provider or active as a self-employed person in the country or a job-seeker with realistic opportunities to find employment.[216] A Union citizen who is registered as a student at an approved educational establishment in Sweden, has sufficient means to support themselves, and a comprehensive sickness insurance cover will also have a right of residence. Other Union citizens must show sufficient funds and comprehensive sickness insurance valid for residence in Sweden for themselves and any accompanying family.[217]

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[210] Sweden: Folkbokföringslag (1991:481) 28 §. Denmark: Bekendtgørelse af lov om Det Centrale Personregister, CPR-loven § 4 og § 20.

[211] 'Verification of Personal Information', accessed 22 May 2015, http://www.nyidanmark.dk/en-us/coming_to_dk/verification-of-personal-information.htm. The Swedish Tax Authority provides other public actors with information through a system called NAVET. 'Om Folkbokföringssystemet | Skatteverket, accessed 6 May 2015, http://www.skatteverket.se/privat/folkbokforing/omfolkbokforing.

In Denmark, the CPR-office issues the requested information for public actors. See CPR-systemet, accessed 31 May 2015, https://cpr.dk/kunder/offentlige-myndigheder.

[212] The Swedish Tax Authority's system for providing private actors with information through a system called SPAR, to which the private actors like banks, insurance companies amongst others must register as clients. 'Om Folkbokföringssystemet | Skatteverket, accessed 6 May 2015, http://www.skatteverket.se/privat/folkbokforing/omfolkbokforing

In Denmark, the CPR-office issues the requested information for certain private actors.

CPR-systemet, accessed 31 May 2015, https://cpr.dk/kunder/private-virksomheder

[213] Peter Blume, 'Direktiv Eller Forordning I Persondataretten', Juristen, no. 2 (2012): 57–60.

[214] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[215] Folkbokföringslag (1991:481) 3-4 §§. The Swedish Aliens' Act: Utlänningslagen (2005:716) 3 a kap.

[216] Utlänningslagen (2005:716) 3 a kap. 3§.

[217] Ibid. Accompanying family members who themselves are Union citizens may fulfil the requirements individually.

2.2.2 The requirement of an intended residence of one year

The interaction of the national definition residence, as the intention of residence at a fixed place of address of one year, and the requirements for lawful residence under Union law, as implemented from the Directive 2004/38, means that the Union citizen must show that he or she will continuously fulfil the conditions for lawful residence for the coming year in order to qualify for registration.[218] The one year residence requirement is motivated by the special rights-bearing effects it has to be defined as a resident according to national law and that one year is a suitable time frame for ensuring that there is a link between the person and Swedish state.[219] A Union worker, service provider or student who can only show a short-term contract or who is following a course of study of less than a year, will therefore not be registered as a resident in the registry. A Union citizen residing on the basis of being an economically self-sufficient person needs to show sufficient funds for at least one year and comprehensive sickness insurance valid for that period in order to qualify. As a general assumption, a Union citizen job-seeker, who has a right of residence based on actively seeking employment in Sweden, will not fulfil the requirements for registration as a resident or given a personal identity number. The Tax Authority here refers to the fact that a Union citizen job-seeker normally only has the right to stay in a host member state for up to six months, which then makes it impossible to qualify for registration as a resident, as this ground for a right of residence cannot fulfil the national residence criteria of an intended residence of one year.[220] A practical issue that arose as a consequence of that many first time job-seekers in Sweden do not have personal identity numbers was that the Swedish Public Employment Service (*Arbetsförmedlingen*) could not register them in their national employer-employee matching system database. Instead, the Employment Service kept these Union citizen job-seekers only on paper file, which in practice made them invisible to potential employers. This measure was changed in 2013 as it was found to discriminate against Union citizen job-seekers in a way that was in breach of Union law. Instead the Employment Service will request that the Tax Authority issues alternative co-ordination numbers (*samordningsnummer*) for job-seekers who lack personal identity numbers so that the persons can be registered in the employment database.[221] These co-ordination numbers are however not as useful as proper personal identity numbers are, as they are generally not an accepted means of identification.[222]

2.2.3 Practical problems in Swedish society without a personal identity number

In an official report of the Swedish Government,[223] the rapporteur considered whether the Swedish legislation concerning population registration based on a national definition of residency and the one-year requirement was compatible with Union citizens' right of residence according to Directive 2004/38. The rapporteur concluded that they were, as long as there are other ways in which unregistered Union citizens can prove their entitlement to certain rights and benefits that they enjoy based on Union law.[224] However, in everyday

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[218] 'Moving to Sweden', accessed 22 May 2015 , http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsemployees/movingtosweden.4.2b543913a42158acf800027235.html.

[219] SOU 2009:75 p. 165 f.

[220] 'Moving to Sweden'(n 21). On the conditions under Union law for a right of residence for EU job-seekers see for ex. Case C-138/02, Collins [2004] ECR I-02703.

[221] 'EU-Medborgare Fick Inte Samma Chans till Jobb - Nyheter (Ekot)', accessed 22 May 2015, http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5495592.

On co-ordination numbers. See Folkbokföringslagen 18 a § and SKV 707 Utgåva 2, Oct 2006.

[222] That alternative co-ordination numbers do not have the same formal standing or acceptance for practical use in Swedish society, is noted in the report by the Swedish National Board of Trade, Kommerskollegium 2014:2 'Moving to Sweden – Obstacles to the Free Movement of EU Citizens', 2014. See also Swedish preparatory work prop. 2008/09:111 p. 28 f.

[223] SOU 2009:75 Folkbokföringslagens förhållande till EG-rätten.

[224] SOU 2009:75, p. 147-149.

practice, a personal identity number, which is the proof of being a registered resident, will often be the only accepted means of identification for access to certain public and private services.

A report by the Swedish National Board of Trade assembled examples of where access to public or private services is conditioned on a person identifying themselves by a personal identity number.[225] The report lists instances where a person is required to have a personal identity number, such as for receiving a parcel through the post office, purchasing a telephone subscription, registering at a Swedish language course for foreigners organised by the local municipality (*SFI*), renting a car from a car rental company, signing an employment contract as well as rental contracts for accommodation, and so forth.[226] The report thereby highlights how having a personal identity number is of great practical importance for everyday life in Sweden.[227] Before the Administrative Court of Appeal in Stockholm (*Kammarrätten i Stockholm*) a Union citizen student appealed the Tax Authority's refusal to register her as a resident.[228] At the time of applying for registration in the population registry, she could not prove a right of residence for at least one year as her planned academic year of study was less than twelve months. The Court of Appeal agreed with the appellant that the fact that several private actors in society, in a perfunctory manner, demand that a person identifies him or herself by a personal identity number, in practice makes it very difficult to live in Sweden without such a number. However, it went on to say that this behaviour of private parties was not attributable to the state and that denying registration and a personal identity number to a Union citizen who does not fulfil the national requirements for being a resident was compatible with Union law. The Court of Appeal therefore upheld the decision to deny the appellant registration in the national population registry due to her failure to fulfil the one year residence requirement.

2.3 DENMARK

2.3.1 FORMAL REQUIREMENTS FOR REGISTRATION IN THE DANISH POPULATION REGISTRY

The legal requirements for registration of a natural person in the Danish population registry are that the person has a place of domicile (a dwelling), normally proven by showing a rental agreement, and that the stay in Denmark is planned to last longer than three months.[229] A Union citizen staying in Denmark for more than six months must register.[230] In addition, but with the exception of nationals from other Nordic states, a Union citizen must prove that he or she fulfils the residence requirements stemming from Directive 2004/38, as implemented in Danish law.[231] The person registers their residence at the local municipality and the personal information will thereby be registered in the centralised registry (CPR).[232] There are four centres for International Citizen Service situated in the larger Danish cities, to where a non-national may turn for these administrative purposes.[233] A Union citizen, who is registered in the population registry because of having moved their residence to a municipality in Denmark is issued a personal identity number and a health

[225] Kommerskollegium 2014:2 'Moving to Sweden – Obstacles to the Free Movement of EU Citizens', 2014.

[226] Ibid, p. 9.

[227] The Swedish legislator has noted the extensive use of personal identity numbers in society, see considerations in the Swedish preparatory work prop. 2008/09:111 p. 15 f.

[228] Kammarrätten i Stockholm, dom meddelad den 20 december 2012 i mål nr 6343-11.

[229] CPR-loven (n 13) § 6 etc.

[230] CPR-loven (n 13) § 16.

[231] CPR-loven (n 13) § 17. The conditions for a right of residence according to Directive 2004/38 are implemented in Danish law in The Executive Order on Residence in Denmark for Aliens Falling within the Rules of the EU: Bekendtgørelse om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler, EU-opholdsbekendtgørelsen.

[232] CPR-loven, § 6.

[233] http://www.statsforvaltningen.dk/site.aspx?p=8191, accessed 31 May 2015.

insurance card. This card shows that the person, as a resident of Denmark, is covered by the national public health care system.[234]

The Danish law implementing the conditions for lawful residence stemming from Directive 2004/38 gives that all Union citizens have an unconditional right of residence for three months.[235] A Union citizen who is a worker, service provider or self-employed has a right of residence exceeding three months and a job-seeker will enjoy a right of residence for at least six months, and longer if he or she can prove that there are realistic opportunities to find employment in Denmark.[236] A student has a right of residence beyond three months provided that he or she is registered with an educational institution. The student as well as a non-economically active Union citizens must fulfil the requirements of having sufficient resources not to become a burden on the social assistance system and show a comprehensive sickness insurance valid for the period up until he or she is eligible for access to the national health insurance system, which the person will be covered by if he or she is assessed to be a resident.[237]

2.3.2 Practical problems in Danish society without a personal identity number

In Denmark, the practical use of the personal identity number has expanded with the increased digitisation of public services.[238] The Global Expat Network in Denmark lists a number of instances where a Danish personal identity number is necessary, such as for purchasing insurance, joining a library, opening a bank account, connecting utilities, receiving salary payments, and some instances of purchasing real estate.[239] Other examples include registering for a public transport card, accessing services by an optician and participating at an online casino.[240]

Some Danish municipal authorities formerly had a practice to deny homeless Union citizens access to night shelters if the person did not have a yellow health insurance card, which only persons registered in the population registry and in possession of a personal identity number will have. The authorities responsible for the shelters assumed that the absence of the yellow card or a personal identity number signified that the person was not lawfully residing in Denmark and therefore not entitled to assistance from the municipality. However, this practice changed after recognition that Union citizens have an unconditional right of residence in the country for three months and longer if they are job-seekers. They might therefore be in Denmark lawfully under Union law, without being registered as residents, and without having a personal identity number and a yellow card.[241]

The paper now turns to a consideration of the Union law framework for the exercise of freedom of movement of persons and the principle of non-discrimination on grounds of nationality followed by an analysis of whether the extensive use of the personal identity numbers by public and private actors in Sweden and Denmark respectively is compatible with Union citizenship and free movement law.

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[234] Sundhedsloven (n 9) § 7 and § 12.

[235] EU-opholdsbekendtgørelsen § 3.

[236] Ibid. 3 §.

[237] Ibid. 5-6 §§ and Sundhedsloven (n 9) 7 §.

[238] "Udviklingen på CPR-området i de seneste 20-25 år frem til 2009", CPR-kontoret, April 2009, s.27 f.

[239] http://denmark.angloinfo.com/moving/residency/cpr-number/, accessed 22 May 2015.

[240] 'Hvem Må Bede Om Dit Cpr-Nummer? | Forbrugerrådet Tænk', Taenk.dk, accessed 22 May 2014, http://taenk.dk/gode-raad/tema/beskyt-dit-cpr-nummer/hvem-maa-bede-om-dit-cpr-nummer.

[241] 'Herbergers Afvisning Af Hjemløse EU-Borgere Er Ulovlig', Information, accessed 22 May 2015, http://www.information.dk/519473.

3. Discrimination and obstacles to Union citizens' exercise of free movement

3.1 The principle of non-discrimination on grounds of nationality

The prohibition of discrimination on grounds of nationality, generally expressed in Article 18 TFEU, and transcending all the fundamental freedoms, is the cornerstone for the building of the internal market, where goods, capital and persons may move freely across the member state borders.[242] Union citizens' right to free movement entails both the right to pursue economic activity in the member state of choice as a worker, self-employed person or service provider, as well as the right to move and reside freely in any member state of the Union without pursuing economic activity.[243] Discrimination and other obstacles that hinder a person's access to the employment market or the taking up of residence in a host member state, as well as to the cross-border reception of services, are incompatible with Union law, unless the member state can justify the measure in accordance with the proportionality test developed in the Court of Justice's rulings.[244] When lawfully exercising the right to free movement, whether economic or non-economic, a Union citizen may thus rely on the right to be treated equally by public authorities comparable to nationals who are in a similar situation.[245] Unless there's a justified ground for derogation from the principle of non-discrimination, nationality or residence should not matter for the purpose of competing for a job, a place of study, or recognition of professional qualifications.[246] As the right of residence in a host member state is conditioned by fulfilment of the requirements given in Directive 2004/38, lawful exercise of freedom of movement entails that the Union citizen and any accompanying family members are residing in a host member state in accordance with the residence directive's requirements, as implemented in national law.[247] The principle of non-discrimination on grounds of nationality has the character of a right to equal treatment associated with Union citizenship. Therefore, there does not have to be an obstacle the person's possibility to lawfully exercise free movement, for the prohibition on discrimination on grounds of nationality to apply.[248] In cases like *Cowan* and *Bickel and Franz*, the Court held that tourists, who are exercising the free movement of services in Article 56 TFEU as service recipients, may rely on the prohibition of discrimination on grounds of nationality to oppose unjustified unequal treatment by the host member state.[249]

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[242] On the importance of non-discrimination for the functioning of the single market, see Barnard, The Substantive Law of the EU: The Four Freedoms, p. 17 f.

[243] The right to free movement for workers, self-employed persons and service providers are given in Articles 45, 49 and 56 TFEU. The right of all Union citizens to free movement is given in Article 21 (1) TFEU and conditioned through Directive 2004/38.

[244] See cases like Case C-281/98, Angonese [2000] ECR I-04139, Case C-55/94, Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-04165, Case C-19/92, Kraus v Land Baden-Württemberg [1993] ECR I-01663, Case C-224/02, Pusa [2004] ECR I-05763, Case C-148/02, Garcia Avello [2003] ECR I-11613, Case C-158/96, Kohll v Union des caisses de maladie [1998] ECR I-01931.

[245] See for ex. Case C-524/06, Huber [2008] ECR I-09705 and Case C-75/11, Commission v Austria, Judgment of the Court (Second Chamber), 4 October 2012. The right to equal treatment has derogations with regards to access to social assistance and study maintenance grants for non-economically active Union citizens in a host Member State, Article 24 (2) Directive 2004/38.

[246] Respectively Angonese (n 46), Case C-147/03, Commission v Austria [2005] ECR I-5969 and Case C-71/76, Thieffry v Conseil de l'ordre des avocats de la Cour de Paris [1977] ECR 0765. See also Davies, 'Discrimination and beyond in European Economic and Social Law', 2011.

[247] The rulings in Case C-140/12, Brey, Judgment of the Court (Third Chamber) of 19 September 2013, not yet reported and Case C-333/13, Dano, Judgment of the Court (Grand Chamber) of 11 November 2014, not yet reported, show the importance of lawful residence in a host Member State for coming within the scope of the right to equal treatment. See comment by Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens', Common Market Law Review 52, no. 1 (2015): 17–50.

The economically active person's right of residence is contingent on him or her coming within the scope of the economic freedoms in Articles 45, 49 or 56 TFEU and thereby fulfilling the requirement for having a genuine link to the host society based in that economic activity, see Frans Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States', International Journal of Comparative Labour Law and Industrial Relations 28, no. 3 (2012): 307–33.

[248] Tryfonidou, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions', p. 404 f.

[249] That service recipient are covered by the free movement of services in Article 56 TFEU is clear from cases like Joined cases 286/82 and 26/83, Luisi and Carbone v Ministero dello Tesoro [1984] 0377, paras 10-16 and Case C-186/87, Cowan v Trésor public [1989] ECR 0195, para 15, See Case C-59/00, Vestergaard [2001] ECR I-09505, para 20. Cowan (n 8) and Case C-274/96, Bickel and Franz [1998] ECR I-07637, para 15. See also Luisi and Carbone (n 8).

3.2 THE NOTION OF DISCRIMINATION AND NON-DISCRIMINATORY BARRIERS

The principle of non-discrimination of grounds of nationality includes indirectly discriminatory measures; rules or measures that rely on other criteria than nationality, such as residence,[250] or a requirement of national diplomas,[251] but that in fact have a similar result to as if nationality had been used as the formal ground for differentiation.[252] The Court has developed the reasoning that measures, which, without being discriminatory, nevertheless restrict the exercise of free movement in some way, are incompatible with the free movement provisions unless justified.[253] Such measures may for example restrict a person's access to the employment or service market of a host member state or pose obstacles to a Union citizen's right under Article 21 TFEU to take up residence in another member state. A non-discriminatory obstacle to free movement is thus a measure that in some way makes the exercise of a fundamental freedom more difficult or deters Union citizens from exercising it.[254] This broad definition of discrimination and access-to-market restrictions does not require that the measures have a quantitative impact on freedom of movement.[255] The Court has found there to be a restriction on free movement of services and persons, also in cases where the realistic effect on these freedoms was minor or even intangible.[256]

3.3 THE BINDING NATURE OF THE FREE MOVEMENT PROVISIONS

It is clear that the member states, and therefore all public law bodies that form part of a state, are bound to respect the free movement provisions and the principle of non-discrimination on grounds of nationality.[257] A Union citizen can therefore claim equal treatment and oppose restrictions on the exercise of the fundamental freedoms in his or her vertical relationship with either a host or home member state.[258] The Court's rulings on freedom of movement reflect a broad notion of the state to extend to private law bodies that are somehow linked to the state or are assigned tasks by the public authorities.[259]

In the area of free movement of workers, the principle of non-discrimination has been interpreted by the Court to also bind private employers, thereby having a direct effect on the horizontal relationship between a worker

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[250] As in Case C-224/98, D'Hoop [2002] ECR I-06191 and Case C-337/97, Meeusen [1999] ECR I-03289.

[251] As in Thieffry (n 48) and Angonese (n 46).

[252] Davies, 'Discrimination and beyond in European Economic and Social Law', p. 11.

[253] For employment see Case C-415/93, Union royale belge des sociétés de football association and Others v Bosman and Others [1995] I-04921, for establishment and services see Cases C-438/05, The International Transport Workers' Federation and The Finnish Seamen's Union (Viking Line)[2007] ECR I-10779 and Case C-341/05, Laval un Partneri [2007] ECR I-11767, for Union citizenship see Case C-192/05, Tas-Hagen and Tas [2006] ECR I-10451. See generally Barnard, The Substantive Law of the EU: The Four Freedoms, p. 18-25.

[254] See for example Kohll (n 46), para 33 for the Court's definition of restrictions prohibited under Article 56 TFEU.

[255] See a discussion on the possibility of a de minimis-rule in free movement law in Max S. Jansson and Harri Kalimo, 'De Minimis Meets "market Access": Transformations in the Substance–and the Syntax–of EU Free Movement Law?', Common Market Law Review 51, no. 2 (2014): 523–58.

[256] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?', Common Market Law Review 47, no. 2 (2010): 437–72, p. 462.

[257] That the free movement provisions have vertical direct effect is a well-established principle of Union law. Case C-26/62, Van Gend en Loos v Administratie der Belastingen [1985] ECR 0779, Case 2/74, Reyners v Belgian State [1974] ECR 631, Case C-413/99, Baumbast and R [2002] ECR I-07091, Case C-33/74, Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299. That Article 18 and the prohibition on nationality discrimination has direct effect is clear from cases like Case C-85/96, Martínez Sala v Freistaat Bayern [1998] ECR I-02691 and Case C-184/99, Grzelczyk [2001) ECR I-06193.

[258] Joined cases C-523/11 and C-585/11, Prinz and Seeberger, Judgement of 18 July 2013, Kraus (n 46), D'Hoop (n 52) and Grunkin and Paul (n 4), Pusa (n 46) concerned the Union citizen's relationship to the home Member State.

[259] Case C-325/00, Commission v Germany [2002] ECR I-09977, Case C-171/11, Fra.bo, Judgment of the Court (Fourth Chamber) of 12 July 2012, Case 249/81, Commission v Ireland [1982] ECR 4005. For a discussion on the broad notion of the State and horizontal direct effect, see Herman van Harten and Thomas Nauta, 'Towards Horizontal Direct Effect for the Free Movement of Goods?. Comment on Fra. Bo', European Law Review, no. 5 (2013): 677–94.

and a private party.[260] The Court's rationale for this reasoning is to ensure the efficiency and uniform application of free movement law.[261] Therefore, the counterparties to the economic freedoms may also rely on the ban on discrimination on grounds of nationality. In the *Clean Car Autoservice* case, the Court held that employers may rely on free movement of workers against the state, in a situation where they are obligated by the state to impose discriminatory conditions on potential employees.[262]

A similar reasoning is found in cases like *Walrave* and *Bosman*, where sports associations, although being private law bodies, were found to be addressees of the principle of non-discrimination in Article 45 TFEU insofar as they had the power to regulate the conditions for the carrying out of cycling and football respectively, as professional activities.[263] In cases *Viking*[264] and *Laval,*[265] the Court found that trade unions, although private law entities separated from the state, were nevertheless under an obligation not to restrict the fundamental freedoms of services and establishment, based on their autonomous power to regulate the conditions for the exercise of these freedoms by concluding collective agreements on employment conditions and taking collective action to enforce these agreements.[266]

Employers and private parties with special regulatory powers, putting them in a position close to a public function, may therefore be bound to respect the fundamental freedoms and the principle of non-discrimination on grounds of nationality in their contacts with job-seekers, workers and other Union citizens exercising the fundamental freedoms.[267] Whether the free movement provisions and the prohibition of discrimination on grounds of nationality can have full horizontal direct effect so as to bind any private actor is, however, less clear.[268] What of those private parties on the internal market that do not have a special regulatory power, but are purely commercial actors, such as utility, telecommunications or insurance service providers? They are essentially the beneficiaries and not the addressees of the economic freedoms. Advocate-General Poiares-Maduro gave a convincing argument in *Viking* for why the provisions on free movement of persons should apply to private action that is capable of restricting other persons from exercising those rights.[269] However, the Court did not follow the Advocate-General's proposed line of reasoning in its ruling and instead focused on the special influence of the trade union to bind them under the prohibition of restricting the right to establishment.[270] As noted by Davies, the *Viking* and *Laval* cases indicate that private actors, who intervene as a third party to restrict the freedom to enter into contract of two other private parties, may be bound by the ban on restricting the fundamental freedoms.[271] However this does not clarify whether one of two contractual private parties is prohibited from imposing discriminatory conditions in their contractual agreement.[272] To impose an obligation of equal treatment on contractual agreements between two private parties will interfere with their freedom of contract and personal autonomy, which in itself is a general

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[260] Angonese (n 46), See discussions by Krenn, 'A Missing Piece in the Horizontal Effect "jigsaw": Horizontal Direct Effect and the Free Movement of Goods', p. 190-191. Mustafa T. Karayigit, 'The Horizontal Effect of the Free Movement Provisions', Maastricht J. Eur. & Comp. L. 18 (2011)p. 303-335, p. 315 f.

[261] Angonese (n 46), para 32. See Karayigit, 'The Horizontal Effect of the Free Movement Provisions, p. 317 f.

[262] Case C-350/96, Clean Car Autoservice v Landeshauptmann von Wien [1998] ECR I-02521.

[263] Bosman (n 55) and Case 36-74, Walrave and Koch v Association Union Cycliste Internationale and Others [1974] ECR 1405.

[264] (n 55)

[265] (n 55)

[266] See Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p. 9-10.

[267] Walrave (n 65), Bosman (n 55), Viking (n 55), Laval (n 55). See Barnard, The Substantive Law of the EU: The Four Freedoms, p. 241.

[268] Ibid. p 240-243. See discussions by Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p. 15 f. and Karayigit, 'The Horizontal Effect of the Free Movement Provisions, p. 322 f.

[269] See the Advocate's General Opinion in Viking (n 55), para 48.

[270] Viking (n 55). See Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p. 19 f.

[271] Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law', p. 61-62.

[272] Ibid.

principle of Union law.[273] The Court has been careful not to interpret freedom of movement and the principle of non-discrimination on grounds of nationality as far as to bind private parties entering into contractual agreements with one another.[274] Against this hesitation and, as noted by Safjan and Miklaszewicz, one can argue that the principle of non-discrimination does not demand substantive equality, but rather 'the equality of the initial position of the parties with regard to the prospects of the expression of free and unbiased will.'[275] To impose the principle of non-discrimination on grounds of nationality on private economic actors would therefore ensure an equal standing of non-nationals and nationals for the purpose of entering into contractual agreements. On the other hand, the Court may find that, in the absence of horizontal direct effect, there may be a positive obligation of the state to intervene to stop private actors' interference with the fundamental freedoms.[276] This reasoning is found in cases *Spanish Strawberries*[277] and *Schmidberger,*[278] concerning obstruction by private parties to the free movement of goods to the extent that the inaction of the member state could bring the matter within the scope of free movement law.

Given the above considerations of the notion of discrimination and restrictions to the fundamental freedoms, as well as the binding nature of these provisions, we now turn to an analysis of the compatibility of the systematic use of personal identity numbers by private and public actors with Union law.

4. Personal identity numbers and free movement law

4.1 Public actors' use of personal identity numbers in the light of free movement law

Member states are free to organise their own social security, taxation and health care systems, but when doing so, they must respect their obligations under the Treaty.[279] Union citizens, lawfully exercising the right to free movement, have a right to be treated equally to nationals of the host member state in a comparable situation, unless differentiation is justified under Union law, such as based on the lawful derogation from equal treatment in Article 24 (2) of Directive 2004/38.[280] To not be registered in the national population registry and navigate through Swedish and Danish public society without a personal identity number will in practice restrict the Union citizen's effective access to public services and assistance that he or she may have a right to access under Union law. This was seen in the case for job-seekers not being entered into the employee-employment database in Sweden, or homeless Union citizens being denied access to night shelters in Denmark.[281] Regardless of their lawful exercise of freedom of movement, Union citizens may in fact be put at a disadvantage because of not having been assessed to be a resident of the state according to national definitions and therefore not obtained registration and a personal identity number. Public actors' differentiation between persons based on the criteria of residence registration and a personal identity number will in some situations result in unjustified indirect discrimination on grounds of nationality, since a Swedish or

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[273] Ibid., p.55-61 and Marek Safjan and Przemyslaw Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private law.(European Union)(Legislation)', European Review of Private Law 18, no. 3 (2010): 475-486 at p. 484-485.

[274] Supra. (n 73). In case C-518/06, Commission v Italy [2009] ECR I-03491, para 66, on Italian third party motor vehicle liability insurance, the Court held that state measures that impede the freedom of contract of private parties constitute a restriction on private service providers' access to the market in a host Member State, contrary to Articles 49 and 56 TFEU.

[275] Safjan and Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private law', p. 485.

[276] Case C-265/95, Commission v France (Spanish Strawberries) [1997] ECR I-06959, Case C-112/00, Schmidberger [2003] ECR I-05659. See Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p. 20 f.

[277] n 77.

[278] n 77.

[279] Vestergaard (n 51), para 15, Case C-169/07, Hartlauer [2009] ECR I-01721, para 29, Kohll (n 46), paras 17-21 and Prinz and Seeberger (n 60), para 26.

[280] See the Court's reasoning on the narrow derogation from the right to equal treatment in Case C-75/11, Commission v Austria, Judgment of the Court (Second Chamber), 4 October 2012.

[281] Supra. section 2.

Danish national in a comparable situation will have such a number.[282] The examples above were found to be unlawful discrimination of Union citizens, and notably first time job-seekers, and the authorities subsequently changed their behaviour. A further issue is that the more advantageous treatment offered in Danish legislation of residence registration of Nordic nationals compared to other Union citizens can also be considered a breach of the principle of non-discrimination on grounds of nationality.

4.2 Private actors' use of personal identity numbers in the light of free movement law

As seen above, free movement law provides that public and private employers alike are prohibited from imposing discriminatory requirements on potential employees or restrict their access to the employment market and the state can be held liable for imposing discriminatory conditions for employment on an employer.[283] Union citizen job-seekers could therefore rely on Article 45 and 18 TFEU to oppose the requirement by a potential employer that they must have a personal identity number before an employment contract can be signed. Compared to job-seekers who are nationals, it is the migrant Union citizen who will clearly be put at a disadvantage if the signing is conditioned on having a personal identity number.

By virtue of exercising the right to free movement as a service recipient in Article 56 TFEU, a non-resident Union citizen may oppose the discriminatory requirement of identifying themselves with a personal identity number with regards to services offered in a public or semi-public capacity, or when such identification is imposed by state regulation on private parties.[284] Credit institutions, private health care providers and other private actors, may be required by law to register their clients by personal identity numbers. Insofar as the state demands of the private actor to carry out this control before accepting a new client, the state should be held responsible for any discrimination or restrictive effects it may have on freedom of movement.[285]

However, it remains unclear whether other private actors, such as private service providers with no obligation to require a personal identity number, are obligated to respect the principle of non-discrimination on grounds of nationality in their contractual agreements with a Union citizen as a client or consumer.[286] The, seemingly perfunctory manner, in which some private actors in Swedish and Danish society demand that a Union citizen is a registered resident and can provide their personal identity number for the access to service or consumer agreements could constitute a discriminatory restriction if the free movement provisions and the prohibition of discrimination on grounds of nationality was binding also on contractual agreements between two private parties. However, if there is no horizontal direct effect of Article 18 TFEU or the free movement provisions, a Union citizen cannot oppose the discriminatory condition to state a personal identity number for entering into a contractual agreement with a private service provider. Following the reasoning of Advocate-General Poaires-Maduro in *Viking* and the point made by Safjan and Miklaszewicz as referred to above, there is little reason why private actors should not be bound by free movement law to justify why they raise a discriminatory obstacle for entering into a contractual agreement. A non-national Union citizen, who does not qualify for a personal identity number although lawfully exercising freedom of movement, cannot reasonably overcome that obstacle unless the private actor accepts other means of identification.[287] In any case, the state can be said

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[282] For instances of indirect discrimination in the area of free movement of persons, see Martínez Sala (n 42), Case C-237/94, O'Flynn v Adjudication Officer [1996] I-02617, Angonese (n 46) Generally on the concept of discrimination, see Davies, 'Discrimination and beyond in European Economic and Social Law', p.10 f.

[283] See Angonese (n 46), Clean Car Autoservices (n 64).

[284] Luisi and Carbone (n 51), Cowan (n 51), Bickel and Franz (n 51), Tryfonidou, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions', p. 405-406.

[285] Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p.10. As was found in Clean Car Autoservice (n 64).

[286] Supra (n 73).

[287] Supra Section 3.3. Opinion in Viking (n 61), para 48. Safjan and Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private law.(European Union)(Legislation)'. See also Prechal and de Vries, 'Seamless Web of Judicial Protection in the Internal Market', p. 24 and Karayigit, 'The Horizontal Effect of the Free Movement Provisions, p. 325.

to be responsible for its inaction when private actors, acting as individuals with no regulatory power, behave in a manner that obstructs the fundamental freedoms, as has been seen in the area of free movement of goods.[288] Therefore, if a private service provider conditions access to the service of potential clients with having a personal identity number, without any legal obligation to do so and without accepting other means of identification or proof of eligibility, the state could be held responsible for the discrimination and the restrictive effects on freedom of movement.

5. Concluding remarks

Formally, the respective Swedish and Danish systems of registration of persons in population registries based on national definitions of residence may not be problematic in the light of Union law. However, the extensive demand of the personal identity number linked to the personal data in the registry, as a means of identification and a proof of entitlement, in fact causes discrimination and practical obstacles to freedom of movement. Considering the disadvantage it may mean for a Union citizen to not have a personal identity number, and in the light of the Court's reasoning on ensuring the efficiency and uniform application of free movement law so as to in some cases bind private parties, there is little reason why private actors should not have to justify why they demand a Union citizen to have personal identity number.

Given the high demand of personal identity numbers in both the public and private sectors in Sweden and Denmark, there will be instances where Union citizens, lawfully making use of freedom of movement, suffer discriminatory treatment because of not being registered in the national population registry and therefore not having such a number. The criteria for qualifying for national residence registration do not fully correspond to the criteria of lawful exercise of freedom of movement. In some instances, this will exclude Union citizens from more public services and assistance than the lawful derogations to the right to equal treatment allow for. Furthermore, the systematic, and to some extent perfunctory manner in which identification by way of a personal identity number is required, hinders and makes it more difficult for a non-resident service recipient and consumer to enjoy the economic freedoms in cases where domestic traders and service providers only register or serve new clients based on their registration in the national population registries.

Due to the requirements of showing a fixed place of domicile and a planned stay of a certain length, in particular first time job-seekers and non-economically active Union citizens who are making use of the right to enter and reside in the country for up until three months, will be put at a disadvantage. The Swedish requirement of intended residence for one year appears particularly disadvantageous for first time job-seekers, who are systematically, denied a personal identity number. In Denmark, the planned stay need only be three months, which is easier fulfilled but which will also affect first time job-seekers or those Union citizens who are entering and residing in the country for up to three months. In addition, to have a personal identity number may be a pre-requisite for fulfilling the conditions for lawful residence as a worker or a self-employed person. A job-seeker who might be offered employment on the condition that he or she has a personal identity number will be caught in a Catch 22-like situation as the signed employment contract might be necessary to prove residence status and subsequently be registered and obtain a personal identity number. The same goes for a natural person exercising the freedom of establishment, who might first need to establish a business account in a local bank and settle other contracts with local public or private service and utility providers in order to prove his or her residence status as a self-employed person, but is hindered to enter into these agreements without first having a personal identity number. The remaining option for persons in that situation is to try to prove a right of residence as an economically self-sufficient person, by showing sufficient funds and a comprehensive sickness insurance. However, it might still be problematic to obtain and show a place of address. Once the valuable personal identity number is obtained, the Union citizen can pursue pending contracts of employment,

[288] Supra. (n 77).

accommodation, bank accounts and utilities and telecommunication agreements. As opposed to the reasoning of the Administrative Court of Appeal in Stockholm in the case referred to above, the state may and should be responsible to solve these practical barriers to Union citizens' exercise of freedom of movement.

REFERENCES

Barnard, Catherine. *The Substantive Law of the EU: The Four Freedoms*. Oxford University Press, 2013.

Blume, Peter Erik. 'Direktiv Eller Forordning I Persondataretten.' *Juristen*, no. 2 (2012): 57–60.

Davies, Gareth. 'Discrimination and beyond in European Economic and Social Law.' *Maastricht J. Eur. & Comp. L.* 18 (2011): 7.

Davies, Gareth, 'Freedom of Contract and the Horizontal Effect of Free Movement Law.' The Involvement of EU Law in Private Law Relationships (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford 2013), 2013.

Jansson, Max S., and Kalimo, Harri. 'De Minimis Meets "market Access": Transformations in the Substance–and the Syntax–of EU Free Movement Law?' *Common Market Law Review* 51, no. 2 (2014): 523–58.

Karayigit, Mustafa T. 'The Horizontal Effect of the Free Movement Provisions,' *Maastricht J. Eur. & Comp. L.* 18 (2011): 303.

Krenn, Christoph. 'A Missing Piece in the Horizontal Effect "jigsaw": Horizontal Direct Effect and the Free Movement of Goods'. *Common Market Law Review* 49, no. 1 (2012): 177–215.

Pennings, Frans. 'EU Citizenship: Access to Social Benefits in Other EU Member States.' *International Journal of Comparative Labour Law and Industrial Relations* 28, no. 3 (2012): 307–33.

Prechal, Sacha, and de Vries, Sybe. 'Seamless Web of Judicial Protection in the Internal Market.' *European Law Review* 34, no. 1 (2009): 5–24.

Safjan, Marek, and Miklaszewicz, Przemyslaw. 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private law.(European Union)(Legislation).' *European Review of Private Law* 18, no. 3 (2010): 475.

Snell, Jukka. 'The Notion of Market Access: A Concept or a Slogan?' *Common Market Law Review* 47, no. 2 (2010): 437–72.

Thym, Daniel. 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens.' *Common Market Law Review* 52, no. 1 (2015): 17–50.

Tryfonidou, A. 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to One of (Almost Complete) Independence'. *Yearbook of European Law* 33, no. 1 (2014):

van Harten, Herman, and Nauta, Thomas. 'Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on Fra. Bo.' *European Law Review*, no. 5 (2013): 677–94.

WELFARE BEYOND CONTRIBUTION? EUROPEAN SOCIAL CITIZENSHIP AND THE CITIZENISATION NEXUS BETWEEN RIGHTS AND DUTIES

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1. INTRODUCTION

Analysing the dynamics and implications of globalisation and Europeanization on national welfare states has been a long standing research tradition. As a starting point, many scholars have focussed on the transformation of domestic welfare states with regard to increased liberalisation, international competitiveness and privatisation (Davies 2006). Increasingly, scholars have also devoted their attention to an evolving genuine concept of 'Social Europe' (cf. Martinsen and Vollaard 2014: 679-85) as well as a 'European Social Model' or even a 'European Social Union' (Aust *et al.* 2002; Scharpf 2002; Jepsen and Pascual 2005; Hacker 2010, 2014; Barnard and De Baere 2014). However, three distinct aspects within this field of research demand further consideration. First, most studies analysing cross-border access to welfare benefits have tended to focus solely on workers' free movement rights as a legal basis, thus, largely putting in-work, contributory benefits into the centre of attention. This approach, however, overlooks free movement rights exercised by economically non-active citizens and their access to non-contributory welfare benefits as based on EU Citizenship provisions, that is in short, European Social Citizenship. Second, political science research on Europeanisation in general, but also with regard to social policy in particular, has centred much around the analysis of the Treaties and European secondary legislation, thus, largely neglecting case law of the Court of Justice of the European Union (CJEU; Börzel 2002; Schmidt *et al.* 2008; Töller 2010; Schellinger 2015). Thirdly, even though the potential effects of European integration on member states' welfare systems are widely discussed in the academic literature, the actual impact is largely unknown (Chase and Seeleib-Kaiser 2014; Dustmann and Frattini 2013: 26). Often, research on Europeanization of national welfare states stops at the point of domestic legislative implementation but does not analyse actual administrative enforcement and application (Treib 2006: 6).

This paper will, therefore, add three new insights to the existing research. First of all, this study focuses on access of non-economically active persons to welfare benefits in other member states by taking the case of university students attending study programmes across the Union and their eligibility to study finance benefits, including both tuition fees and maintenance aid.

Secondly, while cross-border access to study finance benefits has also been broadened by Treaty provisions and EU secondary legislation, a major cause of enhanced citizenship and welfare rights has been jurisprudence of the CJEU, which represents the main causal factor in this paper. With regard to the case of cross-border access to study finance benefits, European court case law is particularly relevant as it had been in this very policy field and through CJEU jurisprudence where European Citizenship - already introduced in the 1992 Maastricht Treaty - materialised for the very first time 2001.

Finally, the second part of this analysis will be devoted to member states' reactions - in Germany and the UK - to European court jurisprudence on student mobility and study finance on several levels: legislative implementation as well as administrative enforcement and application between 2000 and 2015 (that is, the period since European Social Citizenship has materialised, as explained).[289] Finally, the central research question of this paper asks *to what extent does the realisation of European Social Citizenship rights vary across member states and what are the causal mechanisms explaining this variation*?

[289] Subsequent research will add a third dimension, namely judicial transposition, for which empirical data and evidence is currently being collected.

This study will show, first of all, that the European Court of Justice has played a major role in shaping European Social Citizenship rights by extending initial Treaty provisions European Citizenship as introduced within the Maastricht Treaty in 1992. European Social Citizenship had materialised within the important 2001 *Grzelczyk* judgment for the very first time, followed by several other central rulings of the new millennium, which had all extended the material and personal scope of the Treaty based on personal mobility and non-discrimination provisions. This process would not have been anticipated by member states when they had first discussed the idea of European Citizenship in the making of the European Union, nor would this vast extension of individual rights been feasible solely on the basis of intergovernmentalist integration through the Council and the Parliament. Secondly, this study outlines the citizenisation nexus between rights and duties, which explains member states' reactions to such Europeanisation mechanisms stemming from European court case law. It will be argued that the closer social citizenship rights and duties are matched, the less a system relies on redistributive mechanisms and the less it will be hampered by CJEU case law provisions on mobility of non-economically active persons. These mechanisms will be found in the British case, reflecting a Liberal Market Economy. On the contrary, the looser the citizenisation nexus between rights and duties of a welfare scheme is, the more a system thus relies on redistributive mechanisms and the more European court jurisprudence will interfere in the system's regulation, which will be expected to appear in Social Market Economies, as the German case study eventually confirms.

The argument will be presented in three stages. First, the following theoretical part outlines different arguments on whether or not the CJEU can be regarded as an important motor of European integration and how the domestic governance space is built as a reaction to such case law. Also, this part builds a novel model, depicting the citizenisation nexus between rights and duties. Then, the second stage details EU legal provisions on citizenship and welfare rights with a major focus on non-economically active persons in general and mobile university students in particular. Finally, the third stage analyses the two case studies in Germany and the UK.

2. The transnationalisation and judicialisation of European welfare states

Since the advancement of modern statehood, welfare states have been central in ensuring some essential modicum of welfare to their citizens. Their aim has not only been to enhance the life of the weakest and the poorest in a Rawlsian understanding but also to provide for an approximation of living standards to society at large. In order to attain broader welfare objectives of solidarity, equity, accessibility and particularly universal provision, two prerequisites had for a long time been conceived as crucial: the 'principle of territoriality' as well as the 'principle of compulsory affiliation,' according to which social rights and duties, were subject to long-term residence and national citizenship (Cornelissen 1996: 440-4, 465). In particular, taxation and social security spending had long been confined to national borders in a way that these could not be exported, thus, depicting strong elements of domestic 'closure' (Ferrera 2005, 2009: 220-1).

However, these domestically based European welfare states have now undergone the dynamics of 'opening' (Ferrera 2009: 220-2), not only through coalescent markets in ever-growing globalisation but particularly due to two major processes completed within the framework of the 1992 Maastricht Treaty: the Single Market and European Citizenship. These two important cornerstones in the history of European integration have been the necessary basis for broadening cross-border social rights in the European Union: by inferring cross-border welfare rights in accordance with non-discrimination provisions and the prohibition of (most) restrictions on free movement, at least formally, the group of beneficiaries had incrementally been extended to those citizens who were not economically active. Put differently, European integration had then come to a point where those citizens moving to another member state for reasons other than work were also potentially able to access welfare benefits in their host state without necessarily having contributed financially to the system in previous terms. And importantly, this development of 'opening' had largely been driven by CJEU case law, particularly since the end of the 1980s.

2.1. EUROPEAN COURTS AS A VITAL MOTOR OF INTEGRATION

Today, scholarly analysis has widely agreed on the CJEU as an important 'motor of integration,' extending the scope and substance of EU law (Weiler 1994, 1999; Stone Sweet and Sandholtz 1998; Martinsen 2003, 2009; Stone Sweet 2004, 2010). Not only does the European court interpret and elaborate the Treaty as an incomplete contract' (Stone Sweet 2004: 24) with 'vague and ambivalent [Treaty] formulations [that] are effectively invitations to judicial specification' (Scharpf 2007: 12; Garrett and Weingast 1993). These legal interpretations of the Treaty (and secondary legislation) additionally impose high reversibility thresholds: any corrections to these interpretations would require a Commission initiative and support by at least a qualified majority in the Council as well as generally an absolute majority in the Parliament, which are highly improbable in practice, given the heterogeneity of member-state interests (Scharpf 2010: 217).

But also, due to its legal principles of direct effect (cf. 26/62 *Van Gend en Loos*, judgment 1963)[290] and supremacy over member-state jurisprudence (cf. 6/64 *Costa v ENEL*, judgment 1964)[291], the CJEU establishes important individual rights for European citizens. Based on these mechanisms, its preliminary reference procedure specifically fuelled a litigation-driven European integration process (Scharpf 2012: 133-4). Albeit domestic courts are being required to refer cases to the ECJ in certain circumstances, they enjoy discretion in their referring decision in cases of existing previous rulings on similar issues (*doctrine of precedent*) or in cases of evident decisions (*doctrine of acte clair*). This option, thus, enabled ordinary national judges, especially those from lower domestic courts, to refer cases to the CJEU not only to request an interpretation of EU law but also to question and review national legislation (Scharpf 2010: 216).

2.2. THE DOMESTIC GOVERNANCE SPACE

The increased involvement of the judiciary in the process of European integration eventually induces a 'judicialization of politics,' that is, 'the construction of judicial power' which 'shapes the strategic behaviour of political actors engaged in interactions with one another' as first introduced by Stone Sweet (1999: 164; cf. also Shapiro and Stone Sweet 2002; and Stone Sweet 2004 for an application of this concept to EU politics). This means that European jurisprudence eventually impacts on member-state actors' domestic policy choices. However, the direction of this impact, that is, whether member states' *governance space* is either *extended* or *constrained*, and whether domestic actors subsequently either *welcome* or *oppose* such rulings has been largely contested.

With specific regard to the influence of European jurisprudence on member states' welfare systems, findings go into different directions, largely depending on whether citizens and private rights, or states and their public welfare provision are at the centre of the analysis. On the one hand, Caporaso and Tarrow (2009: 595, 609) regard the CJEU as a pioneer in promoting a novel, co-ordinated regime partially relocated to the supranational level for the protection of citizens' social rights. On the other hand, several scholars have criticised the CJEU for its activist role in the sphere of social policy. Dougan (2012: 114) summarises these arguments as 'the allegation that the ECJ has unduly extended the scope of Union law and overstepped its own jurisdiction to the detriment of the 'reserved competences' or (more broadly) the political autonomy of Member States' (Dougan 2012: 114). Regarding legislation on free movement of economically non-active citizens, it has been shown that it still contains many open concepts so that the CJEU was repeatedly in the position of interpreting these in a way that limited member states' options to exclude other EU citizens' access to welfare provision (Rennuy 2013).

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[290] This vital judgment made clear that the Treaty created 'individual rights which national courts must protect' (26/62, *Van Gend en Loos* [1963]).

[291] The Court ruled that the Treaty established law that 'could not, because of its special and original nature, be overridden by domestic legal provisions' (6/64, *Costa v ENEL* [1964]). It has even been argued that the CJEU claims the function of a constitutional court *vis-à-vis* member states on the basis of this legal doctrine (Scharpf 2010: 228).

In order eventually to explain variation in member states' reactions to European social security case law, Scharpf (2010: 234-44) has put forward the argument that *Liberal Market Economies* (LMEs) with both a liberal market economy and a liberal welfare regime such as the UK will not be affected by deregulatory, negative-integration CJEU jurisprudence. On the contrary, *Social Market Economies* (SMEs; combining both a corporatist or social democratic welfare regime with a coordinated market economy) such as Germany or Sweden would be weakened by respective European court case law on mobility or non-discrimination since they rely heavily on domestic regulation of, for instance, beneficiaries, benefit and reimbursement conditions.

2.3. The citizenisation model: defying the rights-duties nexus

This study will be informed by both the multilateral adjudication and transnational politics model as well as by Scharpf's (2010: 234-44) argument on the unequally distributed consequences of Liberal Market Economies *vis-à-vis* Social Market Economies. Yet, this research will be taking models one step further to analyse the special nature of European Social Citizenship rights, that is, residence and welfare rights accredited to non-economically active citizens.

The first part of this argument will highlight the *citizenisation nexus between rights and duties*. As T.H. Marshall (2009 [1950]: 149) has prominently demonstrated, citizenship includes three elements: civil, political and social. With specific regard to the social aspect, he argues that it includes 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the country' (ibid.). However, he also makes very clear that social citizenship does not only encompass certain rights but also includes duties (ibid.: 150). As a precondition to access these social citizenship rights, he importantly explicates that (ibid.: 151) '[c]itizenship requires direct sense of community membership based on loyalty to a civilisation which is a common possession. It is a loyalty of free men endowed with rights and protected by common law.'

Klausen (1995: 244-6) has refined this central point by highlighting that social rights are largely redistributive in nature and rely on a state's fiscal capacity as well as its ability politically to mobilise those enjoying social citizenship rights as well as those fulfilling their social citizenship duties, that is both beneficiaries and contributors. He also stresses residence rights as an important precondition to access social rights since '[c]itizenship defines the relation between individuals and the state. [… It also] defines a community by establishing who may reside within the boundaries and who may not' (ibid.: 249). Taking these two preconditions together, social rights' redistributive nature and the residence precondition, it follows that as long as beneficiaries and contributors, that is rights and duties, overlap for the most part, contested issues will be minimal. When this is not the case, for instance because the degree of a 'sense of community membership' and 'loyalty' is unincisive or because the residency requirement is not fulfilled on a long-term view, tensions will be fuelled. Problems are specifically expected to arise when contributors are barred from deciding on recipients' criteria for eligibility (cf. also Emmenegger and Careja 2013: 83).

Second, it is assumed that state interests significantly vary and that some will be more compatible with European jurisprudence than others, so that the resulting *governance space* will be broader or tighter. This governance space will eventually be situated in the citizenisation nexus rights and duties: on the one hand, the closer beneficiaries' rights and contributors' duties are matched, the less a welfare regime rests upon redistributive measures and is thus largely financed by private means as it is the case in Liberal Market Economies. On the other hand, the less rights and duties overlap, the more a welfare system will rely on redistribution and direct transfers as in Social Market Economies. As a result, LMEs will be more easily compatible with CJEU case law requirements on non-discrimination and personal mobility than SMEs (cf. again Scharpf 2010: 238; Menéndez 2009).

Regarding specifically cross-border access to welfare benefits by non-economically active citizens and by taking the example of student mobility in the EU and their cross-border eligibility to study finance, the following grid can be established (see table 1): taking the case of cross-border study finance as an empirical example of European Social Citizenship rights is particularly interesting. First, this is because education constitutes an integral part of the welfare state (Lindert 2004; Busemeyer and Trampusch 2011: 434) and also it comprises both *in kind* (university tuition) as well as *in cash* benefits (maintenance aid). Second, contrary to other cross-border benefits such as healthcare which are solely reimbursed by the home state, study finance benefits can either be accessed through the *sending* or *hosting* state on the basis of EU non-discrimination provisions, depending on the availability of such benefit schemes in each respective member state. Third, study finance benefits potentially comprise both (*ex-ante* or *ex-post*) *contributory* types of welfare benefits (e.g. up-front tuition fees or tuition fee and maintenance loans) as well as *non-contributory* benefits (e.g. maintenance grants).[292] Fourth, eligibility or repayment instalments can either be *means-tested* or *universal*.[293] These theoretical considerations ultimately lead to six ideal-types combining funding and eligibility for both (a) support for covering tuition fees and administrative costs, and (b) maintenance aid to cover living costs as well as direct payments and/or tax allowance for students' parents, which are presented in table 1.

[292] This differentiation takes Barr's (2012: 8) conceptualisation of welfare benefit types as a starting point but fine-grains it further, in particular to include the idea that contributory benefits can potentially rely both on previous contributions (*ex-ante*) or compulsory subsequent contributions (*ex-post*), both based on income.

[293] Repayment instalments are relevant only with regard to ex-post contributory benefits. For reasons of simplification, this model only tests whether repayment instalments are either universal or means-tested (with regard to ex-post contributory benefits), assuming that means-tested repayments also presume means-tested eligibility.

TABLE 1: SIX IDEAL TYPES ON STUDY FINANCE SUPPORT SCHEMES (SOURCE: OWN PRESENTATION)

Eligibility or repayment conditions/ funding	Contributory		Non-contributory
	Ex-ante	Ex-post	
Means-tested	(a) Paying tuition fees up front - income-contingent (b) [N/A - generally no prior employment; private resource funding]	(a) Tuition fee loans - level of repayment income-contingent, not necessarily adding up to the full amount of the loan (b) Maintenance loans - level of repayment income-contingent	(a) providing tuition fees free of charge up to a certain threshold of income/wealth (similar to ex-ante means-tested contributory tuition fees - income-contingent) (b) means-tested maintenance grants & means-tested child allowance
Universal	(a) Paying equal amount of tuition fees up front (b) [N/A - generally no prior employment; private resource funding]	(a) Tuition fee loans - equal or varying levels of repayment, adding up to the full amount of the loan (b) Maintenance loans - equal levels of repayment	(a) Providing tuition free of charge (b) Maintenance grants to all students & universal child allowance

In addition, indirect financial contributions will probably have to be considered: if a student stays in the hosting state upon completion of her studies in order to work there, she will certainly contribute significantly to the state's economy by paying her taxes and, thus, she will indirectly repay any study finance benefit granted by the hosting state. And even if she does not decide to stay and work in the hosting state but returns to her home state, she will most certainly also contribute to the original hosting state in cultural terms by now being an 'ambassador' in her home/nation state (which is, of course, difficult to measure in economic terms but might still be valued by the funding hosting state in as much as benefits still outweigh costs incurred).

It will be assumed that in the figure the further to the upper left a study finance system is situated, the closer social citizenship rights and duties will be matched, the less a system relies on redistributive mechanisms and the less it will be hampered by CJEU case law provisions on student mobility and non-discrimination. This is expected to be found in the British case study, reflecting a Liberal Market Economy model. On the contrary, the further down to the lower right corner a study finance system is located, the looser the citizenisation nexus between rights and duties will be, the more a system thus relies on redistributive mechanisms and the more European court jurisprudence will interfere in the system's regulation, which is expected to be found in Social Market Economies such as in the German case study. Finally, this main model will be expected to be mediated by different actors as outlined in the transnational politics model such as judges in lower domestic courts, civil servants, party politicians or NGOs. It will be particularly interesting to see how these actors deal with legal uncertainty imposed on them by CJEU case law and how this affects the implementation and enforcement process.

3. EU LEGAL PROVISIONS ON CITIZENSHIP AND WELFARE RIGHTS

Processes of transnationalization and judicialization in the European Union, which incur enhanced access of mobile EU citizens to welfare services in other EU countries, have existed since the first Treaties and a first Regulation in the 1960s. However, for a long time these had been restricted to the economically active, that is, to cross-border workers and their dependents. Yet since the 1990s and the integration of the Single European Market as well as the 2004 Citizenship Directive in particular, these rights have increasingly been broadened to all EU citizens, together with those who are non-economically active such as university students, based on the principle of non-discrimination in regard to nationality and citizenship rights.

3.1. EUROPEAN INTEGRATION OF WELFARE AND CITIZENSHIP PROVISIONS BEFORE THE MILLENNIUM

The first European court ruling on student mobility was pronounced as early as 1974 when the then European Court of Justice stressed university students' general access to educational systems across member states, including a prohibition on charging Community students additional enrolment fees (C-9/74 *Casagrande*, followed by C-152/82 *Forcheri* [1983]; C-193/83 *Gravier* [1985]; C-24/86 *Blaizot* [1988]; C-242/87 *COM v Council* [1989]). Yet, as free movement rights at that time were still closely linked to economic activity, the right to cross-border education was mostly the preserve of migrant workers' children (also C-42/87 *COM v BE* [1988]). The 1980s then saw a series of ECJ cases addressing the question of whether these students should also be eligible to access study finance in their hosting states. In a long row of judgments, the Court made clear that students who retained migrant worker status, either because of their dependant or their own employment status, could access maintenance grants in their country of study. However, this provision clearly required a link between the occupational activity and the employment in question[294] with an exception made for involuntary unemployment where training in another field was also lawful (see e.g. C-39/86 *Lair* para 37 and C-197/86 *Brown* para 26 [both 1988] and also C-389/87, C-390/87 *Echternach, Moritz* [1989]; C-308/89 *Di Leo* [1990]; C-357/89 *Raulin* para 21 and C-3/90 *Bernini* para 19 [both 1992], C-7/94 *Gaal* [1995]; C-337/97 *Meeusen* [1999]). Importantly, the European court also emphasised that university students could not generally invoke Treaty provisions on non-discrimination (Article 18 TFEU) as educational and social policy were still considered to fall outside the material scope of the Treaty (cf. *Lair* para 15 and *Brown* para 18). However, as a concession the Court granted cross-border access to assistance covering solely registration and tuition fees (*Lair* para 16). As will be seen later, these overall rights were eventually not only codified but also extended to university students generally, including those non-economically active.

An important precondition to the extension of cross-border residence and welfare rights in the EU had been the introduction of European Citizenship within the framework of the 1990 Maastricht Treaty. An initiative headed by the then Spanish Prime Minister Felipé Gonzalez proposed to add a new part to the Treaty draft by circulating a paper labelled 'The Road to European Citizenship' (Chalmers *et al.* 2010: 444; Dubiel 2014: 122).

Even more important to current research is also the fact that this document mentioned the extension of European Citizenship rights to non-economically active citizens for the very first time. In detail, the document also explicates that those who were not covered under the category of migrant workers, were to enjoy residence and free movement rights. Finally, European Citizenship was codified within Articles 8 to 8e in the Maastricht Treaty which today specify that all European citizens not only have the right to move but also to reside freely within the Union. However, cross-border welfare rights that are not coupled with economic activity have not been addressed directly. Article 8a(2) specifies that '[t]he Council may adopt provisions with a view to facilitating the exercise of [free movement and residence] rights…,' which was eventually effectuated by three 1993 mobility directives: the General Mobility Directive (90/364/EEC 'on the right of residence'), the

[294] Thereby, maintenance grants constituted a 'social advantage' within the meaning of Art 7(2) Regulation 1612/68 which migrant workers were entitled to under the same conditions as nationals from the hosting state (cf. e.g. *Lair* paras 18-28).

Retired Workers' Mobility Directive (90/365/EEC 'on the right of residence for employees and self-employed persons who have ceased their occupational activity'), and vitally, the Student Mobility Directive (93/96/EEC 'on the right of residence for students').[295] This latter directive not only codified the previously described free movement rights for university students, but also extended these to some extent for the whole category of university students, including those not economically active. This novel Student Mobility Directive recognised the rights of EC students to reside in another member state while attending university there. However, it was clear that mobile students should not rely on the host member state's welfare system. Their right to free movement, therefore, was conditional on proof of sufficient financial resources as well as coverage by sickness insurance (Article 1). Using the same reasoning, the right to establish entitlements for maintenance grants was also completely excluded (Article 3). However, it is important to note that this article did not address the issue of whether or not students were eligible to receive another type of non-contributory aid, that is, social assistance. Lastly, member states had the right to withdraw residence rights if students could no longer financially sustain themselves.

3.2. European Social Citizenship

Despite the introduction of European Citizenship within the Maastricht Treaty and the adoption of these three mobility directives, European Social Citizenship materialised only through follow-up CJEU case law, most prominently within the 2001 'landmark judgment' *Grzelczyk* (Martinsen 2002: 136), which based non-economically active citizens' cross-border welfare rights on a notion of European citizenship for the very first time (O'Leary 2009: 612).[296] Importantly, the court stressed that Union citizenship was 'destined to be the fundamental status of nationals of the Member States' (C-184/99 *Grzelczyk* para 31). Rudy Grzelczyk was a French national studying in Belgium for three years while sustaining himself on own financial means and loans before applying for minimal subsistence measures ('minimex') from the Belgian authorities during his fourth year which had been refused. The CJEU then ruled that exchange students were in fact able to invoke Articles 12, 17 and 18 EC (Art 18, 20, 21 TFEU), and thus they were entitled to social assistance under certain conditions. As noted before, the Student Mobility Directive excluded only maintenance grants but did not address the issue of social assistance, thus, did not exclude it. The Court justified this altered approach, as compared to its 1988 *Lair* and *Brown* judgments, by stating that cross-border mobility had now become a reality of the Union (*Grzelczyk* paras 34 and 35). Also importantly, the Court hinted in this judgment towards the tension between member states' and citizens' interests where the Court stresses the trade-off between not burdening member-states' welfare systems disproportionately, and securing a basic level of financial solidarity across the union (para 44).

A very similar reasoning to that in *Grzelczyk* was applied in the 2005 *Bidar* judgment. Dany Bidar was a French national who had completed three years of secondary education in the UK before commencing his university studies in London and applying for a student loan which was refused by the English authorities on grounds of his not being settled in the UK. However, while a three year period of residence prior to the start of his studies was considered sufficient to qualify for a student loan according to then UK legislation (which dated back to 1971), this condition was linked to being economically active, i.e. Bidar could never obtain the status of a 'settled' person while being enrolled in an educational institution. Here, the CJEU ruled that this exclusion from accessing student loans for reasons of not being settled while being lawfully resident was in breach of EU law. Thus, the Court argued that students who have demonstrated a 'certain degree of integration into the society

[295] The Student Mobility Directive had been adopted after the initial Directive on that matter, 90/366, had been annulled by the CJEU for choice of incorrect legal basis in Parliament v Council (C-295/90) [1992].

[296] Still, also during this period, the Court continued to confirm general access to education across member states (C-413/99 *Baumbast* [2002]) and to tide-over allowances on the basis of dependant status (C-224/98 *D'Hoop* [2002] and C-258/04 *Ioannidis* [2005]) as well as on employment status (C-413/01 *Ninni-Orasche* [2003]).

of the host state', for instance through completion of secondary education in the host state, could be regarded as settled and, therefore, claim a student loan.

These important judgments were among several that eventually led to codification into the 2004 Citizenship Directive, which repealed the three 1993 Mobility Directives mentioned above. It clearly constitutes a cornerstone of enhanced citizenship rights, i.e. extending the coverage of welfare and residence rights from economically active to non-economically active mobile EU citizens such as university students. The Citizenship Directive largely rests on the Treaty's non-discrimination provisions, complementing European Citizenship provisions as they are laid down in today's Articles 8 to 8C TEU. Herein, it is also important to note that the non-discrimination provisions apply only to conditions set out in the Treaty and relevant secondary legislation (Weatherill 2012: 418).[297] So, for instance, both the 1993 Student Mobility Directive and the 2004 Citizenship Directive, which repealed the former, set clear limits on how students can invoke free movement and welfare rights.

The various paragraphs of the Citizenship Directive specify the main conditions under which union citizens and their family members can exercise residence and welfare rights as well as the limits placed against these rights on grounds of public policy, public security and public health. In more detail, these rights are categorised into three distinct residence periods, which also apply to university students. Within the category of 'welfare benefits' for university students, a distinction is drawn between 'social assistance,' also called 'subsistence benefits,' i.e. basic financial aid to all non-economically active persons, and 'maintenance assistance,' also called 'student aid' or 'maintenance aid,' i.e. additional financial support relating only to university students. Essentially, unrestricted residence rights are granted only for a period of up to three months; thereafter, these are conditional upon proof of 'sufficient financial resources' so that the mobile citizen does not become a 'burden on the social assistance system of the host member state.' Access to social assistance is possible only after having established permanent residence status, which is granted after a residence period of five years.

Soon, it becomes clear that this Directive crossed by various opaque provisions such as the condition of non-economically active EU citizens 'not becoming a burden on the host member state' so that it might either be interpreted in favour of member states aiming to restrict full access to national welfare benefits or to the advantage of the free movement of citizens who would favour more unrestricted access to these benefits. Due to this legal uncertainty, national courts have referred numerous decisions to the Court of Justice during the past decades. The subsequent CJEU judgments, then, revealed a 'more cautious judicial tone' (Weatherill 2012: 437). In its 2008 judgment on *Förster*, the CJEU partially revoked its flexible eligibility criterion of a 'certain degree of integration' and replaced it by a more rigid one prescribing a certain period of residence. Jacqueline Förster, a German student enrolled at a university in Amsterdam, was refused a study finance grant by the Dutch authorities even though she had been gainfully employed as a school teacher in the Netherlands prior to her studies. The CJEU ruled that the Dutch requirement of a minimum five year residence period was not excessively long in order to ensure a sufficient degree of integration into the host state society.

Lastly, several cases also reflect university students' cross-border access to welfare benefits financed by their home state. In 2004, the Court ruled in *Morgan and Bucher* that the home state could not make portability of study finance benefits conditional on previous study in this respective home state. Widening this broadened access to study finance benefits, in 2013, the CJEU decided in four similar cases – *Prinz and Seeberger, Thiele Meneses* and *Elrick* – that additionally prior residence could not serve as a preconditioning criterion.

[297] This means that one cannot refer to provisions of non-discrimination in any case. For instance, for EU law to apply, a supranational element has to be involved within the case in question. A prominent example for this is the area of origin: discrimination of citizens from other member states is generally unlawful under EU law whilst discrimination of own national is not in most cases.

All in all, it can be summarised that the Court of Justice of the European Union has played a major role in extending welfare rights to non-economically active citizens on the basis of European Social Citizenship when analysing the specific group of mobile university students. It was only through CJEU case law that European Citizenship rights eventually materialised and certainly also went well beyond what member states had originally expected when adding European Citizenship as a 'democratic layer' to European Union law within the Maastricht Treaty framework. Yet, despite increased legal certainty with regard to integration, i.e. residence provisions, the Court still often requires member states to conduct case-by-case assessments when it comes to evaluating claims for cross-border study finance based on a sufficient degree of integration – a threshold that is very much 'ill-defined' according to Weatherill (2012: 419). In particular, the exact conditions for a student 'not to become a burden on the social assistance system of the host member state' and largely also for what is to be considered 'effective and genuine' employment are still very much unclear. And even though this case-by-case evaluation has been argued to be a fairer process (Kostakopoulou 2012: 183), it is surely much more cumbersome for member states. This finding is in line with Scharpf's (2010) argument that, particularly since 2001, the EU judiciary focuses on the enforcement of highly individualised instead of collective welfare rights.

4. The citizenisation nexus in Germany and the UK

The realisation of higher education generally belongs to member states' welfare systems and also constitutes a major part of a nation's culture and identity. Moreover, systems of study finance may be rather costly and numerous requests for study finance by foreign students may well burden the financial sustainability of host member state welfare systems. Of even greater concern is that member states cannot know whether or not these students might merely be 'free-riders' that will not contribute to the host country's economy after completion of their studies (Dougan 2005: 954). Thus, member states have generally opposed EU integration in this sphere so as to retain their national autonomy (Damjanovic 2012: 149). However, they have not yet succeeded in finding a solution for a fair distribution of financial burdens resulting from student mobility with clear 'exporter,' i.e. sending, and 'net importer,' i.e. hosting countries (ibid.: 156).

The case countries at hand, Germany and the UK - whose domestic reactions to CJEU jurisprudence will be analysed for the period between 2000 and 2015 - both belong to the latter group: as rich Western European member states, together they attract almost half of all mobile European university students (45.6 per cent in 2011, which is 310,000 in absolute numbers; cf. Eurostat 2013). Also, both analysed countries reported that they were net importer (i.e. hosting) countries (for Germany cf. EHEA 2012c: 14; for the UK cf. EHEA 2012a: 12, for England, Wales and Northern Ireland; and EHA 2012b: 13, for Scotland). However, as has already become evident, Germany is also an interesting case for the transposition of CJEU case law on the portability of study finance; so, Germany is not only an important hosting but also a crucial sending country: as regards the EU as destination or origin for mobile students (and not the broader European Higher Education area above), Germany's outgoing student numbers have continued to outweigh incoming numbers since 2008 (DESTATIS 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011,2012, 2013a, 2013b, 2014).

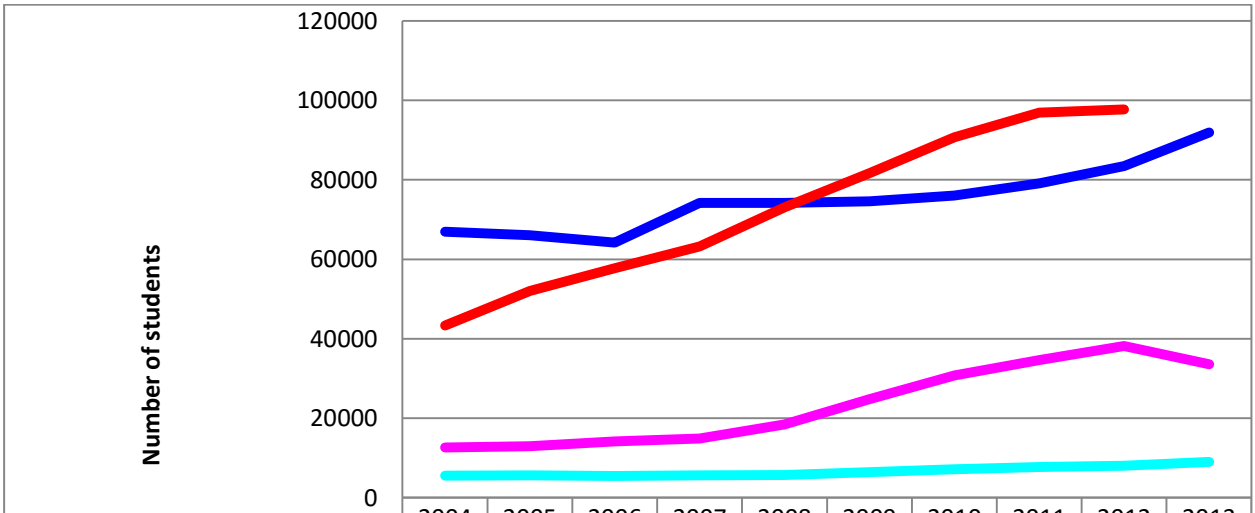
Moreover, these two countries have both been subjects of several CJEU rulings on cross-border study finance: ten cases as regards Germany and four cases as regards the UK. For this analysis, only those cases relating to an extension of European Social Citizenship rights since 2000, will be analysed more closely (which are *Bidar* 2005, *Morgan and Bucher* 2007, *Prinz and Seeberger* 2013, *Thiele Meneses* 2013 and *Elrick* 2013).[298]

[298] Certainly, member states will not only have to react to CJEU judgments where they have been involved as a party (*inter partes* principle) but will also have to consider policy implications resulting from case law regarding other member states with, for instance, similar study finance systems (*erga omnes* principle). Yet whether it would be compulsory to generally treat European court case law as erga omnes has been contested among legal scholars. However, in practice, any new CJEU case (and certainly also national courts' cases) on a similar topic will presumably bear previous CJEU judgments in mind (Obermaier 2009: 16).

4.1. GERMANY

In Germany, the average public spending on higher education amount to 1.2 per cent of GDP (as compared with 1.1 per cent as an EU average; cf. Eurostat 2012: 88). Firstly, in regard to coverage of tuition fees, the current German model can best be summarised by category number six, that is *universal non-contributory* as tuition is provided free of charge throughout Germany; only administrative fees need to be covered by students. Between 2005 and 2015, seven *Bundesländer* (Hamburg, Lower Saxony, Hesse, North Rhine-Westphalia) had introduced tuition fees in reaction to a judgment by the German Federal Constitutional Court which had lifted the prohibition to raise such fees. However, these were met by strong public criticism to the extent that they were eventually abolished again (Baier and Helbig 2011: 1-4). During that period, the model would also partly have fit into the second one, that is ex-ante universal contributory, since students in most *Bundesländer* had to pay 500 euros up front. However, also during that period, the model had been more 'universal non-contributory' as students' tuition fee contributions had covered only about 23 per cent of the overall tuition costs (Petersen 2008: 14). In line with EU law, the same applies to mobile university students from other member states. Table 2 shows that incoming as well as outgoing student numbers (within the EU) have both steadily risen during the past decade in Germany and since 2008, outgoing German students have outnumbered incoming EU students. Lastly, it has been reported in several expert interviews that the mechanism enabling EU students - though often stressed as being generally highly welcomed - to 'receive tuition for free' was perceived as unfair, with the German government directly seeking the contact of other member-state governments with which to find solutions.

TABLE 2: THE NUMBER OF INCOMING AND OUTGOING STUDENTS (EU/GERMANY) AND BAFÖG RECIPIENTS

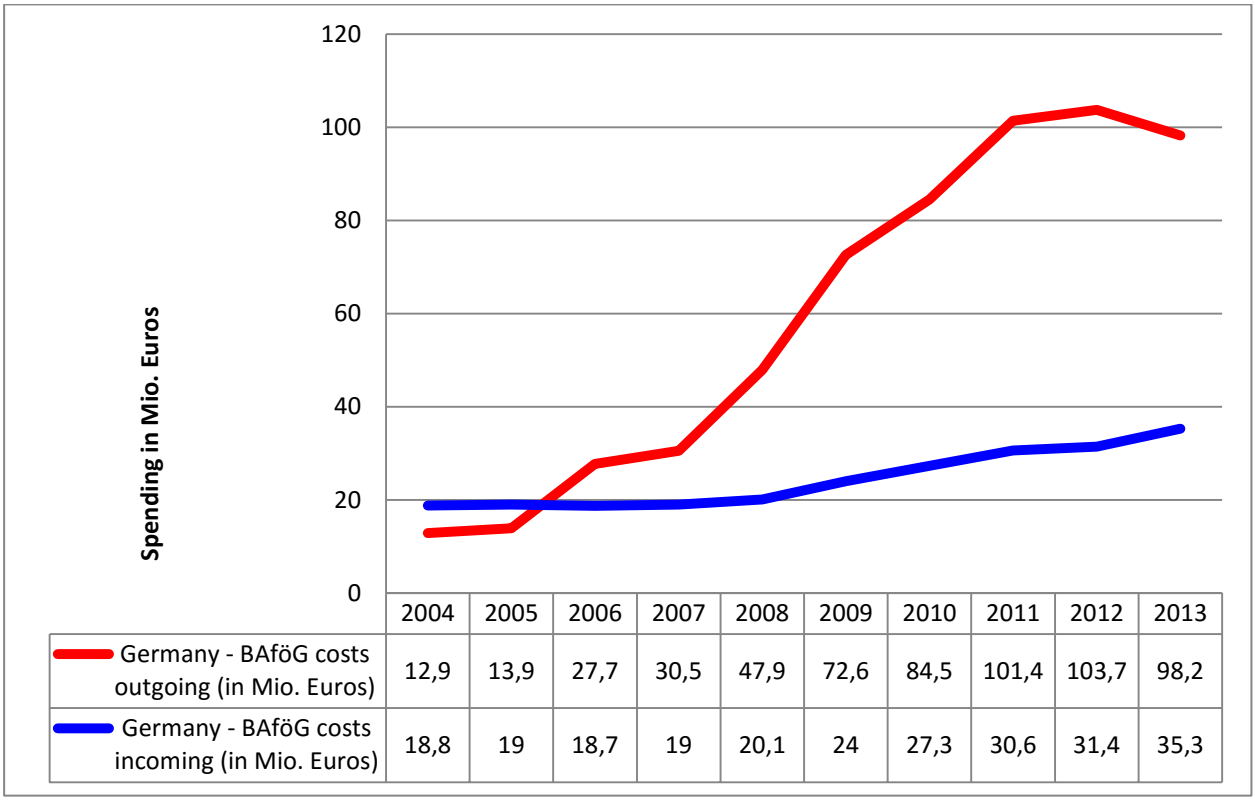


	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Germany - all EU incoming	66944	66059	64225	74155	74207	74583	76052	79088	83460	91912
Germany - BAföG incoming	5513	5663	5442	5671	5725	6411	7194	7734	8075	8993
Germany - all outgoing	43357	52008	57739	63252	73083	81652	90683	96903	97679	
Germany - BAföG outgoing	12665	12953	14197	14882	18453	24791	30732	34604	38215	33625

With respect to maintenance aid, Germany's system can best be described by the fifth category, that is, *means-tested non-contributory*. Financial support (BAföG) is available and students are eligible on grounds of income, savings, housing and family situation as well as disability up to the age of 30 (35 for masters). It is awarded as half a grant and half a loan without interest, ranging from 10 to 670 EUR per month (i.e. 120 to 8,040 EUR per

year) with an upper limit of 10,000 EUR to be paid back for the loan. In addition, the amount to be repaid can also be lowered on a merit basis. Due to this upper repayment threshold, the funding is in fact much rather a redistributive measure funded by the state and students' repayments do not amount to half of the BAföG funding as laid down in theory. Moreover, merit-based financial support used to consist of 300 EUR per month plus the same amount of money as BAföG if the same criteria are met, but awarded as a full grant (European Commission 2013a: 12). According to Art 8(1)(2) BAföG (version as of 7 December 2010, BGBl I p. 1952), all Union citizens who are not economically active and who hold permanent residence status in Germany are entitled to financial support for their studies, i.e. BAföG. According to Article 4(a)(1) FreizügG/EU, all Union citizens who have continuously resided in Germany for five years are considered to be permanent residents. When looking at table 3, it becomes clear that BAföG spending on EU students has almost doubled over the course of ten years but is still relatively low.

TABLE 3: SPENDING ON BAFÖG FOR INCOMING AND OUTGOING STUDENTS (EU/GERMANY) IN MILLION EUROS



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Germany - BAföG costs outgoing (in Mio. Euros)	12,9	13,9	27,7	30,5	47,9	72,6	84,5	101,4	103,7	98,2
Germany - BAföG costs incoming (in Mio. Euros)	18,8	19	18,7	19	20,1	24	27,3	30,6	31,4	35,3

As regards German nationals applying for BAföG while studying in another member state, the *Morgan* and *Bucher* 2007 judgment had been implemented within 2007 BAföG law update (22nd BAföGÄndG). Since then, German nationals can receive a study grant of up to 4.600 EUR for exchange terms of one year maximum duration (ibid.: 22). Graph 2 shows very clearly the tremendous extent by which BAföG spending on students enrolled in an EU higher education institution has risen: between 2004 and 2012, the number increased more than eightfold. And when comparing this third table again with the previous one, it also becomes clear that this increase cannot solely be accounted for by generally increasing numbers of outgoing students, which have only doubled in the same period of time. Furthermore, regarding the 2013 *Prinz and Seeberger* as well as *Thiele Meneses* and *Elrick* judgments, legislation had been changed in a 'copy-and-paste' fashion within the last

BAföGÄndG update, which became effective in 2015. The empirical results of these legislative changes still remain to be seen. However, in several expert interviews with the German government, it had been stressed that the Court's interpretation of a 'sufficient degree of integration' was not satisfactory and difficult to assess. Lastly, it would be unclear as to whether or not such student would ever contribute to Germany's economy in the long run.

Moreover, parents receive additional funding as long as their children pursue vocational training or higher education, and have not yet reached the age of 25 years; this amounts to 184 EUR per month for the first two children, 190 EUR for the third and 215 EUR for the fourth and further children. Alternatively, parents can be awarded a lump-sum tax relief of 3,504 EUR per year per child per parent (i.e. 7,008 EUR per child per family). Whether the child allowance or the tax relief is more favourable to a family will be checked by the regional tax office in favour of the parents (European Commission 2013a: 12). As this allowance is granted unconditionally, this scheme falls within the sixth type of the model, that is, *universal non-contributory benefits*.

Child allowance presents an interesting case of a government directly reacting to challenges posed by EU mobility of non-economically active persons and non-discrimination rights. In a first step, a report by the German government published on 25 March 2014 noted that in December 2013, almost 660,000 children from other member states with parents living in Germany received child allowance from German authorities and alleged potential abuse by parents with children living outside of Germany (BMI and BMAS 2014: 128). According to German law, any EU citizen either residing in Germany (Art. 62(1)1 Einkommensteuergesetz - EStG) *or* subject to unlimited income tax liability (Art. 62(1)2 EStG) is eligible to such 'Kindergeld' (child allowance) from the first day of the stay; children must not reside in Germany but in another EU/EEA member state (Art. 62(1) EStG). Since 01/01/2015, the 'Gesetz zur Änderung des Freizügigkeitsgesetzes/EU' has become effective, which adapted several laws, including the 'Einkommenssteuergesetz' mentioned above. It now states that children must be clearly identified through an ID number to be eligible for child benefits (change of Arts. 62(1), 63(1), 67 EStG). Further, the latest administrative instructions ('Dienstanweisung zum Kindergeld nach dem Einkommenssteuergesetz', which was published in July 2014, prior to the above legislation), clarify the following: stricter testing of free movement entitlements and how to assess a clear identification of children. Importantly, it will be considered in the course of drafting the next version of administrative instructions whether or not it will be possible to adapt the amount of child benefit paid to claimants to the level of living costs of the children's state of residence. Yet last but not least, despite this issue being currently highly relevant to non-economically active citizens' social citizenship rights in the EU, it is probably of less importance for the issue of student mobility as most children addressed by these legislative changes are probably not enrolled in higher education institutions in Germany at all.

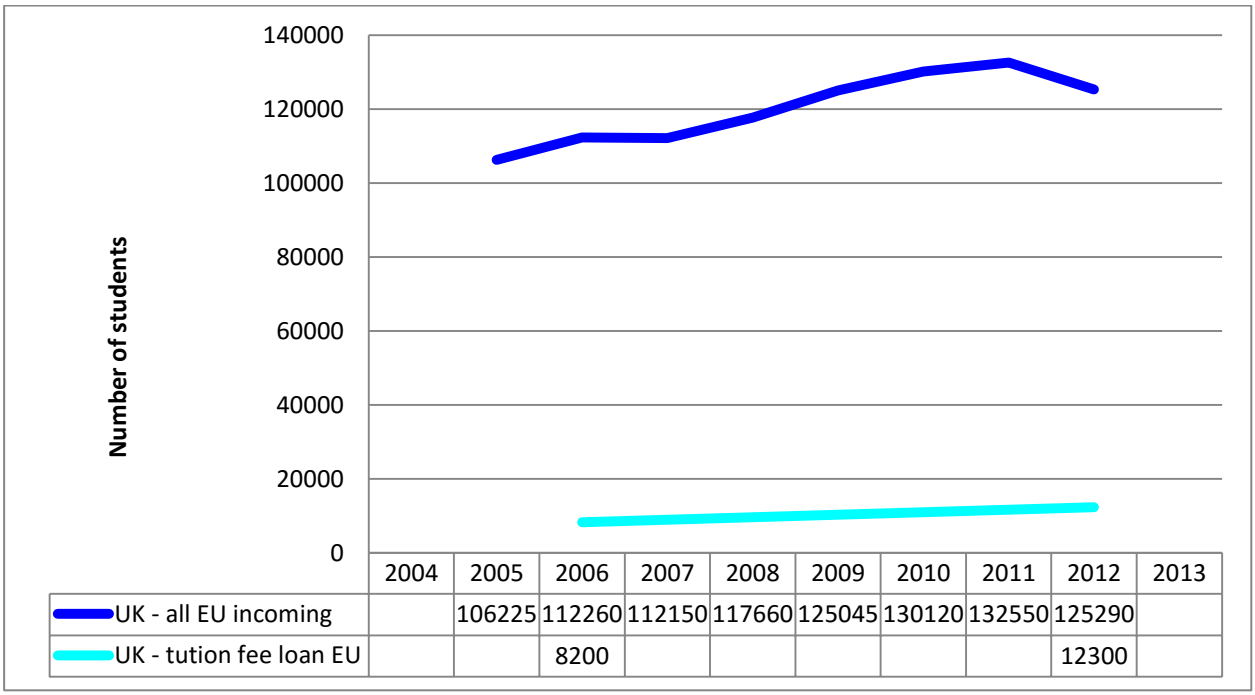
4.2. UNITED KINGDOM

In the United Kingdom, average public spending on higher education amounts to 0.8 per cent of GDP which is amongst the lowest through the EU. Moreover, a large 30.5 per cent of all education spending comes from the private sector (as compared to an average of 13.8 per cent across EU member states; Eurostat 2012: 88). Then, the British tuition fee system can best be characterised as one featured in the third category of the model, that is, *ex-post means-tested contributory*. First of all, tuition fees themselves are regulated differently in the four countries England, Wales, Northern Ireland and Scotland. Tuition fees exist in all four countries but differ largely in their amount. For undergraduate studies, fees are regulated in all four countries and are capped at 9,000 GBP per year in England and Wales for all UK and EU students. Effectively, 8,385 GBP were charged on average in England in the academic year of 2012/13. In Northern Ireland, 3,575 GBP are charged for domestic and EU students but 9,000 GBP for students from other UK countries. A similar logic applies in Scotland: here, studying is free of charge for Scottish and EU students as the Scottish Government covers the tuition fees of 1,820 GBP per year for the students. However, students from other UK countries pay up to 9,000 GBP per year. These tuition fees do not have to be paid up front: students in England, Wales, and Northern Ireland can apply

for loans that cover their full tuition fees and have to be repaid at an interest rate of 9 per cent of income above a threshold of 21,000 GBP (16,365 GBP in Northern Ireland). For graduate studies, fees are unregulated in all four UK countries. Nevertheless, the UK Research Council has recommended 3,900 GBP as a 'most common' amount of tuition fees even though fees still vary widely (European Commission 2013a: 33-6).

In England, Wales and Northern Ireland, non-economically active EU students are eligible for tuition fee loans from the first day of their stay as long as they have lived in the EEA or Switzerland for at least three years prior to their studies and enrol in an accredited higher education institution in the UK (Student Loan Company 2014: 1-2). As graph 3 shows, incoming student numbers have steadily risen during the past decade but have seen a small downturn from 2011 to 2012. Additionally, graph 4 shows that spending on incoming EU tuition fee loans liabilities has doubled between 2006 and 2010, and that tuition fee loans total debt by EU students has quadrupled only between 2008 and 2010. However, as shown again in graph 3, the absolute number of EU students receiving tuition fee loans has increased albeit not to a large extent between 2006 and 2012.

TABLE 4: INCOMING EU STUDENTS (UK) AND TUITION FEE RECIPIENTS

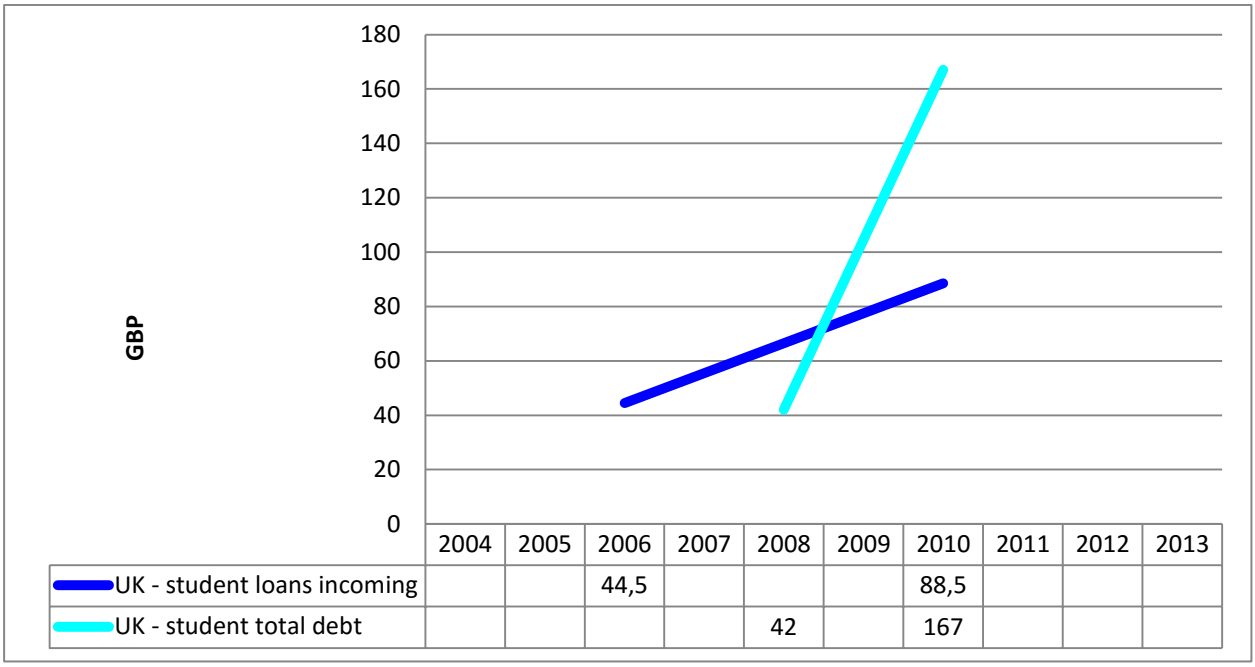


	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
UK - all EU incoming		106225	112260	112150	117660	125045	130120	132550	125290	
UK - tution fee loan EU			8200						12300	

For further financial support, students can also be awarded a need-based grant ('maintenance grants') during their undergraduate studies, which also varies in its amount according to the specific country. This benefit type, thus, fits into the fifth category of the model, that is, *means-tested non-contributory*. In England, students can apply for up to 3,354 GBP per year, which was received by 40 per cent of the students as the full amount and by 14 per cent as a partial amount in the academic year of 2012/13. In Wales, the maximum is set at 5,161 GBP per year, with 38 per cent of students having received a full grant and 30 per cent a partial grant during the same year. In Northern Ireland, the grant amounts to a maximum of 3,475 GBP, with 39 per cent awarded the full amount and 23 per cent a proportion of the grant. In England, Wales and Northern Ireland, additional scholarships are available for students from disadvantaged backgrounds. With regard to financing graduate studies in England, Wales and Northern Ireland, about 60 per cent of students in taught programmes and 30 per cent in research programmes are self-financing; the rest mostly receive scholarships awarded by the

different Research Councils. In Scotland, different grants exist for needy students with a maximum of 1,750 GBP awarded per year. In addition, they can take out loans to a maximum of 6,500 GBP per year depending on their status group.

TABLE 5: INCOMING EU STUDENTS' LOANS AND TOTAL DEBT (UK; IN MILLION GBP



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
UK - student loans incoming			44,5				88,5			
UK - student total debt					42		167			

Take-up rates by EU students – who can access such grants after a residence period of only three years – have steadily risen. For instance, 11,600 nationals accessed living cost support, amounting to 75m GBP for the academic year of 2009/10 compared with 22,800 nationals receiving 162m GBP in total during the academic year of 2012/13. 61m of the 162m GBP reflect maintenance grants, the rest amounts to maintenance loans. It has also been highlighted that the average maintenance loan (2,280 GBP) paid to EU students is higher than the average paid to British nationals (BIS 2014: 8). It is interesting to note that the three year residence eligibility requirement dates back to the original 1971 student finance legislation. This legislation has long been a curious matter, as EU law - on the basis of the 2004 Citizenship Directive - would offer the possibility of extending such waiting periods up to five years. Currently, this is now exactly the matter being discussed within the English government: an on-going public consultation will evaluate whether or not this period can eventually be extended to five years, yet keeping the residence requirement for British nationals to three years as it is currently regulated (BIS 2014: 11-2). As has become clear in several expert interviews, this issue of adapting maintenance grants is much more central to the current policy planning than any discussions on EU students accessing student loans.

TABLE 6: THE GERMAN AND BRITISH STUDY FINANCE SUPPORT SCHEMES (SOURCE: OWN PRESENTATION)

Eligibility or repayment conditions/ funding	Contributory		Non-contributory
	Ex-ante	Ex-post	
Means-tested		Tuition fee loans UK Maintenance loans UK *Maintenance aid – loan part DE (minor part)*	Maintenance grants UK Maintenance aid – grant part DE (major part)
Universal	*Tuition in DE (previously)*		Tuition in DE (today) Child allowance DE

Finally, the above table summarises the empirical findings for the German and British cases, thus highlighting again the argument of the citizenisation nexus between rights and duties: It had been assumed that the further to the upper left a study finance system is situated, the closer social citizenship rights and duties would be matched, the less a system relies on redistributive mechanisms and the less it would be hampered by CJEU case law provisions on student mobility and non-discrimination. On the contrary, the further down to the lower right corner a study finance system would be located, the looser the citizenisation nexus between rights and duties would be, the more a system thus relies on redistributive mechanisms and the more European court jurisprudence will interfere into the system's regulation. As the table shows, this is exactly what can be inferred from empirical evidence: the UK represents a Liberal Market Economy situated further to the upper left, and Germany, on the contrary, depict a Social Market Economy that is located further down to the right.

5. Conclusion

This study has analysed the evolution of European Social Citizenship, that is, non-economically active citizens residence and welfare rights as well duties across EU member states by taking the example of student mobility and cross-border access to study finance support schemes. First, it has become evident that the European Court of Justice has played a major role in shaping European Social Citizenship rights by extending initial Treaty provisions for European Citizenship as introduced within the Maastricht Treaty in 1992. European Social Citizenship had materialised within the important 2001 *Grzelczyk* judgment for the very first time, followed by several other central ruling of the new millennium, which had all extended the material and personal scope of the Treaty based on personal mobility and non-discrimination provisions.

Secondly, this study has outlined the citizenisation nexus between rights and duties, which explains member states' reactions to such Europeanisation mechanisms stemming from European court case law. It has been argued that the closer social citizenship rights and duties are matched, the less a system relies on redistributive mechanisms and the less it will be hampered by CJEU case law provisions on mobility of non-economically active persons. These mechanisms were expected to be found in the British case study, reflecting a Liberal Market Economy. Indeed, the UK case had clearly shown that its study finance support scheme largely relies on private contributions (student and maintenance loans) which have been little contested politically. What is at stake here is that part of its scheme relies to a larger extend on redistributive mechanisms, which are its maintenance grants. Here, the English case reflects exactly the anticipated mechanism as the government currently attempts to constrain EU students' access to such maintenance grants.

On the contrary, the looser the citizenisation nexus between rights and duties of a welfare scheme is, the more a system thus relies on redistributive mechanisms and the more European court jurisprudence will interfere into the system's regulation, which was expected to be found in Social Market Economies such as in the German case study. Also here, the anticipated mechanisms were found to be in place since the German study finance support scheme relies more heavily on redistribution than in the British case, so for instance, tuition is generally free of charge and maintenance aid is largely based on government grants and only to some smaller extent on loans. Yet even though some 'unfair redistribution' within European higher education systems has been discussed within the German government, leading officials still to value highly long-term indirect contributory effects resulting from mobile university students' subsequent employment within the German economy so that this SME model apparently still masters the redistributive challenges opposed by CJEU case law. Yet additionally, child allowance reflects this universal grant character as parents living in Germany can access this type of allowance from the very first day of their stay in Germany, notwithstanding the possibility of their children not residing in Germany. This aspect has been a central point of political contention lately, to the extent that the German government is now seeking 'creative solutions' to limit alleged child allowance abuse.

Finally, the above findings, particularly on the citizenisation nexus between rights and duties are also expected to be applicable to other types of CJEU case law induced domestic welfare state transformations and should, thus, be tested in further research.

REFERENCES

Aust, Andreas, Sigrid Leitner, Stephan Lessenich (2002). 'Konjunktur und Krise des Europäischen Sozialmodells. Ein Beitrag zur politischen Präexplantationsdiagnostik.' In: *Politische Vierteljahresschrift* 43(2), 272–301.

Barnard, Catherine, and Geert De Baere (2014). *Towards a European Social Union: Achievements and possibilities under the current EU constitutional framework*. Leuven: Euroforum KU Leuven.

Barr, Nicholas (2012). *Economics of the Welfare State*. Fifth Edition. Oxford: Oxford University Press.

Baeten, Rita (2012) *The Europeanization of national Health care Systems: National impact and EU codification of the patient mobility case law*. Brussels: Observatoire Social Européen.

Baier, Tina, and Marcel Helbig (2011). *War all die Aufregung umsonst? Über die Auswirkung der Einführung von Studiengebühren auf die Studienbereitschaft in Deutschland*. Discussion Paper P 2011-01. Berlin: Wissenschaftszentrum Berlin für Sozialforschung.

BIS/Department for Business, Innovation & Skills (2014). *Higher Education Policy. Consultation on Extending the Eligibility Criteria for Access to Higher Education Student Living Cost Support for EU Nationals*. London: BIS.

BMI/Bundesministerium des Inneren and BMAS/Bundesministerium für Arbeit und Soziales (2014). *Zwischenbericht des Staatssekretärsausschusses zu 'Rechtsfragen und Herausforderungen bei der Inanspruchnahme der sozialen Sicherungssysteme durch Angehörige der EU-Mitgliedstaaten'*. März 2014. Bonn: BMAS.

Börzel, Tanja A. (2002). 'Pace-Setting, Foot-Dragging and Fence-Sitting. Member State Responses to Europeanization'. In: *Journal of Common Market Studies* 40(2), 193-214.

Busemeyer, Marius R., and Christine Trampusch (2011). 'Review Article: Comparative Political Science and the Study of Education.' In: *British Journal of Political Science* 41(2), 413-43.

Caporaso, Jams A. and Sidney Tarrow (2009). 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets. In: *International Organization* 63, 593–620.

Chalmers, Damian, Gareth Davies, and Giorgio Monti (2010). *European Union Law. Cases and Materials*. Second Edition. Cambridge: Cambridge University Press.

Cornelissen, Rob (1996). 'The Principle of Territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)'. In: *Common Market Law Review* 33(3), 439-71.

Damjanovic, Dragana (2012). ''Reserved Areas' of the Member States and the ECJ: The Case of Higher Education'. In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 149-74.

Davies, Gareth (2006). 'The process and side-effects of harmonisation of European welfare states'. *Jean Monnet Working Paper* 2/06.

DESTATIS/Statistisches Bundesamt (2014). ‚Ausbildungsförderung nach dem Bundesausbildungs-förderungsgesetz (BAföG), 2013.' Fachserie 11, Reihe 7.

——— (2013a). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2012.' Fachserie 11, Reihe 7.

——— (2013b). ‚Im EU-Ausland Geförderte 2011 und finanzieller Aufwand nach Monaten und Art der Förderung' (unveröffentlichte Tabelle).

——— (2012). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2011.' Fachserie 11, Reihe 7.

——— (2011). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2010.' Fachserie 11, Reihe 7.

——— (2010). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2009.' Fachserie 11, Reihe 7.

——— (2009). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2008.' Fachserie 11, Reihe 7.

——— (2008). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2007.' Fachserie 11, Reihe 7.

——— (2007). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2006.' Fachserie 11, Reihe 7.

——— (2006). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2005.' Fachserie 11, Reihe 7.

——— (2005). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2004.' Fachserie 11, Reihe 7.

——— (2004). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2003.' Fachserie 11, Reihe 7.

——— (2003). ‚Ausbildungsförderung nach dem Bundesausbildungsförderungsgesetz (BAföG), 2002.' Fachserie 11, Reihe 7.

Dougan, Michael (2012). 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship'. In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 113-47.

——— (2005). 'Fees, grants, loans and dole cheques: who covers the costs of migrant education within the EU?' In: *Common Market Law Review* 42, 943-86.

Dubiel, Helmut (2014). 'The Paradoxes of European Citizenship.' In: Wiesner, Claudia and Meike Schmidt-Gleim (eds., 2014). *The Meanings of Europe. Changes and Exchanges of a Contested Concept*. New York: Routledge, pp. 119-29.

Dustmann, Christian, and Tommaso Frattini (2013). *The Fiscal Effects of Immigration to the UK*. CReAM Discussion Paper Series, CDP 22/13. London: University College.

Emmenegger, Patrick, and Romana Careja (2013). 'The Other Dualism: Welfare State Nationalism and Migration Policies in Western Europe.' In: Ireneusz P. Karolewski, and Andrzej M. Suszycki (eds.). *European Welfare States - Citizenship, Nationalism and Conflict*. Osnabrück: fibre Verlag, 75-106.

European Commission (ed., 2013). *Proposal for a Directive of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers*. COM(2013) 236 final.

Ferrera, Maurizio (2009). 'The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a 'Virtuous Nesting'. In: *Journal of Common Market Studies* 47(2), 219-33.

——— (2005). *The Boundaries of Welfare*. Oxford University Press.

Garrett, Geoffrey, and Barry Weingast (1993). 'Ideas, Interests, and Institutions: Constructing the EC's Internal Market.' In: Judith Goldstein and Robert O. Keohane (eds.). *Ideas and Foreign Policy*. Ithaca, N.Y.: Cornell University Press, 173-206.

Goldstein, Judith and Robert O. Keohane (eds.). *Ideas and Foreign Policy*. Ithaca, N.Y.: Cornell University Press.

Greer, Scott L. (2006). 'Uninvited Europeanization: Neofunctionalism and the EU in Health Policy'. In: *Journal of European Public Policy* 13(1), 134-52.

Hacker, Björn (2014). *Social Europe as a Field of Conflict. Four Challenges and Opportunities to Shape the European Social Model*. Berlin: Friedrich-Ebert Stiftung, International Policy Analysis.

——— (2010). *Das liberale Europäische Sozialmodell. Rentenreformen in der EU und die Offene Methode der Koordinierung*. Baden-Baden: Nomos.

Jepsen, Maria, and Amparo Serrano Pascual (2005). 'The European Social Model: an exercise in deconstruction.' In: *Journal of European Social Policy* 15(3), 231–45.

Karolewski, Ireneusz P., and Andrzej M. Suszycki (eds.). *European Welfare States - Citizenship, Nationalism and Conflict*. Osnabrück: fibre Verlag.

Kelemen, R. Daniel (2011). *Eurolegalism. The Transformation of Law and Regulation in the European Union*. Cambridge: Harvard University Press.

Klausen, Jytte (1995). 'Social Rights Advocacy and State Building: T.H. Marshall in the Hands of Social Reformers.' In: *World Politics* 47(2), 244-67.

Kostakopoulou, Dora (2012). 'The European Court of Justice, Member State Autonomy And European Union Citizenship: Conjunctions And Disjunctions.' In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 175-203.

Lindert, Peter (2004). *Growing Public: Social Spending and Economic Growth Since the Eighteenth Century*. Cambridge: Cambridge University Press.

Manza, Jeff, and Michael Sauder (eds., 2009). *Inequality and Society*. New York: W.W. Norton and Co.

Marshall, Thomas H. (2009 [1950]). 'Citizenship and Social Class.' In: Jeff Manza and Michael Sauder (eds.). *Inequality and Society*. New York: W.W. Norton and Co., 148-54.

Martinsen, Dorte S. (2009). 'Conflict and Conflict Management in the Cross-border Provision of Healthcare Services'. In: *West European Politics* 32, 792–809.

——— (2005). 'The Europeanization of Welfare. The Domestic Impact of Intra-European Social Security'. In: *Journal of Common Market Studies* 43(5), 1027-54.

——— (2003). 'Who has the right to intra European social security? From market citizens to European citizens and beyond'. In: *EUI working paper law* 2003/13, European University Institute.

——— (2002). 'Comments on Mazzoleni (ex parte Guillaume) (Case C-165/98 of 15 March 2001), Leclere (Case C-43/99 of 31 May 2001) and Grzelczyk (Case C-184/99 of 20 September 2001)', In: *European Journal of Migration and Law* 4: 127–44.

Martinsen, Dorte Sindbjerg, and Hans Vollaard (2014). 'Implementing Social Europe in Times of Crisis: Re-established Boundaries of Welfare?' In: *West European Politics* 37(4), 677-692.

Martinsen, Dorte Sindbjerg, and Karsten Vrangbæk (2008). 'The Europeanization of Health care Governance: Implementing the Market Imperative of Europe'. In: *Public Administration* 86(1), 169-84.

Menéndez, Agustín J. (2009). European Citizenship after Martinez Sala and Baumbast. Has European Law Become More Human but Less Social? RECON Online Working Paper 2009/05, Oslo, ARENA, accessed at http://www.reconproject.eu/projectweb/portalproject/Abstract RECONwp0905.html (05/06/2015).

Micklitz, Hans-W. and Bruno De Witte (eds., 2012). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia.

Mossialos, Elias, Govin Permanand, Rita Baeten, and Tamara K. Hervey (eds., 2010). *Health Systems Governance in Europe: The Role of EU Law and Policy*. Cambridge: Cambridge University Press.

Obermaier, Andreas J. (2009). *The end of territoriality? The impact of ECJ rulings on British, German and French social policy*. Farnham: Ashgate.

——— (2008). 'The National Judiciary - Sword of European Court of Justice Rulings: The Example of the Kohll/Decker Jurisprudence.' *European Law Journal*, 14:6, 735-752.Obinger, Herbert and Elmar Rieger (eds., 2009). *Wohlfahrtsstaatlichkeit in entwickelten Demokratien. Herausforderungen, Reformen und Perspektiven*. Frankfurt a.M.: Campus.

O'Brien, Charlotte (2008). 'Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's 'Real Link' Case Law and National Solidarity.' In: *European Law Review* 33(5), 643-65.

O'Leary, Síofra (2009) 'Equal Treatment and EU Citizens: New Chapter On Cross-Border Educational Mobility And Access To Student Financial Assistance.' In: *European Law Review* 34, 612-27.

Petersen, Hans-Georg (2008). 'Mobilisierung alternativer Finanzressourcen: Erfahrungen mit der Einführung von Studiengebühren.' Vortrag bei der *Tagung Quoi de neuf sur l'Allemagne? Les universités allemandes en mutation / Brennpunkt Hochschulreform. Transformationen des Hochschulsystems in Deutschland*, Sciences Po Paris, 26th September 2008, CSO/Science Po/CIERA, Finanzwissenschaftliche Diskussionsbeiträge, No. 58, http://nbn-resolving.de/urn:nbn:de:kobv:517-opus-27374 (07/06/2015).

Rennuy, Nicolas (2013). 'The Emergence of a Parallel System of Social Security Coordination'. In: *Common Market Law Review* 50(5), 1221-66.

Scharpf, Fritz W. (2010). 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'.' In: *Socio-Economic Review* 8, 211-50.

——— (2009). 'Legitimacy in the Multilevel European Polity'. In: *European Political Science Review* 1, 173-204.

——— (2007). 'Reflections on multilevel legitimacy', In: *MPIfG working paper* 07/3, Max Plank Institute for the Study of Societies, Cologne.

Schmidt, Susanne K., Michael Blauberger and Wendelmoet van den Nouland (2008). 'Jenseits von Implementierung und Compliance. Die Europäisierung der Mitgliedstaaten'. In: Ingeborg Tömmel (ed.). *Die Europäische Union*. Politische Vierteljahresschrift, Sonderheft 40. Wiesbaden: VS Verlag für Sozialwissenschaften, 275-96.

Shapiro, Martin M., and Alec Stone Sweet (2002). *On Law, Politics, and Judicialization*. Oxford: Oxford University Press.

Stone Sweet, Alec (2010). 'The European Court of Justice and the judicialization of EU governance'. In: *Living Reviews in European Governance* 5(2), 1–50.

——— (2004). *The Judicial Construction of Europe.* Oxford: Oxford University Press.

——— (1999). 'Judicialization and the Construction of Governance.' In: *Comparative Political Studies* 32(2), 147-84.

Stone Sweet, Alec and Wayne Sandholtz (1998). 'Integration, Supranational Governance, and the Institutionalization of the European Polity'. In: ibid. (eds.). *European Integration and Supranational Governance.* Oxford: Oxford University Press, 1-26.

Töller, Annette Elisabeth (2010). 'Measuring and Comparing the Europeanization of National Legislation. A Research Note'. In: *Journal of Common Market Studies* 48(2), 417-44.

Treib, Oliver (2006). 'Implementing and Complying with EU Governance Outputs.' In: *Living Reviews in European Governance* 1, 1-26.

Weatherill, Stephen (2012). *Cases and materials on EU law*. 10th ed. Oxford: Oxford University Press.

Weiler, Joseph H.H. (1999). *The Constitution of Europe: Do the New Clothes have an Emperor? and Other Essays on European Integration.* Cambridge: Cambridge University Press.

——— (1994). 'A quiet revolution: the European Court of Justice and its interlocutors'. In: *Comparative Political Studies* 26(4), 510-34.

Wiesner, Claudia and Meike Schmidt-Gleim (eds., 2014). *The Meanings of Europe. Changes and Exchanges of a Contested Concept.* New York: Routledge.

STREAM 3: THE EUROPEAN UNION'S POLITICAL CITIZENS: RIGHTS, PRACTICES, CHALLENGES AND ALTERNATIVE MODELS OF PARTICIPATION

STREAM COORDINATORS: FRANCIS CHENEVAL (UNIVERSITY OF ZURICH) AND UWE PUETTER (CENTRAL EUROPEAN UNIVERSITY, BUDAPEST)

European Union citizenship includes a number of political rights. Notably the right to stand and vote in local and European Parliament elections for all EU citizens regardless where they reside within the Union. Yet, the question of political rights of EU citizens goes far beyond this. As EU political decision-making affects virtually all areas of public policy, a narrow definition of European political citizenship as a small set of additional participatory rights would risk missing the wider dimension of political citizenship as a process of acquiring access to participation in EU-related decision-making at various levels of government and through a variety of different mechanisms. The euro crisis was the most recent episode in EU politics which revealed severe contestation of the existing political rights dimension of EU citizenship as a legitimating device.

Thus, the discussion within Stream 3 focused on gaining further answers to a set of closely related questions: What is the status of explicit or implicit political rights of EU citizens in relation to EU-level and/or EU-influenced decision-making? What participatory practices exist and under what circumstances do they become challenged or may develop further? What alternative models and challenges of participation and representation do exist which could enhance the participatory dimension of EU policy-making? How can we learn from comparing participatory practices and routines in different EU member states and between the EU and other multi-level polities? Did the euro crisis negatively impact on the ability of EU citizens to exercise their political rights? How is the concept of EU political citizenship evolving beyond the notion of a set of limited additional political rights as defined by the Treaty?

In answering these questions Stream 3 paper contributions focused on reviewing alternative models of political participation and the contestation of political citizenship rights within the European Union. One key theme of several contributions was the evaluation of failed and successful models of political representation and citizenship at the national level with a view to understanding institutional options for the European level and the potential for accommodating European Union citizenship within a context of contested domestic political institutions.

For example, Viktor Kosta highlighted the contested character of political citizenship rights and practices in Croatia. Though an EU member state and formally committed to diversity and the integration of minorities in political and social life, the country struggles with overcoming the consequences of its war-time past. Citizenship remains an inherently contested concept in Croatian domestic politics for the foreseeable future and this is not without consequences for the question of how citizen may accommodate to European model of political citizenship and how they may derive legitimacy from such a model. Similarly, ***Vít Hloušek***, whose paper is included in this volume, and Michael Novy flagged the relevance of historical trajectories in domestic party and electoral politics for the exercise of political citizenship in Europe. The focus on local and sub-regional political routines and practices may be crucial for understanding notions of political citizenship in EU member states which are absent from broader juxtapositions of national and Union citizenship practice.

As regards the question of alternative participatory mechanisms which may help to further develop the notion and practice of European political citizenship two contributions – by ***María Peñarrubia Bañón*** (included in this volume) and Fernando Mendez respectively – focused specifically on the European Citizens' Initiative. Their analyses showed mixed results. Though the mechanism of the citizens' initiative as such is not without parallels if compared with similar models in other countries around the globe and though it could be enhanced through

further smaller modifications which would make it easier for citizens to initiate policy change, the overall impact of the European Citizens' Initiative on EU policy-making is expected to remain marginal as there no clear lines of responsibility as regards the political endorsement and implementation of policy change as requested by individual initiatives. Whereas the European Citizens' Initiative could be considered as only a minimal enhancement of European political citizenship rights and thus is seen to have limited potential to contribute to enhancing legitimacy of EU decision-making, ***Hester Kroeze*** argued in her contribution to this volume that historical comparison with Switzerland reveals that the provision of core participatory rights and fundamental rights can help legitimising processes of integration. However, in contrast to the early Swiss Federation in the 19th century early European (Community) integration was not accompanied by a inclusion of citizens into decision-making through the creation of new major political for them.

Finally, the papers which studied the implications of the euro crisis for the exercise of political citizenship in the EU context revealed substantial challenges to the EU's ability to adapt to the consequences of crisis politics and economic crises more generally. Monica Ferrin discussed the impact of the euro crisis on inner-EU labour mobility as a potential development triggering future demand for greater citizenship rights for migrant workers. Robert Csehi and Uwe Puetter interpreted the euro crisis management as a challenge to established channels of political participation and control and stressed the importance of analysing the practice of exercising formal citizenship rights under conditions of crisis decision-making. In both cases European political citizenship is seen as something which yet remains to be further specified. Rather than being a clearly identifiable legitimising device it is an often implicit assumption about how EU politics ought to be. The concept of European political citizenship reaches well beyond formal definitions of explicitly guaranteed supranational political citizenship rights such as the right to stand and vote in European Parliament elections.

MORAVIAN POLITICAL PARTIES: THE STORY OF AN ALMOST FORGOTTEN REGIONALIST ATTEMPT IN THE CZECH REPUBLIC

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The Czech Republic does not belong to those European countries that demonstrate a high level of political salience for centre-periphery cleavage.[299] Regional specificities within the Czech Republic are almost only at the level of folklore and dialects, rather than very distinctive patterns of political behaviour, or in specific regionalist parties' ways of existence in trying to mobilise the voters on peripheral protest against Prague's central dominance. This does not mean that such parties do not exist at all and that their marginal position had stayed the same since the recent democratic regime's creation after the Velvet Revolution. On the contrary, political parties and movements representing the peripheral protest of Moravia were widely supported at the beginning of the 1990s and separate Moravian identity (or at least a perception of it) was an important source of collective as well as individual political behaviour of many people living in the territories of Moravia and Silesia.

Combining historical and political scientific perspectives, this paper presents a look at those developments with the aim of describing and analysing the ups and downs of the Moravian political movement, looking for the sources of its electoral success, as well as examining its rhetoric and arguments developed to mobilise voters and invoke regional Moravian identity from a political standpoint.

In order to meet these goals, the paper will be organised as follows. First a brief course in Moravian history will explain the historical sources of specific Moravian identity. The post-1989 Moravian politics were to some extent following previous attempts to use the Moravian issue as a political programme and a brief review of older Moravian political peripheral claims will, therefore, be provided. The main part focusses on analysis of development within Moravian political parties and movements[300] since 1989 and analyses developments of Moravian political narrative and political discourse. Finally, concluding remarks will try to put the Moravian peripheral politics into a broader political context.

Before starting the analysis, we need to add one important terminological and conceptual remark. Within the Moravian movement, there was a sort of internal dispute concerning the relationship between Moravia and Silesia which together with Bohemia as well as Upper and Lower Lusatia (*Lužice)* belonged historically to the complex of Czech Crown lands as two autonomous bodies. However, the vast majority of Silesia was lost to Prussia after the Wars of Austrian Succession in the first half of the 18th century and only a small part remained part of the Czech Lands, preserving its autonomous status until 1918, before being merged with Moravia into the Moravian-Silesian Province during the inter-war period. For historical, linguistic, national and other reasons, Silesia constitutes an area distinctive from Moravia and separate Silesian identity was also stressed within the Moravian movement. For practical reasons, the claim to create Moravian autonomy was typically including the territory of Silesia. In what follows, we will focus on mainstream Moravian peripheral political protest and consider Silesia only in those cases which include Silesia to foster argumentation for Moravian claims for autonomy.

[299] The paper was elaborated as a part of the research project "bEUcitizen - All Rights Reserved? Barriers towards EUropean CITIZENship" (320294) funded by the European Union within the framework of the 7th Specific RTD Programme.

[300] The term 'party' is perceived by the Czech public as somewhat discredited; for this reason a number of entities prefer the form of a political movement. The difference is purely semantic; under the law (Act No. 424/1991 Coll., as amended) movements and parties are subject to identical requirements.

1. MORAVIA – A DISTINCTIVE PART OF THE CZECH LANDS

To explain the historical sources of Moravian peripheral identity being politicised in the early 1990s, one must look at some type of path dependency that takes into account the specific position of Moravia (and Silesia) within the system of the Czech Lands at least since the early modern period. We are not claiming to support the primordial nationalist idea that the nations are sacrosanct entities, but on the other hand we have to modify the views of pure constructivists such as Ernst Gelner (2006) who stress the moment of modern European nations' political construction. In fact, the best theoretical background for consideration of path dependency's role in the case of Moravia is offered by the approach of a prominent expert in the history of European national movements, Czech historian Miroslav Hroch. According to Hroch, '*nations are not a product of coincidence*' (Hroch 2009). Such a statement does not deny the constructivist aspect of modern nations´ creation, but it pays respect to the fact that the political elite can successfully construct only those national projects that have sound historical backgrounds and can be differentiated from other imagined communities (Anderson 1991), ideally both in territorial and identity dimensions. An example of such a country is represented by Moravia whose territorial coherence had not been seriously disputed since the medieval period and which was an integral but autonomous part of the Czech Crown's territories in the medieval and (early) modern periods.

During the medieval period, the Czech Lands as such were a periphery within the emerging European system of states. Moravia having such a position within the Czech Lands was a '*periphery of a periphery*' (Šedo 2002: 3). The consolidation of political institutions that took place during the rule of the Luxembourg Dynasty (1310-1437) and that lasted until the defeat of the Czech protestant estates in 1620 maintained the general subordinated position of Moravia within the Czech Lands, but modified the Czech political system's institutional settings. Moravian elites had lesser impact on Kingdom-wide institutions but the new institutional arrangement in practice encapsulated the Moravian political elite, limiting access into Moravian autonomous offices to those noble families who lived and had properties in the territory of Moravia. The relative increase of Moravian political autonomy rose because of the changing international context within the period when the Czech Crown was held by the Jagiellonian and the Habsburg Dynasties during the 15th and the 16th centuries. After the Battle of White Mountain (1620), the Czech Lands were firmly incorporated into the body of Habsburg domains. Bohemia was devastated by forceful re-catholicisation and whilst Moravia fared little, to some extent it successfully resisted attempts in the general centralisation of administration (Šedo 2002: 4-5).

When Moravia entered the period of modern mass competitive politics in the second half of the 19th century, Vienna and Prague were two competing centres to which Moravia was attached and against which Moravian peripheral protest could be directed. The role of Vienna was stressed not only by its position as capital of the entire Habsburg Monarchy but because of the considerable German minority living in the territory of Moravia[301] for which in the age of looming mass nationalism Vienna was for obvious reasons more attractive than the predominantly Czech city of Prague. For the emerging Moravian political elite in the mid-19th century, theoretically different ways of how to conceptualise its own identity could be left opened. There was a possibility of having an ethnic Czech identity focussed on Prague as a centre. The second option was a tendency to be identified with the political system of the Habsburg monarchy which favoured the German language but which in a way stayed 'above' national clashes, somewhat like the famous family of Trotta von Sipolje from Joseph Roth´s well-known novels. The third option was German nationalism and the fourth was Moravian provincial patriotism which could in practical terms be blended with moderate Czech or German nationalism (see Malíř 1990). At the turn of the 19th and the 20th centuries, both national options clearly took leading

[301] According to the 1910 public census, German speaking inhabitants constituted roughly 28 per cent of Moravian inhabitants. This does not automatically mean that all these people were of German nationality because the census asked about 'colloquial language' (*Umgangssprache*), so some Jewish inhabitants of Moravia declared that they would also use German as a tool of everyday communication. A German speaking population dominated some regions including some important industrial cities and economic centres such as Brno.

positions, but especially among the Czech politicians from Moravia strong feelings of peripheral specificities (although typically not of strictly distinctive identity) persisted. Last but not least, because of the internal administrative division of so-called Cisleithania into provinces within which autonomous sets of party systems were developed. It means that both Czech and German politicians in Moravia created political parties of a similar kind but administratively independent from other provinces in the Austrian part of the Monarchy (Malíř 1996).

Moravian and Czech parties merged typically in the period just after the end of the First World War (some of them already earlier during the War years) but Moravia was preserved as an autonomous province by the Czechoslovak republic after 1918. In 1927, the new law on Czechoslovakia's administrative division merged only Moravia and Silesia into one province. However, more substantial change occurred in the 1918-1920 period because political autonomy was transformed into mere administrative decentralisation. Moravian and Silesian diets were abolished. The regional governmental body was replaced with bureaucratic authorities subordinated to a Moravian provincial president who was controlled by the Czechoslovak Minister of the Interior. Autonomy was strictly speaking turned into a decentralised public administration. This situation lasted until German occupation (1939-1945). After 1945, the Moravian-Silesian Province was re-introduced with a considerably lower level of real administrative power and with the exception of the Czechoslovak People´s Party, other Czech parties of the National Front (Socialists, Social Democrats, and Communists) expressed a preference to reorganise Czechoslovakia into smaller and purely administrative regions with some regard to the specific position of Slovakia (Pernes 1996: 170-171). After parliamentary elections in 1946, the process abolishing Moravia-Silesia as a unit of decentralised administration started and since the 1st January 1949, provinces have finally been replaced by regions and consequently the last remnants of Moravian autonomy were lost. The regions were reorganised a couple of times during the Communist rule and some territorial adjustments did not even respect the historical border line between Bohemia and Moravia, which had functioned for centuries.

We can use the concept of peripheries drawn by Stein Rokkan (1999: 97-107) to summarise the historical position of Moravia within the Czech Lands. Moravia was a periphery with clear territorial as well as social boundaries controlled by the Czech centre in terms of military-administrative, economic as well as cultural dimensions. However, inclusion of the Czech Lands into the Habsburg Monarchy opened a way for potential competition between Prague and Vienna as 'natural' centres for Moravian periphery and it was exactly this competition together with multi-national (Czech-German-Jewish) character of Moravia which created a convenient soil for the seeds of Moravian identity and peripheral protest to grow. Position of certain 'distance, difference, and dependence' from the centre (Rokkan 1999: 114-115) during the 20th century promoted several waves of political protest aimed at the fostering peripheral identities and addressing related political claims, as shown in the next part.

A historical survey of territory must include the basic population survey. The data of public censes we have for the period of the Habsburg Monarchy, interwar years as well as socialist Czechoslovakia do not include any option for declaration of Moravian nationality. The situation changed after 1991, so we have a survey showing of how the numbers of citizens declaring Moravian or Silesian nationality developed over recent decades. The data are presented in the following table.

Table 1: Moravian and Silesian nationality in the public censes 1991-2011

N. OF INHABITANTS / PER CENT	1991	2001	2011
CZECH	8 363 768 / 81,2	9 249 777 / 90,4	6 711 624 / 64,3
MORAVIAN	1 362 313 / 13,2	380 474 / 3,7	521 801 / 5,0
SILESIAN	44 446 / 0,4	10 878 / 0,1	12 214 / 0,1
CZECH AND MORAVIAN	-	-	99 028 / 0,9
CZECH AND SILESIAN	-	-	4 361 / 0,0
MORAVIAN AND SILESIAN	-	-	4 567 / 0,0
MORAVIAN AND OTHER	-	-	2 217 / 0,0
SILESIAN AND OTHER	-	-	414 / 0,0
UNDECLARED	-	-	2 642 666 / 25,3

Source: ČSU 1991, 2001, 2011

Note: In 2011, nationality was an optional census field and citizens could opt for one or two nationalities.

Interpreting the results, we can conclude that there was a certain period within which to declare oneself as Moravian was a kind of political statement and at the same time 'fashion'. It is not a coincidence that the considerable number of Moravians detected by the general census 'appeared' during the heyday of the Moravian political movement. Still the subsequent censi show that there is an important although not very stable minority (actually the biggest of all nationality communities with the exception of major Czech population) of citizens from the Czech Republic who identify with their Moravian origin not only in terms of regional affiliation but also in terms of distinctive nationality. The other important feature is the geographical distribution of Moravians. Almost one half of Moravians according to the last census live in the territory of the Southern Moravian Region (capital Brno); an important share of Moravians live in the Zlín and Olomouc Regions but in other regions they partially occupy the territory of Moravia (the Moravian-Silesian Region with its capital Ostrava and the Vysočina Region with its capital Jihlava) was considerably lower whilst the share of Moravians in the regions of Bohemia was negligible (ČSU 2011).

The potential for political mobilisation of Moravian issues thus, at least theoretically, takes place in the Czech Republic and especially in Southern Moravia where the bulk of the Moravian population lives.

2. Brief 'prehistory' of Moravian political movements before 1989

The issue of Moravian autonomy was one of the hot topics in Czechoslovak political debates during the 1920s, being part of a general debate concerning the optimal model of the state's administrative division. However, this issue was solved by the formal re-introduction of provinces from the 1st January 1928[302], following which Moravian issues lost any prominence because the political parties faced social and political consequences of the Great Depression and later pro-Nazi radicalisation of German inhabitants within Czechoslovakia, two crucial political problems of the 1930s.

In some political parties (especially among the Christian democratic Czechoslovak People´s Party), contemporaries differentiated among the 'Bohemian' and the 'Moravian' wings but they differed more in terms of differentiated economic and political positions, rather than the level of stress put on Moravian territorial issues. Of marginal interest were Moravian activists' contacts with the Czech and Slovak far right in the period after the Munich Accord (September 1938) which transformed interwar Czechoslovak democracy

[302] Bohemia, Moravia, and Silesia in fact never ceased to function as real administrative units in the period 1918-1928; they were 'only' deprived of political autonomy.

into an authoritarian 'Second Republic' and in March 1938 into the Protectorate of Bohemia and Moravia occupied by Nazi Germany.

Certain interest among some Moravian activists was aroused after secession of the Slovak State from Czechoslovakia. A group of people around an association called the Moravian-Slovak Society (*Moravskoslovenská společnost*), later renamed Ethnographic Moravia (*Národopisná Morava*), established originally as a society to support the development of (and inquiry into) Moravian folklore, established a vision to cede parts of Moravia from the Protectorate and take on the territories of Moravian Slovakia (*Moravské Slovácko*) together with Moravian Wallachia (*Valašsko*) into the body of the fascist Slovak State. These ambitions were propelled especially by anti-Czech resentments of painter and Moravian cultural and political activist Jože Úprka who died in January 1940. Many of following leading characters of Ethnographic Moravia collaborated with the occupation administration during the War. Despite some sympathy expressed by leading politicians of the Slovak State (including its main ideologist Vojtech Tuka), the German administration strictly rejected any border changes (Mezihorák 1997).

In early 1940, the Moravian National Socialist Party (*Moravská národní sociální strana* – MNSS) was created as a successor to previous small factions of Moravian fascists. MNSS was a tiny group of quislings who established contacts with the Brno branch of NSDAP, which worked only in two local communities (Brno and Tišnov) and whose programme included anti-Semite features with verbal declarations of Moravia as an autonomous part of Hitler´s Great German Empire inhabited by people with Moravian nationality distinctive from the Czech nationality. Generally, the manifesto issued in March 1940 simply adopted the main NSDAP theses. The activities of the party even in its heyday included hardly more than roughly 200 members and it had practically ceased to function by 1942. The level of quisling collaboration with the Nazi regime of Moravian regional activism was thus negligible compared to, say, Croatian, Brittany, or Welsh regional movements in the period of the Second World War (Mareš – Suchánek 2003).

The only attempt to bring Moravian issues back to political prominence took place during the short period of the so-called Prague Spring in 1968. General liberalisation of political discourse (but not of political regime ruled by the Communist Party of Czechoslovakia) opened the way for voicing different minority opinions including requests for the restitution of Moravian autonomy. The first voice was raised by a community of staff from the Moravian Museum in Brno, who in their declaration adopted on 2nd April 1968 claimed renewal of a Moravian Province. Such a claim was not the product of mere historical consideration. On the contrary, since one important part of the Prague Spring reform agenda (and actually the only really accomplished reform) was the notion of federalisation in Czechoslovakia. The claim of experts from the Moravian Museum was intended to include Moravia as the third subject of a planned federation together with Bohemia and Slovakia. Two days later, a similar claim was made by prominent Moravian writers, followed two weeks later by Moravian and Silesian journalists. Rather surprisingly, Moravian communist politicians followed suit: the Regional National Committee of Southern Moravia demanded renewal of the Moravian Province in mid-April 1968. However, the same institution from Northern Moravia firmly rejected the plan in favour of one Czech Socialist Republic as a part of the Czechoslovak federation. In the period 1968-1969, the territorial support for Moravian autonomy was concentrated predominantly in Southern Moravia, a feature which was to continue after 1989. The Society for Moravia and Silesia (*Společnost pro Moravu a Slezsko* – SMS) was founded in mid-May 1968, with the high point of popularity reached in the summer of 1968 when the number of members exceeded 250,000. SMS issued a 'Moravian-Silesian Declaration' that claimed not only restitution of Moravian autonomy but also generally supported a process of liberalisation and democratisation in Czechoslovakia, with special emphasis on human rights. Citizens of Moravia and Silesia were labelled as a *'sociologically and psychologically distinctive branch of the Czech nation.'* Although the efforts of SMS to establish close relations with official Communist politicians in the Southern Moravian region met with some sympathy, the reaction of Prague communists remained cool and Moravian claims were simply ridiculed. Soviet occupation in August 1968 and emerging

'normalisation' in the spring of 1969 stopped any Moravian efforts for another two decades (Pernes 1996: 196-212).

Moravia was not a prominent topic within the Czech dissent movement, largely neglected save from some publications produced in the late 1980s by the circle of authors around the samizdat journal Central Europe – Brno´s Version (later known as Proglas) focusing on cultural and historical issues. Revival of Moravian political claims was to reappear together with the Velvet Revolution.

3. Rise and fall of Moravian politics after 1989[303]

The situation regarding Moravian politics, especially during the 1990s, was extremely varied. Many political as well as cultural organisations striving for Moravian autonomy and fostering the Moravian claims with different arguments and strategies emerged immediately after the communist regime's fall in early 1990. In the following analysis, we will focus only on those subjects that gained at least some political prominence or which are typical / important for the development of Moravian political discourse and communication tactics. Minor Moravian movements and groups of activists, therefore, remain beyond the scope of the following analysis.

After 1989, the former generation of Moravian activists as well as some 'new blood' prepared to renew the Moravian movement. The SMS was not forgotten and from its roots the new Movement for Autonomous Democracy – the Society for Moravia and Silesia (*Hnutí samosprávné demokracie – Společnost pro Moravu a Slezsko*, HSD-SMS) was built. HSD-SMS was officially established on 1st April 1990 and its leader became psychologist Boleslav Bárta who had previously chaired the 1968-1969 SMS. Under the clever slogan '*At least one vote for Moravia*'[304], the HSD-SMS obtained parliamentary representation both at national and federal levels. HSD-SMS even entered the Czech government but the reputation of the Movement was soon damaged by accusations that Boleslav Bárta had collaborated with State Secret Police (*Státní tajná bezpečnost*, STB) from the communist regime. Charismatic Bárta was backed by the majority of HSD-SMS but the first rift within the movement had occurred and it was deepened by the decision of the HSD-SMS from January 1991 to leave the Czech government in protest against the lack of interest in renewal of Moravian autonomy.

Minister Bohumil Tichý, the only representative of HSD-SMS in the Czech government, refused to resign and during the spring of 1991 the parliamentary factions within HSD-SMS in the Czech and federal parliaments split into 'HSD-SMS I' as well as 'HSD-SMS II' clubs. The change in public attitudes was quick and the result expectable: the dramatic decline of popular support. Public opinion surveys that assigned around 11 per cent of the vote to HSD-SMS in the Winterof 1990/1991 showed swift defection of the voters to other parties. Symbolical termination of the early (and at the same time the most successful) period of Moravian political movement came with the death of Boleslav Bárta from his third heart attack on 31st May 1991.

Bárta´s successor Jan Kryčer attempted to place HSD-SMS on the Czech political map in a new way by developing the movement's identity, which was less focused on Moravian issues and put greater emphasis on its liberal and centrist image. Kryčer was trying without success to cooperate with other small centrist groupings in the Czech Republic such as the Greens and smaller Moravian parties[305] (Pšeja 2005: 38-39). This strategy was perhaps not completely wrong taking into account the fact that in 1992 HSD-SMS and minor allies

[303] The most comprehensive account on the development of Moravian politics is presented by Pavlína Springerová (2010), in a short but well-informed paper on the origins and developments of Moravian parties written by Maxmilián Strmiska (2000).

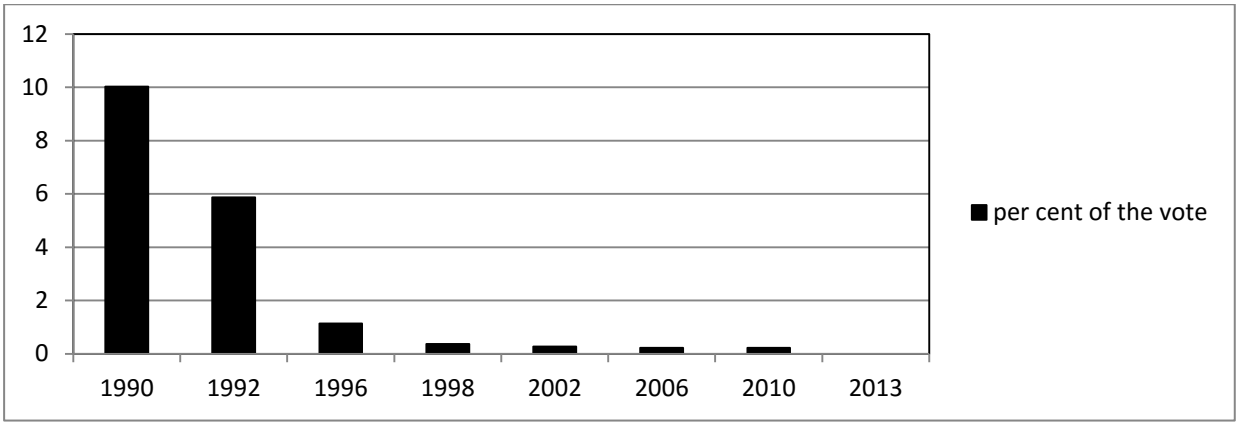
[304] In the 1990 first democratic elections, voters cast votes for the Czech (or Slovak) National Council, House of People, as well as the House of Nations in the Federal Assembly. The same applies to the 1992 parliamentary elections. Another catchy though unofficial slogan of 1990 campaign was *"Moravia and Silesia is not any Bohemia"* (*"Morava a Slezsko není žádný Česko"*).

[305] Moravian National Party (*Moravská národní strana* – MNS).

in the pre-election coalition managed to gain admission into the Czech National Council.[306] On the other hand, tendency towards a centrist profile with 'mainstreaming' of Moravian issues contributed to another round of rifts and heated debates among Moravian political elites resulting in the movement soon being moved to the political margins being backed by no more than 2 per cent of the voters after January 1993.

Kryčer went on with transformation of the movement renaming it first as the Movement for Autonomous Democracy of Moravia and Silesia and in January 1994 the Czech-Moravian Centre Party (*Českomoravská strana středu* – ČMSS). This step was followed by defection of Kryčer´s opponents, who in 1994 established the Movement of Autonomous Moravia and Silesia – Moravian National Unification (*Hnutí samosprávné Moravy a Slezska – Moravské národní sjednocení*, HSMS-MNSj). A merger between ČMSS and other small centrist parties[307] led to creation of the Czech-Moravian Centre Union (*Českomoravská unie středu*, ČMUS). As a follow up to internal splits and feuds, three different Moravian lists of candidates ran for seats in the 1996 Czech parliamentary election with no success (see Graph 1 for details). Moravian politics moved to the fringe of Czech party politics and it has remained there ever since.[308]

Figure 1: Results of Moravian parties in the parliamentary elections in the Czech Republic



Source: www.volby.cz

Notes: Czech National Council in 1990 and 1992, House of Deputies of the Parliament in the Czech Republic since 1996.

The data are for HSD-SMS in 1990 and 1992; in 1996 the data aggregate results of ČMUS (0,45), HSD-SMS (0,42) and Moravian National Party – Movement for Silesian-Moravian Unity (Moravská národní strana – Hnutí slezskomoravského sjednocení – MNS-HSMSj); in 1998 and 2002 MDS; in 2006 and 2010 *Moravané*; no Moravian party run in 2013 elections.

[306] This became the lower house of the Czech Parliament on 1st January 1993. HSD-SMS also ran for the Federal Assembly in 1992 but also failed to gain representation either in the House of People or in the House of Nations, not managing to gain enough votes to achieve more than the minimum required 5 per cent threshold.

[307] Liberal Social Union, Agrarian Union, later on Czech Union of Merchants and Traders joined ČMUS in 1995 followed by Christian Socials Union later on. Needless to say all these parties were small aggregates with only marginal public support.

[308] Moravian parties did not fare much better in local, regional, and Senate elections with some small successes in Southern Moravia only (see Mareš – Strmiska 2005: 1622-1627).

In parallel to HSD-SMS, the Moravian National Party (*Moravská národní strana*, MNS) also existed. This party was founded during the summer of 1990 as an extra-parliamentary party and the structure was fixed by the initial congress held in December 1990. The main difference between HSD-SMS and MNS was the conceptualisation of Moravian identity.[309] HSD-SMS built on the regional approach, MNS stressed that Moravians are an ethnically specific nation differentiated from the Czechs. Some MNS activists even discussed independence for Moravia as the ultimate goal of the Moravian movement and a secessionist agenda became part of the MNS mainstream. However, the gap between MNS and HSD-SMS was not unbridgeable, as two members of MNS were elected at the HSD-SMS led list to the Czech National Council in 1992. Internal conflict so typical for HSD-SMS was present within MNS as well. In 1996 when Ivan Dřímal was confirmed as chairman of the MNS (after a series of heavy disputes), the dissatisfied faction created a Moravian National Unification platform to merge later with HSMS into the HSMS-MNSj.[310] The residual party changed its name several times and tried to combine Moravian nationalism with elements of general traditionalism and conservatism to be differentiated from liberal and centrist ex-HSD-SMS formations (Strmiska 2000: 3-4).

As a consequence of the electoral disaster in 1996, two leading Moravian parties (ČMUS and MNS) merged in April 1997 to become the Moravian Democratic Party (*Moravská demokratická strana*, MDS) chaired by former MNS chairman Ivan Dřímal. HSMS-MNSj continued to exist as a parallel party. MDS and HSMS-MNSj formed a pre-electoral coalition in 1998 but still failed to gain any political prominence. Moravian parties literally exhausted their force with internal personal and programme feuds with the result that they simply fell into oblivion. The last step towards integration of the Moravian movement was taken in December 2005 when HSMS took over the entire MDS. As a symbol of the Moravian movement's newly achieved political unity, a new name was selected for the party. Since December 2005, Moravian party politics is represented solely by the party called Moravians (*Moravané*, M). The party has its own youth movement (Young Moravians – *Mladí Moravané*) and it cooperates at European level with other regionalist parties as a member of the European Free Alliance (EFA). As far as Moravian ideological stances are concerned, liberal and conservative profiles were abandoned in favour of a strong emphasis on direct democracy as the 'natural' ally of a movement towards Moravian self-government.

4. From region to ethnic group: (re)framing of Moravian claims for autonomy

The original framework of Moravian claims was based on the general issue of a Czechoslovak federation and its reform that has been discussed since early 1990. HSD-SMS proposed rebuilding of the federation from two to three entities which would recreate the Moravian-Silesian Province as a self-governing body. The general line of argumentation was focussed on revising the territorial organisation of Czechoslovakia in order to restore the status quo as existed prior to 1949, but the electoral programme for the 1990 parliamentary election contained some references to Moravian ethnic identity claiming '*[a]utonomous and equal position of Moravia within the state* [and] *recognition of Moravians by legislation as an ethnic group with its own juridical subjectivity*' (Jak a koho volit 1990: 70). A similar view was presented in the Moravian declaration from April 1990, an ideological platform for (re)shaping HSD-SMS (cited in Pavlovský 2010):

For provision of realisation … of reconstruction of our state to Czechoslovak federative republic we demand that the Federal Assembly yet before elections [to be held in June 1990 – VH] issues the law on rehabilitation of Moravian-Silesian Province which would provide remedy of injustices perpetrated at more than 4 million of its

[309] At the fringes of the Moravian movement, some radical proponents of Moravian nationalism and anti-Czech separatism were active. However, there is only very limited evidence on any extremist or terrorist plans and activities provided by Moravian activists. Extremist tendencies were limited in time and included only individuals who never blended with mainstream Moravian politics in any substantive way (Mareš 2001).

[310] Among HSMS-MNSj leaders, there were an interesting numbers of Brno intellectuals who have belonged to the prominent political figures of Moravian movement ever since the early 1990s, such as legal expert Jiří Bílý or historian Jiří Pernes.

inhabitants by cancelation of it by the communist power on the 1st January 1949. This wilful act of dictatorship has not any parallel in the entire 1.200 years of Moravian history, Moravian statehood, and provincial autonomy with constitutional elements.

Among the HSD-SMS politicians as well as among the leaders of its subsequent parties, stress was always put on regional identity and the addressing of Moravian claims as being the product of regionalism, not ethno-separatism. Argumentation for re-building the dual federation into the trial single one was, of course, *passé* after dissolution of Czechoslovakia in 1992/1993. However, Moravian regionalists soon found an interesting external 'helper' of their claims by invoking the idea of a 'Europe of regions' (Mareš 2002).

Even the Moravian National Party did not exclude regionalist arguments from its repertoire. On the contrary, it declared that it would follow the historical tradition of the National Party active in Moravian politics during the period from 1861-1911 (Springerová 2010: 67). On the other hand, MNS stressed from the outset that Moravia is not only a specific region to be regarded as an autonomous province but Moravians belong to a nation that is different from and not part of a Czech nation.

The most radical invocation of national differences between the Czechs and the Moravians was offered in *Charta Moravorum*, a document issued probably in 1994, which claimed certain falsification in the results of the 1991 public census by the Czech Republic authorities which aimed at a reduction in the number of people declaring to have Moravian nationality. It appealed to readers for the acts of civil disobedience such as smearing of the official coats of arms of the Czech Republic from public buildings in Moravia. For our purposes it is important to note that the Moravian Information Centre, editor of the *Charta Moravorum* and marginal aggregate of a few Moravian radicals, issued declarations in which the Moravian nation was conceptualised as historically preceding the Czech nation (cited in Springerová 2010: 140):

'We, Moravians, and our sovereign Svatopluk I The Great, were recognized as a nation already in the year 880 by the bulla Industriae Tuae … We are the fourth nation (the chosen one as well?) in the history of our civilization with own language of liturgy! … Moravia and we, Moravians, have had always our own diet, own laws, own army and earlier also own currency'.[311]

Organisational mergers of Moravian parties after a series of defeats (Moravian Democratic Party in 1997 as well as Moravians in 2005) forced Moravian politicians to face the challenge of reconciling both sides of the argument. Moravia as a land with a distinctive territorial identity and tradition of self-rule should be reinstalled, as being inhabited by the indigenous nation differentiated from the Czech nation. The final compromise was based on a simple mixture of both elements without necessarily aiming at their synthesis. However, in a way, radical national framing of the Moravian issue was side-lined in favour of a strong emphasis on regionalism and self-rule. It was a realistic option that took into consideration marginality of those Moravian groupings that used radical nationalist rhetoric as well as the generally bigger impact of regionalist arguments on the Moravian public.

However, the 'transition' from radicalism back to a more moderate stance was not always easy, at least as far as the passionate emotional language of party proclamations is concerned, as the following statement taken from the founding manifesto of MDS shows (cited in Springerová 2010: 153):

[311] The claim is based on existence of the so-called Great Moravian Empire in the 9th century AD. To derive unbroken existence of a separate Moravian nation from the simple fact that an aggregate of territories and tribes under single political rule existed is however not fully supportable with historical evidence and can actually be understood as an example of political construction of a separate national identity by use of arguments on historical existence and longevity. This strategy was typical, by the way, for Czech national awakening period and support of Czech political claims vis-à-vis Vienna with the historical existence of Czech nationhood and statehood which will imply recognition of political right in actual political constellation.

Moravian Democratic Party tries today to raise the Moravian flag; it strives for return of autonomy to Moravia, for respect to rights of Moravian nation, for such state of affairs in which Moravians are deciding on money they pay for the taxes. It is clear that Prague will exploit us as long as it will rule over Moravia. Nothing gets better till Moravians stop to reckon on the promises from the centre and they will not take the affairs into their own hands.

Current political representation of Moravia's regionalism, political party Moravians, instead of the concept of 'nation' uses the concept of 'nationality' and mixes historical as well as political arguments to support the claim for Moravian self-rule (Moravané 2015: 5):

Political party Moravians … is a party of democratic and tolerant provincial patriotism; it has ambition to defend above all the interest of those citizens of the Czech Republic and the EU who claim allegiance to the program of Moravian provincial autonomy, positive Moravian provincial patriotism, and Moravian nationality. In the same time we are convinced that our goals and means to achieve them are advantageous for all citizens of the Czech Republic and Europe.

The manifesto of Moravians refers to the tradition of autonomy since 1182 until destruction of the Moravian-Silesian Province in 1949. Moravians claim that the citizens of Moravia are in fact discriminated against and their Moravian identity is suppressed which makes them citizens of second-order importance. As a practical solution, Moravians wish to organize the Czech Republic as a federation of three provinces (Bohemia, Moravia-Silesia, and Prague), which they are claiming follows the example of federal countries such as Germany, Austria, and Switzerland. They are greatly encouraged by decentralisation successes in some Western European countries. Transformation of the EU into the 'Europe of regions' is mentioned together with emphasis put on following the subsidiarity principle in the administration of public affairs.

In a way, Moravians are closing the circle of Moravian attempts in ideological and conceptual framing of claims for autonomy. Recent conceptualisations of the Moravian movement as regionalist and pro-European follow a decade of shifts from regionalism and nationalism and back again; it puts the Moravian movement onto a similar moderate political footing as it was in the very early period of democratic transition.

5. Concluding remarks

The Moravian political movement striving for autonomy saw its heyday some two decades ago and quickly fell into political marginality during the second half of the 1990s. The most important reason for the fall seems to be an inability to find a common ground and common language for the various and often contentious personalities amongst Moravian leaders and activists. Too many different but mainly minor projects, aggregates and strategies were developed to build a sound organisational background for voters´ mobilisation and become an attractive coalition partner for other political parties.

However, another reason why there is declining support for Moravian political claims was clearly connected with the changing tenor of argumentation as to why Moravia is a distinctive part of the Czech Lands that deserves self-rule and wide recognition of her specific features. Former regionalist discourse aimed especially at the combination of two communication tactics (Moravia deserves autonomy because it formerly existed for centuries; establishment of Moravian-Silesian Province or Republic will solve the stalemate established during the 'Hyphen War'[312] between the Czech and the Slovak political representations) was in fact at its strongest in

[312] The term 'Hyphen War' refers to the symbolical dimension of Czech-Slovak disputes of the early 1990s. The object of dispute was the official name of Czechoslovakia. The suggestion of Václav Havel to change the name 'Czechoslovak Socialist Republic' with the new one clearly showed that the Czech political representation preferred return to 'Czechoslovak Republic' version while the Slovaks preferred

the brief period of 1990-1992. An important feed into this argument was the outcome of a public census in 1991 which showed that there are actually more than 1,300,000 Moravians living in Czechoslovakia. However, a key impact of this strategy was brought about by the partition of Czechoslovakia in 1992; reprise of any dualism (Czech-Moravian) was absolutely unthinkable after annoying experiences with Czech-Slovak disputes. A combination of internal feuds within HSD-SMS and the dramatic change of political and legal context for any administrative reform to consider some Moravian self-rule formed a lethal mixture for moderate Moravian politicians who preferred to frame Moravian issues in strictly regionalist discourse.

The way was opened for a radical version of Moravian discourse based on claims that Moravia is not only a distinctive region but also an especially distinctive country to be differentiated from the Czech nation. Such a change is not completely new among European regionalist movements. Similar radicalisation was, for example, present among politicians of *Lega Nord* in Northern Italy that in the mid-1990s replaced regionalist discourse with a new version built on the idea of a separate ethno-national base of inhabitants in Northern Italy who were actually claimed as superior to their Italian neighbours in moral terms (Cavatorta 2001, Giordano 2000). A concept of independent 'Padania' was an outcome which did not actually happen in the case of the Moravian movement. Even the Moravian nationalists did not want to abandon the common state with the Czechs in favour of an independent Moravian country. However, the radicalisation did not meet with public moods. Even for those inhabitants of Moravia who claim to have Moravian nationality, conceded that separation of Czech and Moravian identities in national terms was hardly acceptable and the more radical nationalist discourse turned, the less followers of the Moravian parties actually had.

One might pose a question why after the return to moderate regionalist discursive strategy (a turn provided around the beginning of the New Millennium) a political party of Moravians was not able to improve its minor popularity among Moravian voters to move from the position of a marginal and in fact irrelevant party. Part of the explanation is based on the major impact of a left-right cleavage based on socio-economic issues as a backbone that shapes Czech party competition (Hloušek – Kopeček 2008); another part is a lack of new, strong, and convincing political personalities among the leaders of the Moravians. However, one must have a look at the territorial population composition: the vast majority of people with Moravian nationality are situated within one region (Southern Moravia with the capital of Brno). Moreover fluctuations in the numbers of Moravians according to the public censi (especially the downswing in 2001) shows that for many people Moravian identity is not firmly fixed and is based perhaps more on fashions within political discourse than on other reasons why one should feel a certain collective identity. In other words, Moravian politicians are extremely fragile vis-à-vis changing the tenor of political discourse and they would need to invent something attractive to regain the same medial and electoral prominence that was achieved in the early 1990s. The contemporary programme of Moravians stressing renewal of the Moravian-Silesian province, in the situation where recent regions achieved a reasonable level of recognition among the citizens as well as political elites, does not seem to bring such an impulse for the revival of Moravian politics in the near future.

REFERENCES

Anderson, Benedict (1991): Imagined Communities: Reflections on the Origin and Spread of Nationalism. Revised Edition. London – New York: Verso.

Cavatorta, Francesco (2001): The role of the Northern League in transforming the Italian political system: from economic federalism to ethnic politics and back. Contemporary Politics 7(1), 27 – 40.

'Czecho-Slovak Republic' which, for the Czech part, was not acceptable because this was the name of the country between the infamous Munich Accord (1938) and creation of the Protectorate of Bohemia and Moravia (1939). Finally a compromise was reached: Czech and Slovak Federative Republic.

ČSU (1991): Sčítání lidu, domů a bytů.

ČSU (2001): Sčítání lidu, domů a bytů.

ČSU (2011): Sčítání lidu, domů a bytů.

Gellner, Ernst (2006): Nations and Nationalism. Second Edition. Oxford: Blackwell Publishing.

Giordano, Benito (2000): Italian regionalism or 'Padanian' nationalism – the political project of the Lega Nord in Italian politics. Political Geography 19(4), 445 – 471.

Hloušek, Vít; Kopeček, Lubomír (2008): Cleavages in Contemporary Czech and Slovak Politics: Between Persistence and Change. East European Politics and Societies, 22(3), 518-552.

Hroch, Miroslav (2009): Národy nejsou dílem náhody: Příčiny a předpoklady utváření moderních evropských národů. Praha: SLON.

Jak a koho volit? Volební programy. Praha: Spektrum, 1990.

Malíř, Jiří (1990): Morava na předělu: K formování národního vědomí na Moravě v letech 1848-1871. Časopis Matice moravské vol. 109, 345-363.

Malíř, Jiří (1996): Od spolků k moderním politickým stranám: Vývoj politických stran na Moravě v letech 1848-1914. Brno: Faculty of Arts of the Masaryk University.

Mareš, Miroslav (2002): Evropská politika moravistických organizací. Středoevropské politické studie 4(4), online http://www.cepsr.com/clanek.php?ID=24, accessed 26 May 2015.

Mareš, Miroslav (2001): Moravismus a extremismus. Středoevropské politické studie 3(4), online http://www.cepsr.com/clanek.php?ID=66, accessed 20 May 2015.

Mareš, Miroslav – Strmiska, Maxmilián (2005): Moravistické strany a hnutí. In: Malíř, Jiří – Marek, Pavel et al.: Politické strany: Vývoj politických stran a hnutí v českých zemích a Československu 1861-2004. Volume II: Období 1938-2004. Brno: Doplněk, 1615-1632.

Mareš, Miroslav – Suchánek, Marek (2003): Moravská nacionální sociální strana. Středoevropské politické studie 5(2-3), online http://www.cepsr.com/clanek.php?ID=171, accessed 19 May 2015.

Mezihorák, František (1997): Hry o Moravu: Separatisté, iredentisté a kolaboranti 1938-1945. Praha: Mladá fronta.

Moravané (2015): Dlouhodobý program strany Moravané. Brno, online http://www.moravane.cz/o-nas/program, accessed 26 May 2015.

Pavlovský, Ladislav (2010): Morava a Slezsko v českých zemích – vývoj obcí a měst od roku 1850, online http://www.moravskoslezskaakademie.cz/msadoc/MS-hist.pdf, accessed 26 May 2015.

Pernes, Jiří (1996): Pod moravskou orlicí aneb dějiny Moravanství. Brno: Barrister and Principal.

Pšeja, Pavel (2005): Stranický system České republiky: Politické strany a jejich vývoj 1989-1998. Brno: ISPO and CDK.

Rokkan, Stein (1999): State Formation and Nation-Building. In Flora, Peter – Kuhnle, Stein – Urwin, Derek (eds.): State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan. Oxford: OUP, 93-224.

Sčítání lidu (1991, 2001, 2011): Sčítání lidu, domů a bytů. Prague: Czech Statistical Office.

Šedo, Jakub (2002): Postavení Moravy podle Rokkanova modelu centrum-periferie. Středoevropské politické studie 4(2-3), online http://www.cepsr.com/clanek.php?ID=37, accessed 19 May 2015.

Springerová, Pavlína (2010): Analýza vývoje a činnosti Moravistických politických subjektů v letech 1989-2005. Brno: CDK.

Strmiska, Maxmilián (2000): Rise and Fall of Moravian Regionalist Parties. Středoevropské politické studie 4(2), online http://www.cepsr.com/clanek.php?ID=101, accessed 20 May 2015.

THE EUROPEAN CITIZENS' INITIATIVE AS AN INSTRUMENT OF PARTICIPATORY DEMOCRACY. NEW FORMULA TO FILL THE DEMOCRATIC DEFICIT OF THE EUROPEAN UNION?

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1. INTRODUCTION

The purpose of this paper is to analyze whether the European Citizens' Initiative will become a key element for the definitive democratization of the European Union. Based on the study of the formal and procedural requirements of the regulation, that *a priori* facilitate the use of this tool, we will propose measures to improve citizen accessibility to the ECI and to overcome the 'knowledge deficit' and 'trust deficit'.

With the institutional redesign articulated through the adoption of the Lisbon Treaty, the European Union (EU) has set up this new transnational participatory democracy tool, the European Citizens' Initiative (ECI). The ECI could allow some progress on the pretense of returning to the citizens their role as agents of change and legitimacy of the process of contructing Europe. It is very important to analyze the ECI in the legislative process as an opportunity to achieve a horizontal Europeanization, capable of integrating all citizens under an inclusive concept of European identity.

2. THE EUROPEAN CITIZENS' INITIATIVE: REGULATION, IMPLEMENTATION AND IMPACT

The aim is to allow the civil society to regain strength and conceive itself as a European citizenship. This aim can be achieved by an institutional redesign that articulates effective and efficient forms of citizen participation.

To get a really inclusive concept of European citizenship, that goes beyond the idea of 'post-national' citizenship, we must be able to articulate effective instruments of political participation based on transnational dynamics that are subject to structural conditions of participation that go beyond the national scope. We must escape from the 'logic of the states', which defines and influences decisively any attempt to active citizen involvement.[313] We must be able to build our own citizen dynamics to legitimize the whole process of building Europe. To achieve this purpose, the ECI is postulated as a hopeful effort that deserves to be analyzed.

The adoption of the Treaty of Lisbon has provided that every citizen is entitled to participate in the democratic life of the Union by the figure of the ECI. This is an important step in European integration that denotes the importance of the legislative power as a binding vector. The ECI is an instrument to include a proposal on the European political agenda.[314] Then its main goal is to enable citizens to influence the political agenda of the EU inviting the Commission to submit a legislative proposal on this issue or matter (the Commission can refuse to act).[315]

Regarding the legislative framework of the European Citizens' Initiative, it should be pointed out that we have a right under Article 11.4 of the Treaty of the European Union the exercise, procedures and requirements of

[313] BURGUERA AMEAVE, L., 2014. 'Identidad política y participación: La Iniciativa Ciudadana Europea", in Estudios de Deusto, vol. 62/2, Julio-diciembre 2014, p. 394.

[314] KAUFMANN, B., Manual de la Iniciativa Ciudadana Europea: Guía sobre la primera herramienta mundial de democracia directa transnacional. Green European Foundation (edited in collaboration with the Initiative and Referendum Institute Europe), Brussels, 2010, p. 83.

[315] On 14 April 2015, the Court of Justice of the EU delivered a judgment on the power of the Commission to withdraw a legislative proposal during the legislative procedure. The Court confirmed, for the first time, that the right of the Commission to withdraw legislative proposal is inseparable from its right of initiative.

which have been developed in Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative and the Commission Implementing Regulation (EU) No 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative.

The process of forming the citizens' legislative initiative is built around a few simple steps that can be described as follows:

2.1 Preparation and establishment of the citizens' committee:

A citizens' committee should raise a proposal of initiative, composed of seven or more EU citizens who are old enough to vote in elections to the European Parliament (18 years old except in Austria, where people can vote from the age of 16) and are resident in at least seven different Member States. Although there is no requirement that members of the committee are citizens of seven different Member States, they must be nationals of a Member State of the EU. Then, this is a right only for nationals of the Member States.

This committee is considered as official 'organizer' of the initiative and is responsible for managing it throughout the entire procedure.

The committee must designate from among its members a representative and a substitute to speak and act on behalf of the committee. They will be the contact persons to serve as a bridge between the citizens' committee and the Commission throughout the procedure. Members of the European Parliament cannot be counted to reach the minimum of seven citizens required to form a citizens' committee.

2.2 Registration of the proposed initiative (the deadline is 2 months):

In order to register the initiative on record, organizers must provide the following information in one of the official languages of the EU:

- The title of the proposed citizens' initiative (maximum 100 characters).
- Its purpose (maximum 200 characters).
- The objectives of the initiative on which the Commission must decide (maximum 500 characters).
- The provisions of the Treaties considered relevant by the organizers for the proposed action.
- The full name, address, nationality and date of birth of the seven members of the citizens' committee, indicating specifically the representative and the substitute as well as their email addresses and phone numbers.
- Documents showing the full name, address, nationality and date of birth of each of the seven members of the citizens' committee.
- All sources of funding and support for the proposed citizens' initiative (known at the time of registration) exceeding 500 € per year and sponsor.

When all these steps are fulfilled the Commission gives the committee a registration number.

2.3 Certification of the online collection system (the deadline is maximum 1 month)

Organizers who want to collect supporting electronic declarations must create an online collection system, accessible via its website that meets the technical and safety requirements referred to in Article 6.4 of the Regulation on the ECI, as well as the detailed technical specifications laid down in the specific Regulation (Commission Implementing Regulation (EU) No 1179/2011). The purpose of these requirements is to ensure the security of the data collection and its storage in the system, in particular.

Once they have created an online collection system that fully meet the Article 6.4 and the specific Regulation requirements, the organizers must apply their certification by the competent national authority of the Member State in which the data will be stored. To do this, they must provide the necessary documentation to the competent authorities.

2.4 Statements of support collected online or in paper (the deadline is maximum 12 months)

After confirming the registration of the proposed initiative, organizers can start collecting statements of support from citizens. They will have 12 months to get the one million[316] required declarations, reaching the minimum established in at least seven Member States.

2.5 Verification of statements of support (the deadline is maximum 3 months)

After collecting the necessary statements of support, organizers must ask the competent national authorities of the Member States where the collection has been carried out to certify the number of valid statements obtained in each State.

2.6 Submission of a citizens' initiative to the Commission

After having obtained the certificates by the competent national authorities (seven at least) that prove the collection of the required number of statements of support, organizers can submit their initiative to the Commission, together with the information concerning the supports and the funding they have received.

2.7 Procedure for the examination by the Commission, public hearing before the European Parliament and the Commission response (the deadline is maximum 3 months)

Within three months after the submission of the initiative, organizers will meet Commission representatives to explain in detail the matters raised by the initiative and they may do so at a public hearing organized at the European Parliament. The Commission will adopt an official document specifying, if any, measures that it intends to propose in response to the citizens' initiative and why it has decided to act or not.

Finally, if the Commission ultimately decides to pursue the initiative the legislative procedure would be launched.

Regarding their implementation and impact, it is worth noting the variety of proposals submitted so far, as they take in consideration disparate aspects as the right to water, neutralizing the screen societies, the need for an extraordinary European plan that promotes sustainable development and employment, increasing the plurality of the media, the suspension of the energy package and climate change in the EU, etc.[317] Another issue is the unequal luck in the procedure designed by Regulation (EU) No 211/2011 of the European Parliament and the Council.

3. Reflections and critical considerations

All ECI campaigns, whether run by well-resourced organisations or by volunteers on a shoe-string budget, faced similar barriers that stem from inherent weaknesses in the ECI regulation. Many procedures are unnecessarily

[316] The requirement of one million signatures represents only the 0.2% of the population of the European Union.

[317] AMEAVE BUGUERA, L. *, op. cit.,*. p. 397.

bureaucratic and burdensome. A radical simplification and harmonization of the ECI regulation and related rules is clearly needed.

Summarised below are recommendations from ECI campaigns and stakeholders for how to change the ECI's governing rules, so the ECI can fulfil its potential as a transnational participatory democracy tool.

3.1 Reduce and harmonise personal data requirements across Member States

Each EU Member State requires different personal data from ECI supporters. This means campaigns must create 28 different signature forms and submit signatures for verification to 28 different national authorities – instead of to a single collection point. At the same time, campaigns, citizens, EU officials and national authorities have all complained that too much information is required from citizens to support an ECI.

To facilitate EU citizens wishing to sign an ECI, the Commission should once again propose simpler and uniform personal data requirements across all member states.

Data protection requirements for the ECI should likewise be harmonised across all Member States and ideally coordinated by a central EU body. Similarly, while Member States must verify signatures, a central EU body could be established to coordinate between campaigns and national authorities.

3.2 Ensure that all EU citizens can support an ECI wherever they live

Another unfortunate consequence of having 28 different sets of personal data requirements – some based on citizenship and others on residence – has been to strip many expatriate EU citizens of their legal right to use the ECI. The Commission must ensure that all Member States accept to check signatures of all their citizens regardless of their country of residence, as hereby currently some 11 million citizens are disenfranchised from their right to participate in an ECI. Notably, the Commission must forcefully call on the governments of the United Kingdom and Ireland to amend their data requirement rules in order to accept to check signatures of all their citizens regardless of whether they reside outside of their home country, and Annex III must be amended accordingly.

Alternatively, preference should be given to citizenship rather than residence, so as to ensure that all EU citizens may support an ECI, regardless of where they live. The best option is the Finnish approach that allows both Finnish citizens (regardless of where they live) and Finnish residents (European citizens) to support and ECI.

3.3 Redesign the online signature collection system (OCS)

Significant and persistent online signature collection system (OCS) weaknesses and glitches were consistently cited by every ECI campaign as extremely problematic. They have led to the loss of signatures, collection time, campaign momentum and resources. Technical problems, especially related to the restrictive 'captcha', have also made it difficult for people with disabilities to support an ECI.

Online campaigning experts insist that the current OCS is so defective, and Commission repair efforts so slow and inadequate, that it needs to be scrapped and rebuilt from scratch – this time with the active participation of campaigners, EU and national stakeholders and civic coders. It should be user-friendly and allow standard online campaigning practices like single click sharing on social media. It should also allow ECI campaigns to safely and efficiently share ECI supporter data with national authorities – e.g., with security 'keys'.

The technical regulation governing the OCS also needs to be reformed so that independent software developers could afford to meet its requirements, which are currently so arcane and costly that only the Commission itself could fulfil them.

Many ECI campaigns and stakeholders advocated for the temporary system of hosting ECIs on the Commission's own server to become a permanent option for all ECIs. An extension of this idea, itself the subject of an ECI, could be a single centralised online signature collection platform where signatures for all ECIs are safely stored while front-end campaigning materials reside on individual ECI campaign websites.[318]

3.4 Redesign statement of support forms to enable signatories to share their e-mail address with ECI organisers through an opt-in

All ECI campaigns insist on the need to collect supporters' contact information, especially email addresses, in order to keep them informed of their ECI's progress. This is vital to create a European debate, a core goal of the ECI. It is also standard online campaigning practice.

Email addresses must be collected within the main ECI support statement form. Campaigns that have tried to collect them on other web pages have confused and then lost potential supporters. The Commission claims that it cannot legally collect email addresses in the ECI support form. However, online campaign experts insist this is technically possible while also respecting data protection rules. Therefore, after submitting the statement of support form, signatories should be given the option of agreeing to an opt-in: 'Authorised representatives of the ECI can contact me further by email regarding this ECI', followed by a field to gather the signatory's e-mail address. This requires an amendment of Annex III[319] clarifying that this is a voluntary field and must be incorporated in the Regulation in Article 5(3).

An amendment in Article 4(1) of the Regulation should make note that the European Economic and Social Committee offers its services to provide translations for each registered ECI into all official EU languages.

3.5. Extension of the period to collect signatures to 18 months

Only the best resourced ECI, Right to Water, managed to collect over one million signatures in 12 months. The other two successful campaigns benefitted from deadline extensions granted as a result of OCS glitches. However, all ECIs insist that one year is far too short and harms the weaker committees that need more time to spread their message in a transnational level and get the support for the proposals. Transnational initiatives need enough time for communication, meetings, traveling, translation and creating enough support in a significant number of Member States. It is thus recommended to lengthen the signature collection time to at least 18 months. A longer collection period would also help smaller and volunteer-run initiatives.

3.6 Give ECI organisers a choice in the date for the launch of their ECI

The 12-month signature collection period currently begins on the same day that an ECI is officially declared admissible and registered by the Commission. Campaigns need much more time to prepare once they know their ECI is valid. The start of the signature collection period should therefore be chosen by campaigns once they are ready and their

[318] BERG, C. and THOMSON, J., 2014, An ECI that works! - Learning from the first two years of the European Citizens' Initiative, Alfter (http://ecithatworks.org/wp-content/uploads/2014/04/An_ECI_That_Works.pdf) (22.10.2015)

[319] The initial Commission proposal COM(2010) 119 final had included the collection of e-mail addresses in its single statement of support form.

OCS has been certified. This could be within a certain time frame, for example within three months of official registration.

3.7 Campaign funding and legal help to identify the legal basis for ECI

Many ECIs encountered challenges formulating their proposal and relied on the counsel of specialized EU legal experts. Nearly 40% of the proposed ECIs were refused registration by the Commission for 'falling outside of EU competence' (for example, environment, agriculture, transport, public health) – a percentage which could perhaps have been reduced with better EU legal advice.

Normally, the ECIs organizers will have a profound knowledge of the rules of the Union. However, to be a tool of participatory democracy aimed at all EU citizens and not just those with financial resources and expertise in this regard, we think the Commission should provide free advice. This would help to promote the success of the initiatives and avoid mistakes regarding the material scope of the proposals.

The Commission should provide a budget line to support the campaigns. This system should provide all kinds of anti-fraud mechanisms and should not be subject to discretionary criteria. The most appropriate mechanism would be to cover part of the operating expenses, including notably the creation of web pages and translation costs of the campaigns conducted by those committees of citizens who are less likely to get funding[320].

ECI campaigns discovered that they needed to campaign in national languages and use country-specific arguments. This required the use of translators, which many campaigns could not afford. Groups new to campaigning also encountered challenges with volunteer management, fundraising and media relations. These ECIs would benefit from practical advice.

As a democratic tool, the ECI is a public good and should benefit from public financial support. ECI campaigns need an official support infrastructure that offers legal advice, translation services and practical campaigning guidance. Grassroots ECIs should ideally also have access to public funding or at least European foundation funding.

3.8 Provide an EU legal status for ECI citizens' committees

The fact that the ECI can only be launched by seven individual EU citizens (i.e., 'physical persons') has created multiple problems. ECI committee members can personally be held legally liable for their campaign's actions. Such entities also lack a legal basis for fundraising or even opening a bank account. Their only options now are national organisational structures, which are contrary to the transnational nature of the ECI.

Therefore, an EU legal status is needed for citizens' committees to shield their members from liability and facilitate fundraising.

3.9 Modify the first legal admissibility check

This measure is related to the seventh measure appointed before. A shocking 40% of ECI proposals have been refused registration, all for the same reason of being 'manifestly outside the Commission's competence'. Some decisions have been unreasonably restrictive. Others have been inconsistent. For instance, one ECI requiring treaty change was accepted while another was rejected. Furthermore, rejected ECIs have not been provided any legal guidance to reformulate their requests, as should be the case.

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[320] BOUZA GARCÍA, L., Democracia participativa, sociedad civil y espacio público en la Unión Europea. Algunas propuestas para el desarrollo del artículo 11 TUE del Tratado de Lisboa. Fundación Alternativas, 2010, p. 30.

It would be necessary that Regulation No 211/2011 foresees more transparency in the decision making process. The rejection of a ECI based on generalized arguments as being 'abusive', 'frivolous', 'vexatious' are not very specific and contravenes the principle of legal certainty.[321] Instead, the Commission should decide basing on a clear legal control. An ECI proposal rejected as inadmissible by the Commission should in written form be given robust, comprehensible and transparent reasons for such refusal, so as to enable organisers to modify and resubmit the proposal. An ECI should be rejected if it violates Art 6 TEU, the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Although the ECI has no direct legal impact (the Commission can refuse to act), it has generated public debate and created new pan-European alliances. At a minimum, ECIs refused registration should be helped to reformulate their requests so they may qualify for registration.

3.10 Amplify the interpretation of the scope of the ECI to allow ECIs to include topics that may entail an invitation to the Commission to use its right to initiate proposals to amend the treaties

The Commission has rejected many ECI proposals because they entail treaty changes. The regulation states that ECIs shall invite the Commission to 'submit a proposal for a legal act of the Union for the purpose of implementing the Treaties' (Preamble 1 and Article 2(1)), however there is no explicit indication that 'legal acts' exclude primary law. As it is within the framework of the Commission's powers to initiate proposals for treaty change (Article 48, Lisbon Treaty), ECIs should have the possibility to invite the Commission to use this right. Furthermore, the political *effet utile* of the ECI is to give citizens more influence in EU policy making; limiting citizens' participation rights to secondary law contravenes the very spirit of the ECI. Given a treaty which is highly complex and regulates extensive policy areas, it is important to allow ECIs to also propose treaty changes. Should the Commission affirm is narrow interpretation of the scope of the ECI, it ought to clarify this in the Regulation (Preamble 1 and Article 2(1)) and the Treaty (Article 11) by explicitly excluding primary law and treaty amendments.

3.11 Parliament must write a report on the subject of the ECI, with a co-rapporteur nominated by the ECI citizens' committee

The Parliament, as co-legislator, should additionally take the initiative to call upon the Commission to act on successful ECIs.[322] A co-rapporteur to the report should be nominated by the ECI citizens' committee, who will maintain close communication with the citizens' committee while drafting the opinion report. The report should then be debated in the plenary followed by a vote. The subject must be debated and voted on in full plenum.

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[321] The proposal shall contain in particular the subject matter and objectives of the initiative. The Commission then examines whether the initiative is admissible. In particular it checks whether:

1. The support committee has been formed and its members designated.

2. The subject matter of the initiative forms part of the policy areas for which the Commission is authorized to submit draft legislation.

3. The initiative is no frivolous, abusive or vexatious.

4. The initiative is not contrary to the values set out in Art. 2 of the TEU.

[322] Reform Proposals for the Revision of the ECI Regulation by Democracy International (https://www.democracy-international.org/sites/democracy-international.org/files/eci_revision_recommendations_democracy_international.pdf) (22.10.2015)

3.12 COMMUNICATION AS A WAY OF BRINGING POSITIONS

The majority of EU citizens still do not know that the ECI exists and public awareness of the ECI is practically non-existent. Mainstream media tends to be either unaware or misinformed, often equating the ECI with a simple petition to the European Parliament. This creates unfair burdens on ECI campaigns to both educate the public about the ECI instrument and convince them of the merits of their own topic. They further have to overcome citizen suspicion and reluctance to share personal data for an unknown EU tool.

Therefore the Commission and the Parliament must proactively promote the ECI as a right of all EU citizens. The Commission could create an application downloadable onto mobile devices to raise public awareness and ECI success rates. The app should share all relevant information regarding the ECI, inform users of running initiatives and provide the possibility for mobile signing.[323]

As a tool for developing a 'European public space', the ECI should be aggressively publicised as an 'official' EU instrument. Actions should be taken both at a European and national level to raise public awareness and comprehension of, as well as trust in, this new tool of participatory democracy.

The course given by the Commission to the first three initiatives that have come before this institution has not contributed in excess to overcome the 'trust deficit', but it has been a setback. The lax response to the initiative 'right2water'[324] and the outright rejection of 'One of us'[325] and 'Stop Vivisection'[326] will not only discourage the millions of citizens who have supported both initiatives by signing, it also can discourage those groups that relied on this instrument as a way to participate in European integration. Therefore, the European Commission should consider seriously and realistically the future requests of its citizens, without mincing words, without vague and intelligible answers, because if not they will be disappointed and will perceive that European integration remains exclusively to bureaucratic elites away from their interests.[327]

4. CONCLUSION

The ECI is a right of political participation, which despite of not being collected between the rights of Article 20.2 TFEU relative to the citizenship of the European Union, it is possible to quickly check their intimate relationship with EU citizenship. Its regulation under Article 11, paragraph 4 lacks specificity in essential aspects of procedure, conditions and other instrumental elements. For the development of these issues the Regulation (EU) 211/2011 was created. This Regulation seeks to ensure that: 1. Citizens' initiatives accurately represent public opinion in the EU. 2. Rules are simple and easy to apply, so that citizens do not have difficulties to join an initiative. 3. Standards do not impose any additional burden for governments and 4. Firms are authentic. However, as we could have seen, the Regulation can be improved and much more user-friendly for organizers and citizens.

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[323] Reform Proposals for the Revision of the ECI Regulation by Democracy International.

[324] The EU legislation should require governments to ensure and to provide all citizens with sufficient and clean drinking water and sanitation. They urge that: 1. The EU institutions and Member States be obliged to ensure that all inhabitants enjoy the right to water and sanitation. 2. Water supply and management of water resources not be subject to 'internal market rules' and that water services are excluded from liberalisation. 3. The EU increases its efforts to achieve universal access to water and sanitation.

[325] They urge the European Commission juridical protection of the dignity, the right to life and of the integrity of every human being from conception in the areas of EU competence in which such protection is of particular importance

[326] They urge the European Commission to abrogate directive 2010/63/EU on the protection of animals used for scientific purposes and to present a new proposal that does away with animal experimentation and instead makes compulsory the use - in biomedical and toxicological research - of data directly relevant for the human species

[327] BELLIDO BARRIONUEVO, M., 2014. 'La iniciativa ciudadana europea: una oportunidad para los ciudadanos y las instituciones europeas", in Revista Española de Derecho Europeo, no 51, July-September 2014, p. 78.

Apart from some intrinsic obstacles to the difficulty of developing a European citizens' initiative due to linguistic, political and cultural diversity, this study detects other new barriers added by the Commission proposal to those established by Article 11 paragraph 4 TEU itself. This constitutes a threat to the successful development of this new participatory mechanism.

Different improvements should be prioritised in the ECI. While some will argue that simple improvements, like a revamping of the online signature collection software, or raising public awareness of the existence of the tool, would be sufficient to improve the ECI, in this study we are convinced that more profound improvements are needed. For the ECI to reach its full potential, the rules governing the ECI (the Regulation 211/2011) require revision, including a more transparent and neutral admissibility check for ECI proposals (to alleviate the current 40 percent rejection rate), less extensive data requirements demanded from supporters of running ECIs (harmonising and simplifying data requirements rather than having 28 different ones), and a stronger follow-up to successful ECIs (obliging the Commission to respond with legal action within 12 months and otherwise bringing in the Parliament).

The ECI can be considered an important tool for the democratization of Europe to try to bridge the gap between institutions and European citizens. Thus, its implementation in the European legislative process can improve the integration of Europe by deploying all its creator potential of European citizenship. We must continue on the path initiated so that, once the 'democratic deficit' has been overcome, we can also overcome the 'trust deficit' in the EU Institutions through the direct involvement of its citizens through the first instrument of transnational participatory democracy known: the European Citizens' Initiative.

REFERENCES

ACADEMIC AND JOURNAL ARTICLES

AUER, A., 'European Citizen's Initiative', in European Constitucional Law Review, vol. 1, Issue 1, January 2005, pp. 79-86.

BELLIDO BARRIONUEVO, M., 2014. 'La iniciativa ciudadana europea: una oportunidad para los ciudadanos y las instituciones europeas', in Revista Española de Derecho Europeo, no 51, July-September 2014, pp. 45-78.

BOUZA GARCÍA, L., Democracia participativa, sociedad civil y espacio público en la Unión Europea. Algunas propuestas para el desarrollo del artículo 11 TUE del Tratado de Lisboa. Fundación Alternativas, Madrid, 2010.

BOUZA GARCÍA, L., Participatory Democracy and Civil Society in the EU. Agenda-Setting and Institutionalisation, Palgrave Macmillan, 2015.

BURGUERA AMEAVE, L., 2014. 'Identidad política y participación: La Iniciativa Ciudadana Europea', in Estudios de Deusto, vol. 62/2, July-December 2014, pp. 391-403.

COTINO HUESO, L., 'El Reglamento de la Iniciativa Ciudadana Europea de 2011. Su especial regulación de la recogida de apoyos vía internet y de la protección de datos de los ciudadanos', in Revista de Derecho Político UNED, no 81, May-August 2011, pp. 323-377.

KAUFMANN, B., *Manual de la Iniciativa Ciudadana Europea: Guía sobre la primera herramienta mundial de democracia directa transnacional*. Green European Foundation (edited in collaboration with the Initiative and Referendum Institute Europe), Brussels, 2010.

MARTÍNEZ JIMÉNEZ, A., La iniciativa ciudadana europea: profundizando en la democracia, Fundación Ideas, Madrid, 2012.

REPORTS AND STUDIES

Paper on 'The European Citizens' Initiative: the experience of the first three years. European Implementation Assessment', European Parliamentary Research Service, Brussels, April 2015.

Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative. COM(2015) 145 final, Brussels, 31.3.2015.

Study on the European Citizen's Initiative – First lessons of implementation by Directorate-General for Internal Policies (Citizen's rights and Constitutional Affairs), Brussels, May 2014.

An ECI That Works! – Learning from the first two years of the European Citizens' Initiative, Carsten Berg and Janice Thomson (Editors), Freiburg, 2014.

Reform Proposals for the Revision of the ECI Regulation by Democracy International, 2015.

THE ACKNOWLEDGMENT OF POLITICAL AND FUNDAMENTAL RIGHTS AS A SOURCE OF LEGITIMACY – A COMPARISON BETWEEN THE EUROPEAN UNION AND SWITZERLAND

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1. INTRODUCTION

The question that is raised in this paper and answered differently by different authors concerns whether and why the Union lacks legitimacy, and how it could be enhanced. The current study seeks to add to this debate by investigating to which extent the acknowledgment of political and fundamental rights benefits the legitimacy of an entity. The underlying premise for this exercise is that if people are involved in an entity – on one hand through being able to take part in decision-making, and on the other hand through receiving protection of their fundamental rights – it will be more easily accepted as legitimate. In this manner, acknowledgments of rights sustains legitimacy. The main research question that will be answered is therefore:

'To which extent does the acknowledgment of political and fundamental rights reinforce legitimacy in a newly established cooperative and diverse entity, as appears from a comparison between the European Union and the Confederal State of Switzerland?'

The main method that is adopted consists of comparing political and fundamental rights in the European Union, and in the Helvetic Confederation (Switzerland). Switzerland has been selected for the comparison, because its historical development shows strong similarities with the historical development of the European Union. Like the European Union, the Swiss Confederation began as a loose form of cooperation between autonomous governments in order to safeguard peace and to promote economic development. Like the Member States of the European Union, the Swiss cantons have always insisted on maintaining a high degree of autonomy. And just as European citizenship is connected to nationality of the Member States, Swiss nationality was originally connected to citizenship of the cantons.

In the following chapters, first the constitutional histories of the European Union and Switzerland will be compared (chapter II). This analysis will set the scene to explore the legitimacy debate in the European Union. Three types of legitimacy are distinguished – input legitimacy, output legitimacy, and social legitimacy. Of these, input- and output legitimacy are adhered to as the theoretical foundation for the last and core part of the study (chapter III). This final part consists of comparing the acknowledgment of political and fundamental rights in the European Union and in Switzerland (chapter IV). Ultimately, the main question of the paper will be answered (chapter V).

2. CONSTITUTIONALIZATION OF THE ENTITIES

A comparison between jurisdictions can only be fruitful if the findings are accurately evaluated in the context of their historical, social and cultural development. For this reason it is relevant to discuss the historical constitutional development of the European Union and Switzerland, as well as the similarities and differences between them.

2.1 The Birth of the Swiss Federation

The history of the Swiss Confederation goes back to as far as the 13th century.[328] In this time, Europe was governed by hundreds of counties, duchies, principalities, free cities, etc.. The valleys or cantons of today's Switzerland were divided over these relatively small governments, or had some type of independent self-governance. This disunity lays at the roots of the diversity in cultures among the cantons that is still prevalent today. In this era, the story of Switzerland began in the valleys of *Uri* and *Schwyz,* which were under the protection of the Holy Roman empire, which meant that local counts and dukes could not assume jurisdiction in their territories. From the year 1291, the Holy Roman empire wavered. The valleys of *Uri, Schwyz* and *Unterwalden* therefore decided to create an alliance that would keep out external forces, and an arbitration system that could settle internal conflicts. They did so through the conclusion of the Swiss Charter of Confederation, or *Bundesbrief*.[329] The establishment of the Swiss Confederation was incentivized by the desire to protect the participating cantons' sovereignty,, and the cantons did not aim for any form of integration beyond forming a defense alliance.[330]

The Swiss Confederation grew in relative harmony, and more and more cantons joined the alliance. In 179 Napoleon invaded the Confederation and created the centralized *Helvetic Republic*, which due to being bound to fail was dissolved again in 1803. After this experience the cantons returned to the loose Confederation. At the same time, in some cantons, the centralistic ideas of Napoleon had nurtured support for more integration, which ended in the *Sonderbund war*, between northern centralists and southern resistance. The war only lasted for about a month, and caused very few deaths.[331] Its implications were very significant though, because the war brought about a formal defeat of the southern cantons and their ideals.. This gave the northern cantons the possibility to introduce substantial reforms, which lead to more centralization, democratization, and the establishment of the Swiss Federation in 1848.[332] The name of *Confoederatio Helvetica* was preserved.[333]

Pursuant to the rootedness of the Federation's heritage in a defense alliance, one of the first policies that was transferred to the Federal level was foreign policy (articles VII-X). Doing so allowed to prevent internal tensions concerning divergent approaches of international affairs. At the same time it nurtured the proliferation of the united cantons in the international arena as a state, and international recognition of Switzerland as a state, reinforced internal approximation of the cantons. These mechanisms thus mutually reinforced each other. In this manner, the direct transfer of foreign policy to the Federal level was one of the factors that accommodated a fruitful development of the Federation.

Besides for cooperation in foreign policy, the Federal Constitution of 1848 provided for economic integration between the cantons through the establishment of a customs union (article XXIII-XXXII) and the introduction of a common currency (article XXXVI). Additionally, Swiss nationality was established. This nationality was made dependent on citizenship of the cantons and the communes. Consequently, they remained the competence to regulate access to citizenship and nationality (article XLII).[334] The 1874 Federal Constitution broadened the scope of policy fields that were transferred to the Federal level. The most recent constitutional revision took

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[328] The year of 1291 is often pointed out as a starting date, but not agreed upon by all writers.

[329] According to mythology, the representatives of the cantons 'met on a meadow on the western shore of Lake Lucerno and swore in the famous Oath of Rütli to help each other against anybody trying to suppress them'.

[330] Fleiner et al. 2012, p. 24-25.

[331] It is said that the war took only 27 days and 86 lives. However, the exact numbers aren't agreed on by historians and thus may deviate. Fleiner et al. 2012, p. 27; Haller 2009, p. 9.

[332] Article XLIV 1848 Constitution. The only deviation of ideals which the northern cantons allowed to southern ones was a limited freedom of religion for Protestantism and Catholicism. Other religions were still not allowed.

[333] Fleiner et al. 2012, p. 27; Haller 2009, p. 9.

[334] Fleiner et al. 2012, p. 28; Groot 1994, p. 116.

place in 1999. The revision was meant to restructure the Constitution, because in the meantime more than 150 amendments had been made.[335]

2.2 The Birth of the European Union

The first predecessors of the European Union emerged in the wake of the two World Wars. In 1952, Franco-German cooperation was initiated by the creation of the European Coal and Steel Community (ECSC).[336] Although the ECSC mainly comprised economic cooperation, it was also 'an attempt to re-stabilize relations between France and Germany after the war'.[337]

The next step for the ECSC countries was to initiate the establishment of a European Defense Community (EDC), with a European army, a common budget, and joint institutions. The ultimate goal of this plan was to establish a European Federation, which would take foreign policy and economic integration under its wings. The EDC Treaty was already signed in 1952, but the French national assembly rejected the Treaty, because it did not want to rearm Germany.[338]

In 1957 the European Atomic Energy Community (Euratom)[339], and the European Economic Community (EEC) were established. Both were subscribed to by the six ECSC countries. As the ECSC, the Treaties were politically motivated, but in order to avoid another (French) rejection, they did not mention any political objectives anymore.[340] The goals of the EEC were to enhance economic cooperation between the Member States and to establish an internal market.[341] Furthermore of importance in the development of the European Union was the initiation of intergovernmental cooperation in foreign policy in 1969. In 1973, this cooperation was baptized with the name European Political Cooperation (EPC). Despite its institutionalization, up until today this cooperation has remained predominantly intergovernmental.[342]

In 1986, the Single European Act (SEA) was adopted, which paved the way for more fundamental institution change. These fundamental changes were brought about by the Maastricht Treaty (1992), which bore the greatest reforms in the history of the Community. The changes that were brought about by this Treaty were again largely economical, but also comprised important democratic and political reforms.[343] Furthermore, a pillar construction was introduced.[344]

Another important reform that was advanced by the establishment of the Maastricht Treaty was the introduction of European citizenship. Even though the rights that were attached to this citizenship already existed before, the introduction of the institution of citizenship itself brought about a direct connection

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[335] Haller 2009.

[336] Craig & De Búrca 2011, p. 5.

[337] Craig & De Búrca 2011, p. 5. The Treaty was adopted by France, Germany, Italy, Belgium, the Netherlands, and Luxemburg. The UK refused to participate. The ECSC expired in 2002. The areas of coal and steel are now governed by the general principles of the European internal market.

[338] Craig & De Búrca 2011, p. 4-5; Chalmers et al. 2014, p. 12-13; Edward & Lane 2013, p. 6.

[339] The Euratom was meant to create 'the conditions necessary for the speedy establishment and growth of nuclear industries' – article 1 EA of the Euratom Treaty – see Kaczorowska 2013, p. 8.

[340] Craig & De Búrca 2011, p. 6.

[341] Kaczorowska 2013, p. 9; Craig and de Búrca 2011, p. 6. Important was, moreover, the introduction of the free movement of goods, workers, companies, self-employed, and services.

[342] Kaczorowska 2013, p. 10-13; Craig & De Búrca 2011, p. 8-9.

[343] Kaczorowska 2013, p. 14-15.

[344] Kaczorowska 2013, p. 17-21. The first pillar covered the old EEC, which was renamed the European Community. The ECSC and Euratom were integrated in the first pillar. The second pillar covered foreign policy – the former EPC – and security policy. The third pillar covered cooperation in criminal matters. The three pillars together constituted the European Union.

between the European Union and the people of its Member States. This event preluded the transition from an economic towards a political community.[345]

Following the Maastricht Treaty, the less revolutionary Treaties of Amsterdam and Nice were concluded before the Union went on another ambitious quest for reform. In 2001, the *Laeken* 'Declaration on the Future of the European Union' was adopted by the European Council, which committed the European Union to become more democratic, transparent and effective and to pave the way towards a Constitution of the European Union. This quest resulted in the very ambitious Constitutional Treaty that was supposed to introduce major reforms into the European Union. The Treaty was rejected by public referenda in the Netherlands and in France, which caused the European Council to abandon the project.[346] Its legacy was preserved, however, because the text of the subsequent Lisbon Treaty, which came into force in 2009, is strongly inspired by the content of the Constitutional Treaty. Furthermore of importance is the draft and the political recognition of the Charter of Fundamental Rights of the European Union that was presented in 2001. The Lisbon Treaty provided that the Charter of Fundamental Rights of the European Union acquired the same status as the two Union Treaties and therefore became binding upon the Union institutions and on the Member States when implementing Union law.[347]

2.3 Evaluative Comparison

Although the European states and the Swiss cantons had similar motives to engage in cooperation with each other, and although they are equally attached to the sovereignty of their units, in the end the Swiss cantons managed to become a Federation, whilst – despite their initial intentions – the European states did not accomplish this.

The conditions in which the vote to establish a Federation was cast are considered to have been crucial for the outcome of the ballot – both in Switzerland and in the European Union. A closer look at these events – for Switzerland in 1848, and for Europe in 1952 – reveals that neither proposal was supported by all the units that would be affected by the Federation.[348] In Switzerland, the opposed votes were overruled, and despite their objections, the reluctant cantons were also included in the polity of the newly established Swiss Federation. In Europe, on the other hand, the lack of unanimity prevented the Treaty on the European Defense Community from being adopted and taking effect. This failure of the European Federation is in accordance with the principle of international law that no state can be bound against its will. The question is raised, however, how Switzerland *could* proceed with the establishment of a Federation despite opposition of some of the cantons, even though they were still autonomous countries, and why the overruled cantons did not simply opt-out of the Federation.

The answer to this question has several dimensions, but in essence can be brought back to one single circumstance. Cantons are so small that it is difficult to survive on their own. They need each other in order to preserve their autonomy, and to stand strong in a world full of larger and stronger countries. Additionally, the dissenting (southern) cantons had just been defeated by those that advocated the new Constitution. Therefore, most probably, they were not only morally demotivated to pull off another fight, but they were also factually conquered by the north, and therefore had to accept its terms. Moreover, there was a history of cooperation between the cantons, which was sealed with the existence of a Confederal Charter. It is suggested that all

[345] Kaczorowska 2013, p. 19; Nic Shuibhne 2012; Kostakopoulou 2005.

[346] Kaczorowska 2013, p. 24-25.

[347] Article 6 TEU and article 51(1) Charter.

[348] In Switzerland only 15½ cantons out of 22 were in favor, and in Europe only 5 out of 6 countries were in favor.

these factors added to a successful transition from a Confederation towards a Federation, even though there was no unanimity among the Swiss cantons.

The European countries, on the other hand, were not only bigger in size than the Swiss cantons, but each of them also had a rich history of world-governance – each on its own time. They did not need each other economically, nor morally. The incentive to cooperate was primarily to establish and maintain peace among them – and thus not to protect themselves against any foreign powers, which was the incentive for the Swiss cantons to cooperate. Consequently, all of the factors that had allowed Switzerland to become a Federation despite resistance were absent in the emergence of European cooperation.

2.4 Development of the Entities

Why is it important for the study of legitimacy that one entity became a Federal state and the other one did not? The answer to this question is that the sequence of policies that are transferred from the unit-level towards the level of the entity has an influence on its legitimacy, and whether or not an entity reaches the status of a Federation influences the sequence of policies that are transferred.

The Swiss cantons managed to establish a Federation allowed them to shape their entity as a whole in a comprehensive manner, and to rapidly and effectively transfer policy fields to the Federal level, such as foreign policy. This would turn out to play a prominent role in the process of acquiring legitimacy. The European Community, on the other hand, even though its incentives were political in nature, was set up as an economic project. This approach restricted the kind of policies that could be transferred to the Community level. The process of shaping the Community was therefore inevitably one-sided and not comprehensive. Consequently, policy fields of which representation at a central level could have nurtured the entity's legitimacy remained at the Member State level, with the result that their potential to facilitate the attainment of legitimacy was not employed.

The Swiss Federation was established as a genuine state, from the first moment that it was established it paid attention to the position of its citizens in the polity. This meant, for instance, that it directly established a Swiss nationality. This act constituted a manner to define and include the citizens of the cantons in the coming into being of the larger entity. Moreover, the Swiss Federation directly filled in the meaning of citizenship, by introducing the requirement of popular consent for the adoption of a new Constitution or a revision thereof, and also gave citizens the right to ask for a revision. In this manner, the position of the citizen was firmly anchored in the Constitution, and the people have had a say in the broadening of their rights from the beginning. Accordingly, citizens' rights were progressively extended.[349]

In the early years of the European Community, the focus was inevitably on economic cooperation. Because of the economic focus, involvement of the Community in many other areas was out of the question. Pursuant to the rejection of the Treaty on the European Defense Community, one of these areas was the formation a political union. Citizen involvement and democracy are an eminent part of politics and polity formation, hence they could not receive much attention in the strongly economically oriented Community. Thus, in the starting up phase of the Community, there was no acknowledgment of significant political or fundamental rights yet.

[349] Fleiner et al. 2012, p. 161-162.

3. Conceptual Framework – Input Legitimacy

The purpose of this chapter is to elucidate the relationship between legitimacy, and the acknowledgment of political and fundamental rights.[350] Thereto it introduces the legitimacy debate in the European Union, from which the relevancy of the further inquiry of political and fundamental rights can be derived. For this purpose, the categorization of Scharpf is used as a starting point. On the basis of his work, a distinction can be made between input legitimacy, output legitimacy, and social legitimacy.[351] Building on these contemplations, the conceptual framework of the research is constructed. This framework is used as a tool for the comparison between the European Union and Switzerland.

3.1 Input Legitimacy

Input legitimacy is concerned with the moral authority of the source from which the decision-making body derives the legitimacy to legislate. If the attribution or 'input' of authority is legitimate, it lends legitimacy to the exercise of this authority. Scharpf connects this kind of legitimacy to the notion of 'government of the people.' Kumm refers to this institutionalization of democratic mechanisms as the embodiment of the principles of adequate participation (of the people) and accountability (of the government).[352]

Mechanisms of public engagement can have different forms, and there is a rich line of literature available about all the different types of democracy that could be distinguished.[353] The current paper is not occupied with elucidating each of these types, but will compare the shape of some of these elements of democracy in the European Union and in Switzerland. Voting rights, the popular initiative and the referendum are discussed.

3.2 Output Legitimacy

Output legitimacy is concerned with the substantive righteousness of the outcome of legislation. The measure to assess this type of legitimacy is the people's policy preference. If the people agree with the results of the decision-making process, the results are legitimate. If they do not agree or find them unfair, they lack legitimacy. Scharpf connects this type of legitimacy to the notion of 'government for the people.' He explains that this classification implies that 'collectively binding decisions should serve the common interest of the constituency.'[354] The 'agreement' of citizens with policy outcomes requires a dynamic understanding, which is not merely concerned with the question about whether they 'like' or 'dislike' a certain decision, but rather concentrates on the question whether the outcome of a deliberation is considered to be acceptable.[355] This acceptability can be assessed in multiple ways. Fundamental rights, for instance, should be respected, and legislation should be reasonable.[356] If these conditions are satisfied, citizens are more easily prepared to make individual sacrifices for the common good. Additionally, the legislative process should be fairly efficient, which means that the deliberation should only take as long as is functional. This allows the entity to make institutional progress.[357] Mechanisms of input legitimacy and output legitimacy complement each other.

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[350] Later on in this chapter, the concept of input-legitimacy is explained.

[351] Scharpf 1997, p. 19-20; Scharpf 1998, p. 2-4; 6-7. Scharpf uses a different terminology which he borrows from Lincoln. For the purpose of this paper these terms are translated into input, output, and social legitimacy. The corresponding terms are 'the governed ("government of the people")' – social legitimacy; 'the governors ("government by the people")' – input legitimacy; and 'the beneficiaries of government ("government for the people")' – output legitimacy. Schmidt 2004, p. 9 provides for a similar matching of concepts.

[352] Kumm 2004, p. 907.

[353] E.g. Cini 2011.

[354] Scharpf 1998, p. 2.

[355] Moravcsik 2002, p. 604-605; Crombez 2003.

[356] Kumm 2004, p. 907.

[357] Jensen 2009; Scharpf 1998, p. 2-3.

3.3 Social Legitimacy

Social legitimacy rests on the assumption that democracy is not merely an electoral matter, but also requires socio-cultural cohesion in an institutional context or a public sphere to determine the common will of the people. This assertion is based on the notion that this common will – or common interest – consists of the accumulation of the individual opinions of the entity's citizens. This means that for a citizen to accept the benevolence of decision-making and its outcomes, he cannot merely rely on its own ratio, but should also trust in the reasonability of its fellow citizens. In order to do so, the existence of what Scharpf calls a 'we-identity' is a prerequisite, because people tend to trust those who are somehow akin or familiar to them.[358]

4. The Acknowledgment of Political and Fundamental Rights

4.1 Switzerland

4.1.1 The Establishment and Development of Citizenship

Before there was Swiss citizenship, there was citizenship of the communes and citizenship of the cantons, which coexisted with each other.[359] When the Federal State of Switzerland was established, these two types of citizenship were complemented with a third type of citizenship at the national level – Swiss nationality. Nationality was awarded to all citizens of the Swiss cantons (article XLII 1848 Constitution). This wording meant that the competence to regulate access to and forfeit of nationality was acknowledged to the cantonal level. The only limitation of this competence was codified in article XLIII, which provided that no canton could deprive a person who already had a citizen status of his citizenship rights.[360] In 1874, article XLII was renumbered as article 43 of the Federal Constitution, and complemented by article 44 (today, articles 37-38 1999 Constitution). These provisions attributed the competence to regulate acquisition and loss of citizenship through descent (*ius sanguinis*)[361], marriage and adoption to the Federation. Additionally, the competence to regulate loss and restauration of Swiss nationality was transferred to the Federal level, and ultimately, minimum conditions for naturalization were set. Up until today the cantons retain discretion in this area.[362] The policy field of Swiss citizenship is thus shared between the cantons and the state.

4.1.2 Political Rights

Democracy is one of the pillars on which the Swiss Federation is built. Article 34 of the Federal Constitution guarantees the acknowledgment and protection of political rights, and the freedom to form a political opinion.

4.1.2.1 Polity

Switzerland has three governmental levels – the Federation, the cantons, and the communes. Democracy is implemented at all three levels and each of them is competent to regulate the political rights that are acknowledged within their polity (article 39(1) Constitution).

The Swiss Parliament consists of two chambers. One chamber houses the Swiss National Council (*Nationalrat*), which represents the people (article 148(1) Constitution). This chamber has 200 seats (article 149 Constitution). The other chamber is occupied by the Council of State (*Ständerat)*, which represents the cantons. Each canton sends two delegates, except for the six 'half-cantons', which send only one. The members of both chambers

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[358] Scharpf 1998, p. 6; Schmidt 2004, p. 10; Jolly 2005, p. 12-18.

[359] Achermann et al. 2013, p. 4.

[360] Groot 1994, p. 116.

[361] This regulation was laid down in het *Bundesgesetz betreffend Erteilung des Schweizer Bürgerrechtes und den Verzicht auf dasselbe* of 3 juli 1876 – updated in 1903.

[362] Groot 1994, p. 116; Achermann et al. 2013, p. 9-22; articles 44 and 54 of the 1874 Constitution.

are directly chosen by the people at the cantonal level (article 150 Constitution). This means that people can only vote for candidates from their own canton (articles 149(3) and 150(3) Constitution). Both chambers together constitute the *United Federal Assembly (Vereinigte Bundesversammlung)*. Decisions of the Federal Assembly require the approval of both chambers (article 156 Constitution).[363] Article 148 of the Constitution depicts that the Federal Assembly is the supreme authority of the Confederation.

The Federal Council is the executive of the Swiss Federation. The Federal Council is 'a multi-party collegiate body of seven equal members collectively' (article 175(1) Constitution). 'The Federal Council is the supreme governing and executive authority of the Confederation' (article 174 Constitution).[364]

4.1.2.2 Beneficiaries of the Right to Vote

Article 136 Constitution provides that all Swiss citizens over the age of eighteen, with the exception of mentally ill or disabled people, have political rights in Federal matters. It also dictates that all Swiss citizens have the same political rights and duties. Article 136(2) Constitution adds that these political rights include participation in elections, popular initiatives and referenda. Article 143 Constitution regulates the passive right to be elected for the national institutions, which is acknowledged to 'any person eligible to vote'. All citizens have the right to vote for all governmental levels, regardless of the canton or commune in which they reside, save the possibility for cantons and communes to impose a waiting period for a maximum of three months (article 39(4) Constitution).

To facilitate migration between cantons and communes without loss of political rights, one of the functions of Federal policy is to determine the place (canton or commune) where an individual can cast his vote. The main rule is that everyone votes in the place where he resides, even if he does not possess citizenship of that canton or commune, except when he chooses to vote elsewhere, for instance in his canton or commune of origin (article 39(2) Constitution). Therefore, migration within Switzerland does not affect citizens' possibility to exercise their political rights.

4.1.2.3 Popular Initiative

A popular initiative is a democratic instrument which allows citizens to get involved in the political decision-making process by providing them with the possibility to come up with a legislative proposal, independently from the government. If they collect sufficient signatures, the initiative is successful. There are two types of popular initiatives. One is an agenda initiative, which requires the government to put the issue that is advocated by the people on its agenda to discuss whether it would be possible and desirable to meet the popular request to legislate. The other type of initiative is of a compulsory nature, and results in a legal obligation for the government to legislate. Another distinction that can be made is between constitutional and legislative initiatives. Constitutional initiatives see to amendment of the Constitution, whilst legislative initiatives see to non-constitutional matters.[365]

The initiative in Switzerland is compulsory in nature, but only sees to amendment of the Federal Constitution. Both proposals for a complete revision, and proposals for a partial revision are permitted. When the proposal collects a minimum of 100.000 signatures, it is presented to the people (articles 138-139 Constitution).[366] In

[363] Haller 2009, p. 115-116.

[364] Haller 2009, p. 110-112.

[365] Kaufmann & Pichler 2010, p. 33-48.

[366] Haller 2009, p. 218-227; Fleiner et al. 2012, p. 77-83.

2003, on the initiative of the parliament, the possibility to present a popular initiative that sees to statutory law was introduced.[367] On evaluation it turned out that the introduction of this initiative wasn't a success after all, so it was abandoned again in 2009.[368] The popular initiative in Switzerland is binding for the government, and must be decided upon by means of a referendum (article 140(1a) Constitution). This means that the government may not decide on the content of the popular initiative itself. The whole process normally takes about five years.

Article 51 of the Federal Constitution dictates that the cantons of the Federation should also foresee in the possibility to propose constitutional amendment by means of a popular initiative, and all cantons suffice to do so. In addition, most of them provide for legislative and administrative initiatives as well.[369]

4.1.2.4 Referenda

Being able to make use of popular initiatives allows citizens to become *pro-actively* involved in politics. A referendum, on the other hand, provides in a possibility for *reactive* involvement of the people. Through a referendum the people may approve or reject constitutional and legislative proposals that were put forward by the parliament, or by popular initiative. There is a distinction between binding and consultative referenda. Binding referenda result in an obligation for the government to effectuate the outcome of the referendum. Consultative referenda impose an obligation on the government to reflect on the outcome of a ballot, but still may be ignored if it does not agree with the result. In Switzerland, all referenda are binding. There are no consultative referenda. A distinction is made between mandatory and optional referenda (article 140 Constitution).[370]

There are two types of mandatory referenda. The first type concerns the adoption of important decisions, such as constitutional reform, or the entry into an international or supranational organization. To get through, a mandatory referendum requires a double majority of the people and the cantons (article 140(1) Constitution). This means that it needs the support of the Swiss people of a whole, and a majority of affirmative voters in a majority of the cantons (article 142(2) Constitution). In this manner, a balance between large and small cantons is safeguarded.

The second type of mandatory referenda requires a single majority of the people in order to get adopted. No double majority is required, because it does not see to the approval of legislation. It is used to decide on whether a popular initiative for constitutional revision should be elaborated upon by the parliament or not (article 140(2) and 142(1) Constitution). If the answer is affirmative, another referendum will follow when the parliament submits a concretized proposal. The second referendum is needed to approve the constitutional reform itself, and therefore a double majority is required (article 140(1) Constitution, see above).[371]

In addition to the obligation of the Swiss government to organize a mandatory referendum on the adoption of key decisions in Swiss politics, the Swiss people and the Swiss cantons have the possibility to request for an optional referenda. This possibility can be used when a person or a canton disagrees with a legislative proposal

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If the proposal is of a general nature it is firstly elaborated upon by the parliament. If the parliament rejects the proposal, then the initiative itself is presented to the people, but then for the purpose of deciding whether or not it is desirable to elaborate on the proposal - article 139(4) Constitution.

[367] The idea behind this reform was that some subjects are more suitable to be regulated by statutory law than by the Federal Constitution, but if the people do not have the possibility to initiate or amend statutory law, then those subjects inappropriately end up in the Federal Constitution.

[368] Fleiner et al. 2012, p. 81.

[369] Administrative initiatives are directed at specific projects, such as building a school or a hospital.

[370] Kaufmann & Pichler 2010, p. 33-48.

[371] Fleiner et al. 2012, p. 83-87.

from parliament. In that case, the optional referendum offers the possibility to ask the public for its opinion. The outcome of the referendum is binding. The optional referendum therefore essentially comprises a citizens' and cantons' right to veto legislative measures (article 141 Constitution). The optional referendum can be requested by 50.000 citizens or 8 cantons.[372]

For the cantons, the Federal Constitution prescribes the use of mandatory referenda for the approval of constitutional amendments (article 51 Constitution). The introduction of other mandatory referenda and optional referenda are left to the discretion of the cantons and may concern, for instance, the revision of statutes, the conclusion of inter-cantonal treaties, or the way in which the cantonal budget is spent.[373]

4.1.3. FUNDAMENTAL RIGHTS

Another policy field that adds to the legitimacy of an entity is the protection of fundamental rights. In chapter 4, it was shown that this protection is an example of output-legitimacy. Because output-legitimacy concentrates on the question whether a legislative measure is considered to be acceptable. And whether a measure is considered to be acceptable can be assessed on the basis of whether it meets certain minimums standards of righteousness, such as the need to respect fundamental rights.[374]

In 1848, the amount of fundamental rights that was granted by the Federal Constitution of the Helvetic Confederation was rather limited. Besides the right to freedom of domicile (article XLI), the right to equality between citizens of the different cantons (articles IV and XLVIII), and the political rights that developed over the years, the first Federal Constitution merely guaranteed a few civil rights.[375] The Constitution of 1874 lengthened the list of fundamental rights.[376] Hereafter it took until 1999 before another comprehensive constitutional review was carried out. In the meantime, several constitutional changes were made in order to provide for better protection of fundamental rights, and the Federal Supreme Court played a role in their development, by interpreting existing rights, and developing new ones.[377] In 1974, Switzerland became a party to the European Convention of Human Rights of the Council of Europe. Switzerland has a monistic system, which means that the provisions of the ECHR are directly applicable in the Swiss legal order.[378] A landmark in the constitutional history of Switzerland in the field of fundamental rights was the adoption of the reviewed Federal Constitution of 1999, which for the first time included a bill of rights.[379]

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[372] Fleiner et al. 2012, p. 83-87.

[373] Fleiner et al. 2012, p. 86-87.

[374] Kumm 2004, p. 907.

[375] Among these were press freedom (article XLV), the freedom of association (article XLVI), the right of petition (article XLVII), and a relative freedom of religion (only Catholicism and Protestantism were allowed) (article XLIV). Article CV of the 1848 Constitution regulated that these rights were enforceable before the Federal Court.

[376] It did so by adding the freedom of trade and industry (article 31), the right to marry (article 54), and the right of access to a judge (article 58). The freedom of religion and belief was extended (restrictions were removed), and the right to worship was added (articles 49-50). The first social right was also introduced, which was the right to a decent burial (article 53). This right was not enforceable in court, but imposed an obligation on the government.

[377] Fleiner et al. 2012, p. 201-202.

Among others the Federal Supreme Court recognized the freedom of expression (1961 FSC BGE 87 I 1114(2)), the freedom of language (1965 FSC BGE 91 I 480 (II/1)), the freedom of assembly (1970 FSC BGE 96 I 219 (4)), and the right to aid in distress (1995 FSC BGE 121 I 367 (2a-c)).

[378] Haller 2009.

[379] Article 2 of the Constitution reiterates: 'The Swiss Confederation shall protect the liberty and rights of the people and safeguard the independence and security of the country. […] It shall ensure the greatest possible equality of opportunity among its citizens.' This general aim of the Federation is further elaborated upon in title 2, which is dedicated to enlisting the fundamental rights it protects. The title is divided in a chapter for fundamental rights, a chapter for citizenship and political rights, and a chapter for social objectives.

4.2 The European Union

4.2.1 The Establishment and Development of Citizenship

European citizenship was firstly introduced in the Maastricht Treaty. Recital 8 stated: 'Resolved to establish a citizenship common to nationals of their [the Member States'] countries.' Article B(3) of the TEU clarified that this step in the integration process was meant 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union.' Article 8 EC-Treaty substantiated these aims with the words: (1) 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.' The Amsterdam Treaty added to this provision 'Citizenship of the Union shall complement and not replace national citizenship'.

In the Lisbon Treaty, this wording has largely persisted. Recital 8 has now become recital 10. And article 8 of the EC-Treaty (Maastricht) turned into what is now article 20 of the TFEU. The first part remains unchanged; the second part was slightly altered into: 'Citizenship of the Union shall be additional to and not replace national citizenship.'[380] In the Lisbon Treaty, except in recital 10 of the TEU and article 20 of the TFEU, European citizenship is mentioned in article 9 TEU, which has the same content as article 20(1) TFEU.

4.2.2 Political Rights

Article 10(1) TEU reads: 'The functioning of the Union shall be founded on representative democracy.' Paragraph 2 clarifies the form of this representative democracy by depicting that '[c]itizens are directly represented at Union level in the European Parliament'. In addition to providing for representation of citizens at the Union level, the Lisbon Treaty introduced the European Citizens' Initiative, which allows citizens to engage in a more direct manner in Union politics.

4.2.2.1 Polity

The European Parliament has one chamber with 750 seats (article 14(2) TEU). The members of parliament are chosen at the Member State level. This means that people can only vote for candidates from their Member State of residence. The European Commission is considered to be the executive of the European Union. The Commission is not formed out of the European Parliament, but appointed by the Member States' heads of government (the European Council) (article 17(5) TEU).

4.2.2.2 Beneficiaries of the Right to Vote

Article 20(2b) reads that European citizens have 'the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that state'. Article 22 TFEU exemplifies that Member States retain discretion in defining the conditions to vote and to stand as a candidate in municipal elections and elections for the European Parliament, as long as they do not discriminate between their own nationals and citizens from other Member States. The Union is often criticized for lacking a citizens' right to vote for national elections in their residence country of which they are not a national.

[380] This change is the result of an elaborate debate about the relationship between national and European citizenship. Eventually the word '*additional*' was preferred over '*complementary*' to emphasize that Union citizenship cannot detract from national citizenship. The intention of its establishment was not to replace national- with European citizenship, but to create a dual citizenship for the nationals of the Member States. – See Shaw 2011.

4.2.2.3 The European Citizens' Initiative

In the European Union, the popular initiative (European Citizens' Initiative) was introduced by the Lisbon Treaty in 2009 (article 11(4) TEU).[381] The initiative is an agenda initiative and comprises a non-binding invitation for the Commission to legislate. The Commission should react to a citizens' initiative[382], but if it refuses to act on the initiative, there is no appeal to that decision.[383]

The initiative can only be used for general legislative proposals. Hence, proposals that are already concretized into legislative texts cannot be submitted.[384] Furthermore, proposals can only see to policy fields that are already attributed to the Union. This means that propositions for constitutional reform do not find recourse. Following the Swiss terminology, it could be said that the European Union provides for a non-binding general legislative popular initiative, whilst the Helvetic Confederation foresees in a binding constitutional popular initiative.[385]

It is suggested that the restrictions on the use of the European Citizens' Initiative jeopardize the effectiveness of the instrument and its impact on decision-making. Because the initiative is not binding, it cannot be used to pressure the Commission to execute the will of the people. The question remains whether conditioning the popular initiative in this manner adds to strengthening the citizens' position in the European Union, and therewith to enhance the Union's legitimacy – or not.

Lastly it is mentioned that most Member States of the Union lack familiarity with the functioning of the popular initiative at a national level. Because different than in Switzerland, popular initiatives are no part of their political culture. Its introduction in the European Union was thus not motivated by a bottom-up public demand, but originated from a top-down intervention by the drafters of the Treaties. Although some Member States start to experiment with the implementation of elements of direct democracy in the national legal order as well.[386]

4.2.2.4 Referenda

Referenda are not institutionalized as an instrument of policy-making in the European Union. Member States occasionally do make use of national referenda for the purpose of acquiring consent from their peoples for further European integration. In the history of the Union, these referenda have had an important impact on European integration.[387]

In itself it is laudable that steps in the integration process of the European Union are subjected to the public opinion, and that this public opinion also has an effect in the form of amendment or annulment of the

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[381] 'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.'

[382] Article 10 of the European Citizenship Initiative Regulation (ECI)382 describes how the Commission must react to a citizens' initiative. It should publish the initiative (par. 1a), and it should receive the organizers and allow them to explain their initiative (par. 1b) on a public hearing at the European Parliament in which the Commission may partake (article 11 of the Regulation). Then, within three months it should 'set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action' (par. 1c). This communication should be submitted to the organizers as well as to the European Parliament and the Council, and it should be made public (par. 2).

[383] Kaczorowska 2013, p. 149.

[384] Kaczorowska 2013, p. 149.

[385] For the purpose of this reasoning, the European Treaties are considered to have the same standing as the Swiss Constitution.

[386] Such as Germany - Scarrow 1997, p. 451-472. Also see Scarrow 2001.

[387] In 1992, the Danish people rejected the Maastricht Treaty in a referendum, which led to the enactment of several changes in its text. In 2004, the Dutch and the French people rejected the Constitutional Treaty, which annulled the adoption of the Treaty all together. And in 2008, the Irish people rejected the Lisbon Treaty, which again led to changes before it could be installed.

proposed Treaty. At the same time, there are some points of criticism that can be expressed. First of all, referendums are always national – never European – and whether or not a referendum is organized is left to the discretion of the Member States. This means that whether or not the people get a vote on a new Treaty differs per country, and this creates inequality between citizens from different Member States.

Secondly, although European leaders claim that they try to accommodate the public opinion, amendments are frequently only marginal and it is questionable whether they really satisfy the people's discontent, or whether they are merely meant to let the people believe that they were heard.[388]

4.2.3 Fundamental Rights

The original European Treaties did not contain many provisions on the protection of fundamental rights, save a few exceptions, such as the principle of non-discrimination on the employment market.[389] At that time this lack of fundamental rights protection at the Community level was not problematic, because fundamental rights protection was left to the discretion of the Member States. A problem arose, however, when the European Court of Justice declared that European law would prevail over national law.[390] Then when an economic provision of European law would clash with a fundamental right of national origin, the EU-provision would prevail – no matter how shallow the content. The loss of national fundamental rights protection that followed from the primacy of European law could only be compensated by the introduction of fundamental rights protection at a European level, because these would be the only rights that could not be set aside by other provisions of Union law. But such protection did not exist yet.[391]

In response to – unsurprisingly – heavy criticism on the mentioned judgments, the European Court introduced the European fundamental rights protection through the recognition of unwritten general principles of EC-law, which can be derived from the common constitutional traditions of the Member States. [392] Fundamental rights were to be part of these general principles, and the Community therefore had to respect them, even if they were not codified in the Treaties or in any other written source of Community law. Through its adjudication, the Court itself would be responsible to safeguard respect for these rights.[393]

The Maastricht Treaty was the first to mention fundamental rights protection in its text – even though it was merely included in the preamble, and not in the substantive provisions of the Treaty. One of the most important events, hereafter, was the presentation of the draft of the Charter of Fundamental Rights of the European Union.[394] And the Lisbon Treaty acknowledged it to have the same status as the Union Treaties (article 6(1) TEU), which means that it is now binding upon the Union institutions and on the Member States when they implement Union law (article 51(1) Charter).[395]

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[388] After the rejection of the Constitutional Treaty, for instance, the Treaty was abandoned, but the substance of the Lisbon Treaty – which was meant to make up for the Constitutional Treaty – in fact hardly deviated from the substance of its rejected predecessor. And to avoid another rejection, it was simply not proposed to the people again (except in Ireland), so it has not been assessed whether the people's discontent was reconciled by the changes or not.

[389] De Vries 2013, p. 59.

[390] Case 26/62, *Van Gend en Loos*; Case 6/64, *Costa/Enel*.

[391] Kaczorowska 2013, p. 215; Case 1/58, *Stork.*

[392] It was urged to do so under pressure of the German Constitutional Court (*Bundesverfassungsgericht*), which proclaimed that it would not accept the European Court's judgment that EU-law prevails over national constitutional law for as long as (*solange als*) the European legal order itself does not provide in fundamental rights protection that at least equals the national level of protection. – BVerfGE 37, 271 – *Solange I;* BVerfGE 73, 339 – *Solange II*.

[393] Case 29/69, Erich Stauder, par. 7; Case 11/70, Internationale Handelsgesellschaft, par. 4; Case 4/73, Nold, par. 13 – in Nold, also the value of international conventions, especially the ECHR, was recognized.

[394] The Nice Treaty provided for political recognition of the status of this Charter in the EU.

[395] De Vries 2013, p. 59.

4.2.3.1 Charter of Fundamental Rights

The preamble to the Charter 'places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice' (recital 2), and confirms the attachment of the Union to the universal values of human dignity, freedom, equality, solidarity, democracy, and the rule of law. It also refers to the explanations to the Charter, which are not binding, but due authoritative.

The Charter's scope of applicability is defined as binding upon the Union institutions, and on the Member States when they implement Union law (article 51(1) Charter). This means that there is no general applicability of the Charter, and when a situation does not fall within the scope of Union law, citizens are deprived of the Charter's protection. This strong limitation of the Charter's scope is detrimental for its effectiveness, because it reduces the rights it contains to be mostly merely of symbolic value, and therewith jeopardizes the effects it could have on the Union's legitimacy. Another consequence of imposing limitations to the applicability of the Charter is that the interpretation of the criterion for applicability becomes subject of debate. The European Court of Justice tried to clarify the criterion, but its approach is much criticized – both for extending the scope of the Charter[396], and for merely using it to reinforce economic freedoms, rather than for real fundamental rights protection.[397]

4.3 Evaluative Comparison II

4.3.1 Input-Legitimacy – Political Rights

In the chapter about legitimacy, it was shown that the acknowledgment of political rights to an entity's citizens may enhance its legitimacy. Because if people are involved in the decision-making process, they are made co-responsible for the outcome, which increases its acceptability. Moreover, if the people's voice is heard in the process, they are more likely to respect the decisions that are taken as a result thereof.

The comparison between the acknowledgment of political rights in the European Union and in Switzerland is evaluated against this background. Several observations can be made. To begin with, Switzerland included the people in its polity from the very beginning of the establishment of the Swiss Federation in 1848. It did so by the acknowledgment of Swiss nationality to all the citizens of its cantons, which directly established a connection between the new Federation and the people. Moreover, Swiss nationality – or Swiss citizenship – was directly filled in by connecting it to the acknowledgment of voting rights for the Swiss Federal Parliament[398], and – most importantly – by providing the people with a right to decide on the content of their own Federal Constitution through a popular vote. It was shown that the introduction of these rights has been crucial for the further development of the strong democratic tradition in Switzerland, because the people itself could decide which rights it would introduce to enhance its political influence – and it used this right to perpetuate its position in the polity. The introduction of the popular initiative (in addition to the requirement of public consent for the adoption of a constitutional amendment), and the introduction of the mandatory and optional referenda in Switzerland debouch from this tradition.

The European Community initially did not provide for involvement of its people at all. The lack of policy on public involvement was a consequence of the choice to found cooperation between the Community's Member States on a an economic, rather than a political discourse. This choice was due to the French rejection of the Treaty on the earlier drafted European Defense Community, which precluded the inclusion of political components. Citizen involvement and the acknowledgment of political rights are classic components of political

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[396] Case C-617/10, Åkerberg Fransson.

[397] Case C-438/05, *Viking*; Case C-341/05 *Laval*; Dashwood 2007-2008.

[398] Even though these voting rights were initially only reserved for men. The right to vote for women wasn't introduced until 1971.

policy. To preclude these elements was thus necessary to effectuate the European cooperation that was aimed for.

In a later stage of European integration, an attempt was made to compensate the absence of political rights in the European Union. This compensation included the acknowledgment of European citizenship to all citizens of the Member States, and the introduction of political rights at local level (for the municipality), and a European level (for the European Parliament). These rights can be exercised by all European citizens in the Member State where they reside – regardless of their nationality. The European legal order does not, however, provide for a right to vote for national elections in the Member State of residence. Reluctance to introduce this right can be understood against the background of Member States' struggle to preserve their sovereignty within the Union, which is – once again – placed in the context of the fact that the Community never accomplished to establish a Federation. Because in a Federation, full acknowledgment of citizenship and the pertaining rights from its first establishment is more self-evident, because the participating units together form a new and comprehensive entity, which requires the inclusion of its citizens in politics.

Upon the establishment of the Swiss Federation, citizens were directly included, and voting rights at all the governmental levels – communal, cantonal, and Federal – were connected to the citizenship status. The acknowledgment of political rights in the European Community, on the other hand, was an after effect of the establishment of the Community rather than a constitutive requirement. This allowed the Member States to limit the reach of political rights and this led to the exclusion of a right to vote for national elections in a Member State of residence of which a citizen is not a national. When citizens reside in the Member State of which they possess its nationality, the absence of a general voting right for national elections is not problematic, because all people of the Member States have the right to vote for their own national elections. Migration to another Member State, however, compromises this right, because it makes the possibility to vote for national elections dependent on the discretion of the Member States. In Switzerland, this adverse effect of migration on political rights does not exist.

What is left for the contemplation about the availability of political rights in the European Union and in Switzerland is the comparison between participatory rights – most specifically the right to initiate a popular initiative, and the right to directly vote upon important decisions that need to be taken by means of a referendum. It was shown that both in the Swiss Federation and in the European Union, people have the right to initiate and present a popular initiative. The nature of these popular initiatives differs substantially, however. It was observed that Switzerland provides for the possibility to present a binding popular initiative which sees on amendment or revision of the Constitution, and which is directly decided upon by the people itself by means of a referendum. Whilst the European Union provides for a non-binding agenda initiative, which functions as an invite for the European Commission to legislate, rather than a pressure mechanism to execute the people's will.

An analysis of the use of the public referendum in the European Union and in Switzerland induces a similar conclusion. In Switzerland, the referendum has a prominent place in the political system. It is used in two ways. First, it accommodates the procedure to pass decisions on popular initiatives – both for the question on whether the parliament should elaborate on an initiative, and to decide on adoption of the initiative. Secondly, it is used as a control mechanism on the functioning of the parliament, because if the people or the cantons do not agree with the policy that is proposed, they are allowed to request a referendum to validate the proposal that is made. All referenda are binding.

In the European Union, use of the referendum is not institutionalized. At a European level, it is not employed at all. At a national level, the referendum is used occasionally as a means to ratify a new Treaty. Whether or not Member States employ the referendum for this purpose is left to their discretion. This discretion, however, leads to political inequality between citizens of different Member States, because some do receive a direct vote on the acceptance of a new Treaty, whilst others do not get that vote. Moreover, it may be questioned

whether citizens who do get to vote are satisfied with the governmental response to the referendum's outcome, especially when this outcome is a rejection of the Treaty. It is therefore debatable whether use of the referendum in this manner adds to the Union's democratic legitimacy.

In reference to the theoretical framework for input-legitimacy as it was presented earlier, it is observed that the acknowledgment of political rights could add to enhance an entity's legitimacy. In accordance with this notion, both Switzerland and the European Union indeed acknowledge political rights to their citizens. The main difference between the entities is the way wherein these rights are conditioned. Switzerland established a system of political rights – both voting rights and rights of direct participation – which involves the people in a genuine way, and gives real effectiveness to their votes. In the European Union, on the other hand, the acknowledgment of political rights was an aftereffect of – rather than a constitutive requirement for its establishment. A consequence thereof is that the rights which it acknowledges are limited and conditioned, and lack comprehensiveness. Voting rights are introduced, but not at a national level, which affects intra-Union migration. Equally, participatory rights are acknowledged, but the real effect of exercising these rights is undermined by their conditioning. In order to enhance input-legitimacy, however, rights should be real, genuine, and comprehensive.

4.3.2 Output-Legitimacy – Fundamental Rights

In the chapter about legitimacy, it was shown that the acknowledgment of fundamental rights to an entity's citizens enhances its output-legitimacy, because it comes forth from agreement of the people with the outcome of the decision-making process. And whether or not the people agree is not only dependent on the individual preferences of citizens, but also on meeting certain general criteria of qualitative policy making, such as respecting fundamental rights. The comparison between the acknowledgment and protection of fundamental rights in the European Union and in Switzerland is evaluated against this background. Several observations can be made.

To begin with, at the time of their emergence, neither Switzerland, nor the European Union provided for fundamental rights protection. The Swiss Federal Constitution only acknowledged the right not to be discriminated on the basis of the canton of origin, and the right to freedom of domicile. In addition, the Constitution acknowledged a few civil rights to its citizens, such as press freedom, the freedom of association, and a relative freedom of religion (which was extended in 1874). The 1874 Federal Constitution slightly lengthened the list of fundamental rights. In addition, the Federal Supreme Court of Switzerland developed fundamental rights protection on the basis of its case-law. Nevertheless it took until 1999 – 151 years after the first establishment of the Federation – until a comprehensive bill of rights was adopted and included in the Federal Constitution.

The development of fundamental rights in the European Union resembles the Swiss sequence of events. At the first establishment of the Community, merely the right not to be discriminated on the basis of nationality, and the right to freedom of domicile for economically active citizens was acknowledged (by means of the introduction of freedom of workers and freedom of establishment – article 48 and 52 of the Treaty of Rome). Part of the right not to be discriminated was, moreover, the right to enjoy fundamental rights protection in all Member States under the same conditions as their own nationals (article 220 of the Treaty of Rome). Hereafter, the first steps in fundamental rights protection were set by the European Court of Justice. The European Court considered that fundamental rights and their protection in the Union are part of unwritten general principles of Union law, with which all national and Union legislation should concur. In 2001, a comprehensive bill of rights was introduced in the form of a Charter of fundamental rights of the European Union, which became binding in 2009. In comparison with Switzerland, the introduction of this Charter in the Union came rapidly. Its scope of applicability is, however, restricted to situations which fall within the scope of Union law (article 51(1) Charter), which undermines the significance of the Charter for European citizens.

Fundamental rights protection in the European Union and in Switzerland thus evolved slowly. Nevertheless, both entities eventually managed to introduce a comprehensive bill of rights, which is considered to be of large importance for the (further) enhancement of output-legitimacy in the entities. There is, however, a crucial difference between fundamental rights protection in the European Union and in Switzerland. In Switzerland, the constitutional bill of rights is always applicable, so that citizens may always rely on it. The European Union, on the other hand, restricted the scope of application of its fundamental rights Charter, which also restricts the possibility for citizens to rely on it. This diminishes the effect it could have had on output-legitimacy, if it would have had general applicability in the Union.

Thus it is observed that even though the acknowledgment and reinforcement of fundamental rights could enhance output-legitimacy, the conditioning thereof undermines the effectiveness of this strategy. The main difference between the European Union and Switzerland in fundamental rights protection is therefore not the acknowledgment of these rights, but the way in which their applicability is conditioned. This difference could be an explanation as for why Switzerland enjoys more legitimacy than the European Union. Moreover it indicates a strategy which the Union could adopt to enhance its legitimacy – removing the restrictions for the applicability of the Charter.

5. Concluding Remarks

This study has tried to determine the extent to which the acknowledgment of political and fundamental rights reinforces legitimacy in cooperative and diverse entities, such as the European Union and Switzerland. The analysis that was carried out suggests that it is not the acknowledgment of the rights itself that has the most significant effect on legitimacy, but the extent to which reliance on these rights is conditioned. If the rights that are awarded are not complete, or not always applicable, it undermines their effectiveness, and therewith their capability to enhance the entity's legitimacy. The conclusion that follows from the analysis of political and fundamental rights in the European Union and in Switzerland, is that the European Union tends to condition the applicability of the rights it acknowledges, whilst Switzerland does not. Rights in Switzerland are thus more significant and effective than in the European Union. As a result of this difference, the acknowledgment of political and fundamental rights in Switzerland yields more legitimacy than it does in the European Union.

The question that emerges is why the European Union conditions the rights it acknowledges, whilst Switzerland does not. From the historical overview that was given at the beginning of this contemplation, it can be derived that this difference can be explained by the fact that Switzerland managed to become a Federation, whilst the European Union did not – due to the rejection of the Treaty on the European Defense Community. The reason why this difference is important, is because Federations are able to be more resolute in their policy making, whilst non-federal cooperative entities are always divided by a tension between the cooperation and its units. This tension is caused by a defensive attitude of the units to protect their sovereignty against the overarching organization, and leads to compromises about the applicability or reach of the legal instruments that are adopted. These restrictions compromise the instruments' potential to add to the enhancement of legitimacy.

Whether or not a cooperation evolves into a Federation is, however, dependent on the circumstances in which it is founded, and cannot be forced into an indicated direction. For the current contemplation it is especially observed that upon the establishment of cooperation, the Swiss cantons needed each other more than the Member States of the European Community did. That is why Switzerland managed to become a Federation, whilst the European Union could not.

Still, if the Union aims to enhance its legitimacy, the reinforcement of political and fundamental rights can be used as a strategy to do so – but only if the conditioning of these rights is abolished. To that end the Union should show more decisiveness in its policy making than it has shown up until now.

REFERENCES

BOOKS

Barents, R. & Brinkhorst, L.J. 2012: 'Grondlijnen van Europees recht' Deventer: Kluwer.

Barnard, C. 2013 : 'The substantive law of the EU : the four freedoms' Oxford University Press.

Chalmers, D. & Davies, G. & Monti, G. 2014 : 'European Union law: cases and materials' Cambridge University Press.

Chalmers, D. & Davies, G. & Monti, G. 2010 : 'European Union law: cases and materials' Cambridge University Press.

Craig, P. & De Búrca, G. 2011: 'EU law: text, cases, and materials' Oxford University Press.

Craig, P. (ed.) 2011: 'The evolution of EU law' Oxford University Press.

Dahl, R. A. 1998: 'On Democracy' Yale University Press.

Edward, D.A.O. & Lane, R. 2013: 'Edward and Lane on European Union law' Cheltenham UK : Edward Elgar.

Fleiner, T. & Misic, A. & Töpperwien, N. 2012: 'Constitutional law in Switzerland' Alphen aan den Rijn: Kluwer Law International.

Gillet, N. 1989: 'The Swiss Constitution, can it be exported?' Bristol: YES Publications.

Haller, W. 2009: 'The Swiss Constitution in a Comparative Context' Zürich: Dike.

Kaczorowska, A. 2013: 'European Union Law' Routledge.

Kapteyn, P.J.G.; Amtenbrink, F.; Bartens, R.; Inghelram, J.; Kingston, S.; Kuijper, P.J.; Lauwaars, R.; McDonnel, A.M.; Mortelmans, K.J.M.; Slot, P.J.; Timmermans, C.W.A.; Witte, B. de (Kapteyn et al.) 2008: 'The Law of the European Union and the European Communities' Alphen aan den Rijn: Kluwer Law International.

Kaufmann, B. & Pichler, J. W. (ed.) 2010: 'The European Citizens' Initiative-into new democratic territory' BWV-Berliner Wiss.-Verlag.

Maxwell, J.A. 2012: 'Qualitative Research Design, an interactive approach' London : Sage Publications.

Moussis, N.S. 2013: 'Access to European Union: law, economics, policies' Cambridge : Intersentia.

Urbinati N. 2006: 'Representative democracy: principles and genealogy' University of Chicago Press.

Zweifel, T.D. 2002: 'Democratic deficit?: institutions and regulation in the European Union, Switzerland, and the United States' Swiss Consulting Group, Inc.

Zweigert, K. & Kötz, H. 1992: 'An introduction to comparative law' (2nd ed.) Oxford: Clarendon.

CHAPTERS IN BOOKS

De Vries, S. 2013: 'The protection of fundamental rights within Europe's Internal Market after Lisbon—an endeavour for more harmony' in: De Vries, S. & Bernitz, U. & Weatherill, S. (eds.) 'The protection of fundamental rights in the EU After Lisbon' Oxford: Hart Publishing, p. 59-94.

Gordley, J. 2008: 'Comparative Law and Legal History' in: Reiman, M. & Zimmerman, R. (eds.) 'The Oxford Handbook of Comparative Law' Oxford University Press, p. 754-773.

Groot, G.R. de, 1994: 'De Zwitserse nationaliteit' in: CJHB: Brunner-bundel: op 15 april 1994 aangeboden aan prof. mr. CJH Brunner ter gelegenheid van zijn vijfenzestigste verjaardag, p. 115-125.

Jansen, N. 2006: 'Comparative Law and Comparative Knowledge' in: Reiman, M. & Zimmerman, R. (eds.): 'The Oxford Handbook of Comparative Law' Oxford University Press, p. 305-338.

Shaw, J. 2011: 'Citizenship: Contrasting Dynamic at the Interface of Integration and Constitutionalism' in: Craig, P. & De Búrca, G. (eds.) 'The Evolution of EU Law' Oxford University Press, p. 575-609.

ARTICLES

Cheneval, F. & Schimmelfennig, F. 2013: 'The Case for Demoicracy in the European Union' Journal of Common Market Studies, vol. 51(2), p. 334-350.

Crombez, C. 2003: 'The Democratic Deficit in the European Union: Much Ado About Nothing?' European Union Politics, vol. 4, p. 101-120.

Dashwood, A. 2007-2008: 'Viking and Laval: Issues of Horizontal Direct Effect' Cambridge Year Book European Legal Studies, vol. 10, p. 525-540.

Fleiner, T. 2002: 'Recent Developments of Swiss Federalism' The Journal of Federalism, vol. 32(2), p. 97-123.

Follesdal, A. & Hix, S. 2006: 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' Journal of Common Market Studies, vol. 44(3), p. 533-562.

Frey, B.S. 1994: 'Direct democracy: politico-economic lessons from Swiss experience' The American Economic Review, p. 338-342.

Jensen, T. 2009: 'The democratic deficit of the European Union' Living Reviews in Democracy, vol. 1.

Jolly, M. 2005: 'A demos for the European Union?' Politics, vol. 25(1), p. 12-18.

Kumm, M. 2004: 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' The European Journal of International Law, vol. 15(5), p. 920.

Kostakopoulou, D. 2005: 'Ideas, Norms and European Citizenship: Explaining Institutional Change' The Modern Law Review, vol. 68(2), p. 233-267.

Moravcsik, A. 2002: 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' Journal of Common Market Studies, vol. 40(4), p. 603-624.

Mueller, S. & Keil, S. 2013: 'The Territoriality of Fiscal Solidarity: Comparing Swiss Equalisation with European Union Structural Funding' Perspectives on Federalism, vol. 5(1), p. 122-148.

Nic Shuibhne, N. 2012: '(Some of) The Kids Are All Right' Common Market Law Review, vol. 49, p. 349–380.

Scarrow, S.E. 2001: 'Direct Democracy and Institutional Change A Comparative Investigation' Comparative Political Studies, vol. 34(6), p. 651-665.

Scarrow, S.E. 1997: 'Party competition and institutional change the expansion of direct democracy in Germany' Party Politics, vol. 3(4), p. 451-472.

Scharpf, F.W. 1997: 'Economic integration, democracy and the welfare state' Journal of European public policy, vol. 4(1), p. 18-36.

Schmidt, V.A. 2004: 'The European Union: Democratic Legitimacy in a Regional State?' JCMS: Journal of Common Market Studies, vol. 42(5), p. 975-997.

Weiler, J.H.H. & Trachtman, J.P. 1996: 'European Constitutionalism and its discontents' Northwestern Journal of International Law & Business, no. 17, p. 354.

Working Papers & Conferences

Cini, L. 2011: 'Between participation and deliberation: Toward a new standard for assessing democracy' 9th Pavia Graduate Conference in Political Philosophy.

Fahrni, D. 1983: 'An Outline History of Switzerland. From the origins to the Present Day' Pro Helvetia.

Oderkerk, M. 2014: 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of "Methodological Pluralism" in Comparative Law' Centre for the Study of European Contract Law Working Paper Series 4.

Scharpf, F.W. 1998 : 'Interdependence and democratic legitimation' MPIfG working paper, No. 98/2, p. 2.

Reports

Achermann, A. et al. 2013: 'EUDO Citizenship Observatory. Country Report: Switzerland' http://www.eudo-citizenship.eu.

STREAM 4: LINGUISTIC DIVERSITY AS A HINDRANCE TO THE REALIZATION OF EUROPEAN CITIZENSHIP RIGHTS?

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The realization of European citizenship rights needs to address a series of potential barriers deriving from linguistic diversity. Although the European Union is certainly not the first State that has had to deal with multilingualism, its linguistic diversity is, first of all, a crucial aspect distinguishing the EU experience from that of other federal States, such as, for instance, the United States of America or Germany. However, secondly, it is characterised by a larger variety of languages compared to other countries that have had to deal with linguistic diversity before, such as Canada, India, Switzerland and South Africa. From a comparative perspective, the experiences of the latter can surely show alternative models of managing social, economic, political, and legal multilingualism, which can help in addressing linguistic barriers in Europe. Nonetheless the specific features of linguistic diversity in the European Union, along with the peculiar nature of its legal system and of its regulatory competences and challenges, inevitably raise more intricate and multi-faceted issues.

While other States are characterised either by one widely shared dominant language or by a relatively limited number of official ones, the European Union lacks a broadly shared language and has now to deal with 24 official EU languages, 6 semi-official ones, 39 minority languages, and 7+ main immigrant languages such as Turkish, Arabic, Chinese, Hindi and Russian. That is, altogether 75+ languages.

Moreover, the competences of the European Union do not specifically cover all fields in which linguistic diversity may turn to be a concrete barrier for its citizens or for migrants, since in many cases cultural and linguistic issues are linked to needs arising from the national context, concerning national identity or the protection of specific individual and collective rights, such as, for instance, the protection of national linguistic minorities.

Anyway and early on, the EU recognised and tried to regulate linguistic diversity through a policy of multilingualism, which identified the official languages of the then still European Economic Community (Art. 217 of the E.C. Treaty and Council Regulation No 1 April 15, 1958).

While this linguistic diversity may certainly be a cultural enrichment for Europe, it is also likely to be a practical limit. It could form a hindrance in common understanding among different residents in the various European territories, maintain linguistic identity segregation, and make for the absence of one common public discourse across Europe: shared mass media channels such as TV-stations and newspapers followed or read by citizens in all the nooks and crannies of Europe. It could also be a practical hindrance for the realization of European citizenship rights by Europeans living in another European country or region where a language is dominant which these mobile citizens cannot master (so well). Thus it is imaginable that linguistic misunderstandings may frustrate first of all the comprehension of relevant documents and secondly, produce misunderstandings in official contacts with administrative and legal authorities, which may be instrumental in providing access to citizenship rights in the country of residence. Furthermore, such alienation due to language barriers could affect some groups in society more than others, thus creating one more source of inequality in Europe.

This linguistic diversity could also be a hindrance to the equality of citizens before the European law. The same rule providing that EU regulations and other documents of general application shall be drafted in all the EU's official languages (art. 4, Council Reg. 1/1958) might lead to different translations of the same rule in the various EU legal languages, hence to misinterpretations and consequently to a patchy application of European

citizens' rights from State to State. And that could produce de facto unequal rights and/or treatments of Europeans who are citizens of different Member States.

This is partly due to the fact that in this uniquely polyglot organization the presence of EU language-regulation does not correspond to a genuine 'EU Language Policy.' A likely consequence of this passivity is the lack of general, comprehensive reflection on the language matter, within the framework of EU action in the Member States. As a consequence, the impact of these actions on language issues is largely fortuitous.

In this framework, assuming that this linguistic diversity can be a cultural enrichment as well as a practical obstacle, the following part of this publication focuses on some features of the plurilingual and multicultural character of the European Union, which are of crucial importance in shaping European identity and in dealing with the exercise of European citizenship rights.

First of all, issues concerning the definition of the EU identity, the analysis of its roots as well as of the problem posed by the absence of a shared language and the dichotomy national/supranational, are dealt with by ***Roberta Astolfi*** from the theoretical perspective of the circular relation between system of concepts, system of language, and system of law. The application of such a theoretical approach on some practical EU issues shows indeed how a concept-of-value can play a role in connecting and improving the system of language and the system of law. From this perspective, on the one hand, the EU represents a challenge for both a philosophical and political theory of language and law; and on the other hand, practical, political and theoretical reflections and decisions could cooperate in improving a structured society, as the European Union is supposed to be or to become.

Thus, there are more specific and distinctive features concerning the function that language may perform as a fundamental element of cultural identity and diversity in the European context at both the national and EU level.

In this context, the European regulation of State aid for films in the native language of the different EU-member states shows the importance, but also the difficulties in shaping a European cultural identity through the maintenance and promotion of cultural and linguistic diversity and as such richness in film. This is the topic of the contribution of ***Maarten van der Heijden***. He elaborates in particular on the potential tension between such forms of support for national languages and cultures and one of the EU's most fundamental principles, namely that of the free market and the importance of the principle of a level playing field for all potential market participants. I.e. it is a case study of how one EU-policy can conflict with and frustrate another one and how cultural rights can collide with economic rights.

Another contribution focuses on the tension between individual and collective language rights, or in other words between linguistic minorities surrounded by another linguistic majority. Thus ***Simona Gribulyte*** focuses on the recent language-related challenges posed by the Polish ethnic minority in Lithuania. The existence of this minority is a typical product of European history, namely the aftermath of the Second World War. One of the victors, Russia, claimed territory at its western border, whereas loosing Germany had to give away territory. Hence the territories of the countries in between, Poland and Lithuania, were moved also westward, as a result of which former Polish territory and Polish citizens became part of Lithuania. Such tensions and mutual distrust, by challenging bilateral relations, are indeed likely to influence, or even to hinder, European integration and regional cooperation, also from a market perspective. The EU power to intervene in national disputes concerning linguistic minorities and the lack of a clear conceptualization of 'citizenship', 'minority' and 'identity' at the European level are particularly at stake in addressing these complicated issues.

Collective linguistic identities of both majorities and minorities tend to call for expression in public spaces where it should become clear to all those using those spaces. Absence of such a visibility can be a crucial issue for minority groups claiming rights in relation to the state majority. This is the topic addressed by ***Višeslav***

Raos. Referring to many cases in point, his study of the linguistic landscape in Europe and the comparative analysis of the policies in enacting public visibility and presence of linguistic minorities through bilingual or multilingual signs on roads, streets, squares, and public buildings in towns reveal that incontinences still exists throughout Europe and testify to the importance of these issues concerning linguistic minority rights in shaping national and European identity.

In this perspective, the pre-admission language proficiency requirements affecting family reunification at the EU level discussed by ***Gracy Pelacani*** offer an interesting and significant example of how language is an important means to participate in society but, at the same time, of how linguistic diversity and especially pre-language tests could turn into a disproportionate barrier to the exercise of EU citizenship rights. The analysis of the ECJ case law, along with the reference to the content of EU acts on integration of TCNs, the debate concerning the family reunification Directive, and Member States' laws on pre-departure integration requirements give the picture of the concrete barriers, which may arise from this field.

All the aspects addressed by the following papers raise therefore intricate linguistic and cultural issues affecting the exercise of European citizenship rights and new challenges for the European identity, which impose an on-going and dynamic process of finding new balances between all the rights and principles involved.

VALUE IN LAW: CONCEPT AND APPLICATIONS WITHIN THE LEGAL SYSTEM OF THE EU

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1. INTRODUCTION

This paper is based on current doctoral research and accordingly will briefly summarise some issues which could be relevant in a debate about possible perspectives for the EU.

'Values-as-concepts'[399] and the Legal System of the EU have been chosen as a background for this contribution.

A legal system includes values reflecting the purposes and decisions of the organised society by which those values have been constructed. These values are expressed by concepts. The first part of this paper aims to present briefly these bold features of a legal system, i.e. concepts and values as well as their interactions.

Concepts are expressed by words. The epistemic function which concepts possess in their system becomes evaluative and validating in the system of law. Due to this, concepts could represent a bridge between the system of language and the system of law.

A system of law can modify the concepts it includes. These modifications should adapt the concepts to the purposes of the legal system, up to a 'new creation' of these concepts themselves. Nonetheless, these modified concepts are also expressed by the system of language; it should, therefore, recognise and re-adopt their new form.

Since the conceptual background of a community is built and expressed by its system of language, the inclusion of the modified concepts will also modify its original system of concepts. The consequent modification of the concept-of-value will give rise to the so-called circular relation between the system of language, system of concept and system of law.

This paper secondly seeks to sketch how a concept, i.e. the concept-of-value, can connect the system of language and the system of law and also cooperate in their improvement.

The European Union and its development represent a challenge from both a political theory and philosophical perspective of language and law. Given the difficulties that the EU is called upon to tackle, it could be helpful to lead a theoretical, and thus more sober, analysis of them. The purpose of the research on which this paper is based is the application of a theoretical point of view on some practical issues concerning the EU.

The final section of this presentation tries to depict how the blend of both practical and political decisions together with theoretical reflections could be combined to suggest a possible improvement of a structured society, as the EU should be.

2. CONCEPTS AND VALUES: SHARED VOCABULARIES

Concepts could be understood as a quite steady vocabulary and values as a quiet variable – even though not short-term – vocabulary.[400] The former would allow for the expression of mutual values and the latter would

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[399] About the difference between concept-of-value and value, cf. J.E. HEYDE, *Wert. Eine philosophische Grundlegung* (Value. A Philosophical foundation), Kurt-Stenger Verlag, Stuttgart, 1926, p. 15 ff.

[400] R. MANDRY, *Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU* (Europe as community of values. A thelological-ethical inquiry on EU's political self-understanding), Nomos Verlag, Baden Baden, 2009, p. 218 and C. BRÜLL, 'Sprache als Werkzeug diskursiver Konstruktionen kollektiver EU-Identitäten. Der Verfassungsdiskurs als Ankerpunkt einer Analyse'

allow for a sort of condensation of mutual needs, interests and inclinations.[401] This could demonstrate the supposed analogy between the function of concepts and the function of values.

2.1 CONCEPTS[402]

It has been said that the system of language and the system of law can be related to each other through the system of concepts. Moreover, concepts would allow the legal system to consider and respect the needs of its social background responding to its requests. According to this, it would be worthwhile explaining how concepts can achieve this result. The core of the explanation is the epistemic function of concepts in the language system.

Epistemology can be briefly described as the study of human knowledge possibilities. What matters here is researching the relations between human beings and both their internal and external worlds.

The internal world of a human being can be understood as the whole of his psychological dispositions or attitudes, i.e. both the emotional and the rational. The whole collection of actions, reactions and interactions, which a human being maintains with his neighbour and with the objects around him, represents his external world. In order to research the connections between humans and their worlds, concepts have been understood as the tools which allow humans to participate in them. A set of these connections could comprise the knowledge for which humans seek.

Against this background, concepts come to fulfil an epistemic function, that is a function which permits (some sort of) knowledge. This task can be fulfilled by concepts because they can also be understood as some of the features which human connections share.

Concepts are special tools of a mental kind. Saying 'tools' is an attempt to emphasize how concepts could operate as shared vocabularies. A reduction of concepts to bare tools has nevertheless to be avoided, in order also to avoid an interpretation of words as instruments. A second peculiarity of concepts will be the controversial definition of their origin, development, application and purposes.

Speaking of concepts as mental tools, they could be referred to as a primary kind. This means that concepts allow for the building of all the skills humans possess in order to relate each other. As far as the existence of concepts is recognised and accepted, they can also represent a passage between theory and praxis. The analysis of concepts begins with ontological issues, proceeds with researching the origins of knowledge and comes finally to debating about the external world's structures.

(Language as instrument of discursive constructions of collective EU's identities. The constitutional discourse as core of an inquiry), in H. HEIT (ed.), *Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?* (Europa's values. Constitutional patriotism and community of values in the EU?), LIT Verlag, 2006, p. 264 ff.

[401] Ivi, p. 163, but also C. SCHMITT, 'Die Tyrannei der Werte – Einleitung' (The Tyranny of Values – Introduction), in Säkularisation und Utopie. Ernst Forsthoff zum 65. Geburtstag (Secularisation and Utopie), Kohlhammer, Stuttgart/Berlin/Köln/Mainz, 1967, p. 39

[402] i.a., J. L. AUSTIN, *Philosophical Papers*, Clarendon Press, Oxford, 1961; T. BORSCHE (Ed.), *Klassiker der Sprachphilosophie. Von Plato bis Chomsky* (Classics of the philosophy of law. From Plato to Chomsky), C.H. Beck, München, 1996; J. A. FODOR, *Concepts. Where cognitive sciences went wrong*, Oxford Univ. Press., Oxford, NY, 1998; G. FREGE, *Funktion, Begriff, Bedeutung. Fünf logische Studien* (Function, Concept, Reference. Five logical studies) (Ed. G. Patzig), Van den Hoeck&Ruprecht, Göttingen, 1980; G. GABRIEL, *Grundprobleme der Erkenntnistheorie von Descartes zu Wittgenstein* (Fundamental issues of Epistemology from Descartes to Wittgenstein), UTB, Paderborn/München/Zurich/Wien, 1993; P. HANNA/B. HARRISON, *Word and world. Practice and the foundation of language*, Cambridge Univ. Press, Cambridge UK, 2004; L. E. LOEB, *From Descartes to Hume,* Cornell Univ. Press, London, 1981; C. PEACOCKE, *A study of Concepts*, The MIT Press, Cambridge, Mass., 1992; A. ROSS, *Kritik der sogenannten praktischen Erkenntnis* (A criticism of the so-called practical knowledge), Meiner, Leipzig, 1933; L. WITTGENSTEIN, *Tractatus logico-philosophicus*, *Philosophische Untersuchungen* (Philosophical investigations); *Midwest Studies in Philosophy*, XIV, Univ. Of Notre Dame Press, Notre Dame, 1989.

There are various interpretations of 'concept'. Within the framework of the present research, concepts can be considered either as dispositions or as entities. The latter definition concerns an ontological inquiry into concepts, while the former refers to their function.

Focusing on the function of concepts, they would connect world and human beings. In this way, concepts could be understood as dependent on humans.[403] Nonetheless, humans depend on concepts as well: only concepts can allow them to achieve their purposes. Without concepts, no relation with the world and other human beings would be possible.

A human has been understood as always being linked to his fellow man and his (physical and mental) worlds. Only in this way can he entirely develop his skills. With this background, a human could not realise himself without concepts, i.e. without the tools which permit the interaction with his *milieu*, his social environment. If a subject always relates to an object,[404] these relations could be analysed by their shared features. Concepts can be understood as some of these. The most significant issue, which always has to be kept in mind, is that concepts are expressed by words. All the explanations concerning the system of concepts should be set within a system of language.

A system of language should be understood here as the entire set of words, of grammatical and semiotic rules and of their applications as well. Such a system has also to be understood as general, without any connection to a particular language. This kind of generality should guarantee the highest pertinence of the present analysis.

Only languages can form and structure human thoughts. Only within a system of language can those relations be analysed, which allow for the definition of concepts. If the system of concepts gives the individuals the tools to interact with their *milieu*, the system of language structures and reproduces this *milieu* itself. It could be said that the epistemic function of concepts can apply only within a system of language. This issue will be tackled in the second part of this paper.

2.2 VALUES

'Value' looks like a compass which is used by human beings as social animals, that is, as beings living in an organised society. There seems to exist something which makes the word so indispensable that it must also be used when humans exercise their legislative capacity.

Values have been variously studied and described, from ancient times up to contemporary philosophy. Furthermore, they have been analysed in other fields, e.g. economy and sociology.[405] Values can be understood either in a moral or in an ethical way. They are certainly relevant as broad guidelines for private purposes or decisions. Despite that, in a social context the values that matter are those which could be said to be shared.

Shared values, i.e. values with which most of a society agree,[406] constitute the framework of all private values. Shared values can also be defined as primary[407] and it should also be for them to be realised as private [408].

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[403] Or, more precisely, on the human purpose to reach knowledge.

[404] This object can also be another subject.

[405] Cf. e. g., K. BAIER, 'The conflict of value', in LASZLO/WILBUR (ed.), Value Theory in Philosophy and Social Science, Gordon and Breach Science Publishers, 1973, pp. 1-11; C. SCHMITT, 'Die Tyrannei der Werte – Einleitung', op. cit.

[406] This topic will be analysed later.

[407] For a point of view which differs a little bit from the present interpretation, cf. A. BERLEANT, 'The experience and judgment of values', in LASZLO/WILBUR (ed.), Value Theory in Philosophy and Social Science, op. cit, p. 30

[408] As a theorethical foundation of this interpretation cf. F. BAMBERGER, Untersuchungen zur Entstehung des Wertproblems in der Philosophie des 19. Jahrhunderts (Studies on origin of the problem of values in the philosophy of the 19th cent.), vol. I. Lotze, Max Niemeyer Verlag, Halle, 1924, p. 78 ff.

Primary values express interests and aspirations of a certain society. In this way, they define and differentiate it in regard to other societies.

Two further issues appeared in the inquiry on values: the distinction between 'being' a value and 'having' a value as well the distinction between 'being' and 'being valid'. Considerations about value judgements should also be added to the aforesaid distinctions. These three issues should at least be mentioned, because they are the framework for the risk of subjectivity, arbitrariness and a consequent high relativity of values. These risks could be related to a split between values and their historical and social context.[409]

2.3 THE CONCEPT-OF-VALUE

It has been said that, in a social *milieu*, values should be understood as primary. Only in this way can values tackle the risks of subjectivity and arbitrariness as well as responding to the needs of the society. However, how can values express these needs?

The problematic definition of values shows that they are not something concrete. In spite of that, they are neither subjective nor arbitrary.[410]

In order to analyse values, the 'evaluating subject'[411] has always to be taken into consideration. Primary or shared values summarise evaluations with which the most[412] evaluating subjects agree. Thanks to this 'general subjectivity'[413], both subjectivity and arbitrariness could be avoided. 'General subjectivity' is a definition which has been used in order to explain how values could avoid the risk of subjectivity, even though they have to be related to an evaluating subject. A general subjectivity can be described as the set of structures and activities which individuals share. Since the procedures for the achievement of such a generality are controversial, a further question could concern the extent to which subjectivity should be considered in defining it. Within a socially organised environment these procedures could be helped by the circular relation which is the core of this research.

Concepts have been presented as primary and shared mental tools, which allow humans to interact in their social *milieu*. At the same time, values guide human beings in responding to needs, interests and inclinations. If concepts are mental tools enabling one to act socially, they can also be understood as shared features enabling the expression of common needs and interests. With that in mind, concepts represent a shared (primary) code by which values can be expressed. The attempt here will be to show how primary values have – in an organised society – a function which is analogous to the function concepts usually have.

2.4 VALUES AS CONCEPTS

Value could be defined as the shared and mildly elastic instrument that an organised society owns in order to express its needs, interests and inclinations.

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[409] A. BERLEANT, 'The experience and judgment of values', in LASZLO/WILBUR (ed.), Value Theory in Philosophy and Social Science, op. cit, p. 27

[410] J.E. HEYDE, Wert. Eine philosophische Grundlegung, op. cit., p. 44 ff.

[411] A. BERLEANT, 'The experience and judgment of values', in LASZLO/WILBUR (ed.), Value Theory in Philosophy and Social Science, op. cit., p. 28. It has to be noticed that the inquiry on value judgements and their relations with the values-as-concepts concerns, above all, this issue. Another issue with this topic refers to the role of value judgements. Do they give rise to values or do values express themselves by value judgements? Cf. R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU, op. cit., p. 158 ff.

[412] A subsequent question could obviously concern the meaning of 'majority'. Some reflections about this issue will be sketched in the following pages.

[413] F. BAMBERGER, *Untersuchungen zur Entstehung des Wertproblems in der Philosophie des 19. Jahrhunderts*, op. cit., p. 78

In a social field, values should be something capable of improving people's lives.[414] If this were the case, than values would become goals, which could guide political decision-making.[415] In order to fulfil this purpose, these goals should be shared.[416] Under these circumstances, values have to refer to some general kinds of 'super individual reason' in which the individual participates.[417] Thanks to this, values can express some mutual guidelines for acting.

'Super individual reason' is a term borrowed from Johann G. Fichte in order to explain the social, political and cultural development of a nation state. This kind of reason could be different for each different national state or, in the present analysis, for each organised society. The super individual reason refers to a *supra*-individual subjectivity – i.e. a general subjectivity – in which individuals just participate. According to Fichte, such a construction would also depend on a natural inclination which seeks for the *genus´* purpose. However, here it is worthwhile to intend the aforesaid reason in a socio-political way, i.e. to understand it as being developed within and by an organised society.

Remarkably, values differ according to the society by which they have been produced. Values have different degrees and kinds, just as concepts[418] do. The former express human intentions, while the latter represent shared human tools. Human intentions can be shared, but they do not need to be. Shared intensions, i.e. shared (primary) values, show typical features of a society. It is worthwhile repeating that, in this way, values mark the identity of a society but also separate it from other social groups. Furthermore, conflicts of values can also arise within the same society.[419] Conflicts of values are the core of various and relevant critical points of view concerning values and their inclusion in a legal systems.[420]

It must be noted that values, as guidelines for acting, seek realisation. Their classifications allow for this in defining the priorities of a specific group of human beings. Different kinds of classifications or hierarchies characterise different kinds of societies. These hierarchies, to borrow an economic term, could be said to be 'elastic'. 'Elastic' means that they react to the changes of the communities they represent and in which they belong.

Since values are expressed by concepts, primary values can recognise and show social changes. Due to their epistemic function, concepts should fit with the community in which they belong. Nevertheless, they need a long time to recognise the modifications which can occur in this community. In this way, concepts would avoid too high a level of relativity within the hierarchies of values.

Concepts would represent some features of a community's shared knowledge[421]; (primary) values would represent the shared needs, interests and inclinations of an organised society. Primary values as shared purposes of a society refer both to local and temporal dimension, which concern not only the present but also the future. They provide some usable starting points or useful changes which should be recognised by the society as a whole. Concepts, in turn, relate to the sharing of knowledge, which takes place both in the past and

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[414] This definition borrows some features from economical points of view on the concept of value.

[415] W. HALLSTEIN, Die europäische Gemeinschaft4 (The european community), Econ Verlag, Düsseldorf/Wien, 1973, p. 49

[416] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU, op. cit., p. 47

[417] F. WAPLER, Werte und das Recht (Values and Law), Nomos Verlag, Baden Baden, 2008, p. 77

[418] Cf, i.a., D. PFORDTEN von der, Suche nach Einsicht. Über Aufgabe und Wert der Philosophie (Searching for knowledge. On duty and value of philosphy), Meiner, Hamburg, 2010 cap. VII

[419] N. RESCHER, 'The study of value change', in LASZLO/WILBUR (ed.), Value Theory in Philosophy and Social Science, op. cit., p. 17

[420] Cf. The well-known critical point of view of C. SCHMITT in Die Tyrannei der Werte (The Tyranny of Values) but also T. RENSMANN, 'Grundwerte im Prozess der europäischen Konstitutionalisierung. Anmerkungen zur Europäische Union als Wertegemeinschaft aus juristischer Perspektive' (Fundamental values in the european constitutional process) in D. BLUMENWITZ/G.H. GORNIG/D. MURSWIEK (Ed.), *Die Europäische Union als Wertegemeinschaft* (The European Union as community of values), Dunker&Humblot, Berlin, 2005, p. 70

[421] 'Knowledge' means here the comprehension of the whole system of relations between humans and their (physical and mental) worlds.

also in the present. The conceptual background allows for the building of new perspectives in consideration of past situations.

3. System of Language, System of Concepts, System of Law: Inquiry into a Circular Relation

So far, both concepts and values have been set against a social background. Concepts refer to the shared knowledge of a *community*, whilst values refer to shared needs, interests and inclinations of an *organised society*. Both communities and organised societies are social contexts. In such contexts, something should make possible the connection of the individuals. Languages could represent a possibility for achieving this connection. However, the existence of a legal system points out the difference between the two social backgrounds mentioned above.

An organised society has been understood as being a community which has provided itself with a legal system. According to this, a legal system might seem to be the final step of the development in human social aggregations. As system of language, system of concepts and system of law are in a circular relation, this relation should continuously improve each system and, therefore, also their social background. This second section aims to show that a legal system is not a conclusion but rather just a phase of this development.

3.1 The Role of the System of Language

Concepts can be expressed only by words. This definition, which has been previously given, is based on the language system's relevance in building shared backgrounds.

It can briefly be stated that only languages can allow both the building and the recognition of shared contents. Only by means of languages can those contents be thought, grasped and expressed which have been defined as tools for achieving knowledge, i.e. concepts. Even though each particular system of language entails relevant difficulties[422], only the system of language in its general form[423] allows for the expression of concepts. Due to this dependence, neither concept nor values – if values are understood as concepts – could be *a priori*[424] or immutable.

Since each community refers to a particular system of language, each organised society could have its specific hierarchy of values. Being expressed by concepts, values reflect the different historical, political and cultural features of the system of language system to which these concepts refer. Furthermore, for each individual uses his particular system of language, there could be almost as many hierarchies of values as individuals. This could give rise to conflicts of values. However, these conflicts are not just an obstacle: they also represent a possibility. A strategy to deal with this chance will be outlined below.[425]

The risks of bare subjectivity, arbitrariness and high-relativity have been related to a split between values together with their historical and social context. These risks could be avoided by relating concepts (and, consequently, values) to their social background. A system of language entails various historical, political and cultural features. Since both concepts and values fulfil their task within this system and by it, the system of language seems to be the unavoidable social background to which they should be referred. The aforesaid risks could, therefore, be tackled by the link between system of concepts and system of language.

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[422] Which system should be used? Who decides which system is the correct one? Are there dominant systems? These are just some examples of the questions which could arise concerning systems of languages.

[423] By the definition 'general form' it has been tried to set the (general) semiotic structure of a shared communicative code. This definition could therefore also refer to other systems beyond the linguistic ones, even though the latter represent a facus of these pages.

[424] C. BRÜLL, 'Sprache als Werkzeug diskursiver Konstruktionen kollektiver EU-Identitäten. Der Verfassungsdiskurs als Ankerpunkt einer Analyse' in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 261

[425] Cf. 2.3 The role of the System of Law

3.2 THE ROLE OF THE SYSTEM OF CONCEPTS

The problems concerning (hierarchies of) values as guidelines for political decisions could be handled by relating them to their social background, i.e. their system of language.

Concepts, by their steadier construction in the system of language, would soften too high a level of relativity within the hierarchies of values. In addition, the development of an evaluating general subjectivity in this system could avoid subjectivity and arbitrariness in organising these hierarchies.

These corrective procedures would be applied through discursive practice. According to this, concepts can be used in order to define values only in a 'hermeneutical space'. Only in such a space, can new experiences[426] and disagreements be taken into consideration.

As 'discursive practices' have been understood as all those communicative practices which take place within an organised society and which also respond to some specific requirements in order to be fair.

The dispute about the principles to which these practices should respond and about the results these practices could achieve is relevant. In spite of that, the assumptions about the enlargement of the public debate and about the confrontation between different members[427] of an organised society that these practices imply are also remarkable.

To be called fair, these aforesaid practices should be set in a space which should allow people to participate in a public debate. In this 'hermeneutical space' all the results which can be achieved, could and should be continuously structured, re-structured and interpreted according to their communicative *milieu.*[428]

By interpreting values as concepts, disagreements, new experiences and the problem of the majority can be tackled. What Claudia Attucci calls 'process of reciprocal horizontal justification' could apply thanks to these concepts.

Concepts would – in a theoretical way – be those 'implicit assumptions' which would make it possible to understand disagreements.[429]

As epistemological tools, concepts make knowledge possible. Knowledge also entails understanding diversity. A different stance could be understood by the recognition of those shared contents upon which the knowledge was based, i.e. concepts. New experiences could also be tackled in this way.

This does not mean that disagreements and new experiences will always be accepted, but they could at least be understood. Only due to this understanding, will it be possible to develop a real discursive practice.

This discursive practice – although highly problematic – could help to increase the involvement of the public in the discussion of primary values. Thanks to the recognition of more points of view, that majority which first defined the primary values of the society can be enlarged. In this way, the problem of the majority could also be tackled.

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[426] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU, op. cit., pp. 174-5

[427] Different roles, activities, 'classes' and so on.

[428] This milieu can be historical, political, social, economic and so on.

[429] C. ATTUCCI, 'European values and constitutional traditions in the EU charter of fundamental rights' in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 254 ff.

3.3 The role of the System of Law

Discursive practices have been defined as highly problematic. A relevant issue about them concerns the realisation of their outcomes. Due to the permanent openness of hermeneutical and discursive practice, it could be difficult to achieve an applicable appropriate final result.

Thanks to its principle of legal certainty, the legal system comes into play in order to deal with this issue. According to this principle anyone should be capable of considering, as much as possible, the legal consequences of a certain conduct. Although this principle is also highly controversial, above all concerning its realisation, it represents in any event a principle for a legal system.

A legal system should represent a reliable set of guidelines[430] ruling on human actions in order to achieve some results. If this system aims to be something more than a bare transcript of prescriptions or, at worst, an instrument of domination, it should also be shared.

It could be supposed that the purposes of a shared legal system should reflect the needs, interests and inclinations with which the bulk of society agrees. Accordingly to this, primary values as purposes leading organised societies should be included in the legal system of these societies.

This inclusion is based on, at least, a twofold reason. Firstly, primary values allow for the defining of the society which builds the legal system. Secondly, (primary) values-as-concepts allow also for the sharing of at least some fundamental features of this system.

3.4 Clues of a Circular Relation

It has been said that primary values refers to an organised society. Such a society would arise when a community gives itself a legal system. Nonetheless, in order to create a shared legal system, some primary values should already be available. This could be a *petitio principii* but could also show the link between the system of concepts and the legal system.

In this case, the problem of a *petitio principii* – i.e. of an argument which entails in its premises the conclusions it wants to show – concerns the definition of 'organised society' as a community which gave itself a legal system. Since it has also been also said that some primary values should already be available in order to create a shared legal system, an overlapping could indeed appear. Nonetheless, this overlapping can be recognised as a signal of the circular relation on which the research focuses.

Furthermore, this circularity affects the influence of the legal system on discursive practices. It could reveal the possibility also to improve the system of law by its connection with the system of language and the system of concepts.

Values should seek their realisation and the legal system could fulfil this purpose, for it can crystallise the mutable outcomes of discursive practices in its positive codifications. In this way, the legal system would contribute to the realisation of values and to the application of discursive practices.

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[430] The topic of the features of a legal system is a wide one. It suffices here to say that the legal system has not been understood as a bare set of norms. About this topic, cf. also D. PFORDTEN Von der, Rechtsphilosophie. Eine Einführung (Philosophy of Law. An Introduction), Verlag C.H.Beck, München, 2013, p. 32 ff.; 'On Obligations, Norms and Rules', in M. ARASZIEWICZ (Ed.), Problems of Normativity, Rules and Rule Following, Springer, Cham, 2005; 'About Concepts in Law', in J. HAGE/D. PFORDTEN Von der, Concepts in Law, Springer, Dordrecht, 2009

However, a legal system is also made up of norms. Against the background of this research,[431] norms could be interpreted as explaining how one should (or should not) act in order to achieve some certain goals. As features of a legal system, norms also represent the will of those to whom they refer.[432] These interested parties should, at the same time, be those who contributed to the creation of the legal system itself.

Norms can represent the will of those they refer to thanks to the concepts that the norms contain[433]. The epistemic function which concepts have within the system of language becomes an evaluative and founding one in the system of law.[434]

Due to the epistemic function of the concepts they are expressed by, values can found the system of law. At the same time, this epistemic function will allow for the evaluative function which the norms also have.

The new functions that the concepts take on within the legal system could deeply modify these concepts. According to this, the new meanings of the concepts in the system of law would no longer link with their original meaning.

Nonetheless, it has to be kept in mind that concepts should always be understood against a hermeneutical background. The link between concepts and their social background cannot be broken; otherwise, all the risks concerning values would again arise. This could provide the starting point of the circular relation 'system of concepts-system of language-system of law'.

Even though the legal system is a very relevant stage of this relation, it cannot nevertheless be isolated: its capacity to contain the variability of values is limited.

Concepts should be reintroduced into the system of language. Only in and through this system can those discursive procedures apply, which allow for the adjustment of values according to the society by which they have been expressed. Obviously, if the system of law aims to achieve its purposes, it should also recognise and accept these further modifications of its concepts. If the legal system embraces these further modified concepts, it could also readapt them again according to its aims. This would entail another modification, which would again begin the exchange between a system of concepts, system of language and system of law.

The circular relation should be a timeless one. Only in this way can the three systems constantly contribute both to their improvement and to the improvement of the society in which they belong.

4. Values in the Legal System of the European Union

It will be explained now how the theoretical analysis could be connected with some issues concerning the European Union and how this link could help in developing its legal, political and social structures. If it were not the case, this theoretical inquiry could or at least allow for a better understanding of them. The analysed issues concern the definition of the EU´s identity, an inquiry on into its roots as well as the problem of a shared language.

This consideration will try to show how the inclusion of values-as-concepts in the treaties of the European Union can be helpful in tackling the issues mentioned above. The circular relation 'system of concepts-system of language-system of law' has to be the unavoidable framework for this explanation. It has been suggested

[431] This research refers to democratic political systems.

[432] D. PFORDTEN Von der, Über Begriffe im Recht (On Concepts in Law), ARSP, 98, IV, 2012

[433] Ibidem

[434] Ibidem

that only within this framework could the European Union could improve itself in responding to the needs of its members.

4.1 A Controversial Self-Definition

In analysing the European Union through the concept of value, a key dispute arises. This controversy concerns the comprehension and self-comprehension of the EU itself.

The problem focuses on the difference between two different interpretations. On the one hand, the EU could be understood as a community of values;[435] on the other hand, it could be interpreted by means of the so-called constitutional patriotism.[436]

Those who define the identity of an organised society according to the shared values this society expresses in its legal system, define this society as a community of values. These values would provide the society with a sense of togetherness which should be the basis for the construction of a political identity beyond the cultural identity. Despite that, this paper will show that such a view does not need to refer to a cultural identity. A community of values can work properly only against the background of a theory which not only implies both concepts and law and but also which understands the cultural identity only as a hermeneutical space.

Constitutional patriotism attempts to relate and realises the shared potentialities and values of a community within a constitutional text. This text would represent the unifying feature by which the members of a political community should be represented. Moreover, these members should consider this constitution – and not their shared values – as their own expression and, accordingly, as an expression of their identity.

It could be said that these theories imply a different timing. Whereas the former establishes the identity on values and, *therefore*, includes them in a constitutional text, the latter creates the identity on a constitutional text and, *therefore*, understands the values that this text includes as being shared.

In this way, it seems that these perspectives represent the circular relation 'system of concepts-system of language-system of law'. Consequently, they could be understood as being connected.

However, this paper aims to show how some practical improvements could be achieved through a theoretical inquiry. With this in mind, it would be worthwhile taking into consideration a current situation, without further conjectures. Shared or common values have been already included in the legal system of the European Union.[437] Under these circumstances, the European Union should at least be referring to them. This analysis will concern the inclusion of values in the legal system of the EU and the interpretation of the Union as a community of values. The first question about this inclusion refers to its purposes. This issue also implies a second one, which concerns the contents of the values which should be included.

4.2 Tackling the First Issue

It could be said that the inclusion of shared or common values allows for a definition of the European Union. Moreover, this inclusion allows also for its self-definition. Thanks to the interpretation as a community of values, the EU could be understood and could understand itself as well.

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[435] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU, op. cit.; D. BLUMENWITZ/G.H. GORNIG/D. MURSWIEK (Ed.), Die Europäische Union als Wertegemeinschaft (The European Union as community of values), op. cit.

[436] H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU? (Europa's values. Constitutional patriotism and community of values in the EU?), op. cit.

[437] Cf. Charter of fundamental rights of the European Union; Treaty of Lisbon; Treaty of Amsterdam

'Community' refers to a political community, i.e. a socially created, discursively realised and continually improving community.[438] Within such a community, values comes to be objective guidelines for decision-making.[439]

This is relevant due to the difference between community and organised society which has been outlined above. According to the interpretation of 'community' as 'political community', 'community' could be understood as 'organised society'. In this way, the role of values would be clearer. Since values become objective guidelines for decision-making, they have to be included in the legal system. The objectivity, which values should have, could be achieved through this inclusion.

It has been shown that the legal system can deal with the risks implied by the concept of value. Furthermore, this system can also allow for the realisation of values. Within a legal system, values fulfil a double function. They both define a political community and provide it with guidelines for the decision-making.

It must be noted that if a community refers to some national heritage, for the members of this community there could be no identification as citizens. They could achieve only a cultural identity[440], in which case this community will not be a political one.

Identification with a cultural background could allow for the recognition of shared concepts but would not suffice for the expression of primary values.

In order to be expressed, primary values require shared concepts as well as some corrective practices. These practices can apply only within the circular relation, which connects a system of concept, system of language and system of law.

While a system of language, as the social background of a *community*, could suffice to express shared concepts, shared values need also a legal system in order to be realised. It could be said that a cultural identity could refer to a *community* but does not refer to a political community, i.e. to an *organised society*. Since the European Union would be supposed to be such a society[441], a different kind of identification should be achieved.

Moreover, a cultural identity, although important, would not avoid a possible conflict between national and supranational entities. The European Union – as a supranational entity[442] – handles the possibility of this conflict thanks to some peculiarities[443] which concern the application of its legal system. On the contrary, the EU as a cultural community would not be provided with a shared legal system. However, only by this system could the EU tackle one of its most relevant problems.

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[438] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU , op. cit., p. 203

[439] V. BALLI, 'Europäische Werte in Praxis?' (European values in praxis?), in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 165; W. HALLSTEIN, Die Europäische Gemeinschaft, op. cit., p. 49

[440] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU , op. cit., p. 123

[441] V. BALLI, 'Europäische Werte in Praxis?' (European values in praxis?), in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 165; W. HALLSTEIN, Die Europäische Gemeinschaft, op. cit., p. 164

[442] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU , op. cit., p. 187; C. WIESNER, 'Die Identität Europas und die Balance zwischen partikulären und universalen Werten' (Europa's identity and the balance between particular and universal values) in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 210

[443] E.g. the implementation of the European treaties through the particular, national legal systems Cf. T. SHMITZ, 'Die Charta der Grundrechte der Europäische Union als Konkretisierung der gemeinsamen europäischen Werte' (The Charta of fundamental rights of the European Union as realisation of the shared european values) in D. BLUMENWITZ/G.H. GORNIG/D. MURSWIEK (Ed.), Die Europäische Union als Wertegemeinschaft (The European Union as community of values), p. 85

It could be concluded that an identification as citizens should be achieved in order to define a political community. This identification can be achieved through the political values.[444]

These values should be called political due to their normative function[445] which they fulfil. Being included in the legal system, they could and should be realised. In this way, they become objective guidelines for political decision-making.

The inclusion of primary values in the legal system of the European Union could allow for its definition and self-definition as a political community. Being a political community, the EU could deal with some difficulties which it is called upon to tackle.

4.3 Tackling the Second Issue

The (primary) values which have been included in the European treaties could be not supported[446] by all members[447] of the European Union. Nonetheless, these members – as citizens – should share these values.

This split between being a citizen of an organised society and being a member of a community does not imply any inconsistency and could be explained thanks to the relation between the system of concepts and the content of the primary values.[448]

The contents of primary values represent the minimal but fundamental core of a political community. Being expressed by shared concepts, primary values should be recognised by the members of the *cultural* community. At the same time, (primary) values-as-concepts should be expressed by the members of the *political* community.

Primary values are expressed by shared concepts and they should, therefore, be at least understood by the members of the community in which these concepts have been produced.

This understanding represents a starting point for the discursive and corrective practices which have been discussed above.[449] There may also be some values which could be not shared: they will not be primary. They could define a community, albeit one which is not political.

If values were not included in the European treaties, there would be no possibility of tackling the important issue of the European roots. Without the relation 'system of concepts-system of language-system of law', the risks which have been referred to values mentioned above would arise again. However, this time, they would arise in a community. According to this, and without the inclusion of values in a legal system, there would be no possibility of applying any corrective practice.

Shared concepts, and not any cultural heritage, represent the core of an organised society. The problem of the European Union's cultural roots could also be tackled thanks to the very contents of primary values.

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[444] R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU , op. cit., p. 123

[445] In a legal system, values fulfil also those functions which have been described above. Cf. '2. System of Language, System of Concepts, System of Law: Inquiry into a Circular Relation'

[446] Cf. R. MANDRY, Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU , op. cit., p. 100 ff.

[447] It could be asked who are the real members of the EU.

[448] Cf. 2.2 The Role of the System of Concepts

[449] Ibidem

4.4 Shared Vocabularies, again

Within the legal system of a political community, primary values have to fulfil a *normative* function. This could make the differences of languages within the European Union a *normative* difficulty.[450]

The absence of a shared language, i.e. of a shared social background, could prevent the expression of shared values as well as the expression of some guidelines for decision-making. Under these circumstances, the (self-) definition of the European Union would be impossible. However, this deficiency could be avoided: concepts and values, as shared vocabularies, could overcome it. The issue of languages' differences within the EU could also be handled in this way.

Concepts and values can fulfil this purpose because they are based on languages. The language, in its general form of a social background, allows them to respect both cultural and political communities. It has been said that values are not immutable. The contents of primary values should be related to the circular relation between system of language, system of concept and system of law. According to this, these contents should always reflect the identities of the members of the community. At the same time, they should also represent its political identity.

The epistemic function which concepts possess makes the values understandable. They no longer depend on a particular language. Primary values will depend on a core of shared concepts which relate the humans and the world beyond their contingency. It has been shown how the relation system of language-system of concept-system of law can deal with this contingency in order to achieve an improvement of the three systems.

Thanks to their epistemic function, shared concepts, as content of the primary values which have been included in the treaties, could overcome the lack of a largely shared language.

5. Conclusion

The attempt of this paper was to show how some theoretical reflections could help in dealing with some practical issues. The paper focused, above all, on the circularity of the relation 'system of concepts-system of language-system of law'. According to this, the values-as-concepts and the legal system of the European Union have been used in order to connect the theoretical inquiry into this relation with a practical, political challenge.

Against this background, it could be said that this so-called circular relation both requires and justifies the inclusion of values(-as-concepts) in the European treaties.

The continual process of improvement which this relation represents comes into play in order to tackle some relevant topics of the dispute on the European Union.

Unfortunately, not all the most important issues from this discussion could be analysed here. For the topics which have been chosen, e.g. the dichotomy of national entity/supranational entity, the roots of the EU or the difference of languages, it has been possible also to give only a brief outline. The aim of this paper was rather to suggest a way of handling these issues in order to achieve a better understanding.

The impossibility of breaking the circular relation between system of concepts, system of language and system of law implies the impossibility of dividing the legal and political constructions from their social background. It could be concluded that this impossibility can also imply the impossibility of separating a political praxis from

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[450] C. WIESNER, 'Die Identität Europas und die Balance zwischen partikulären und universalen Werten' (Europa's identity and the balance between particular and universal values) in H. HEIT (ed.), Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?, op. cit., p. 212

the theoretical reflections on it. The relation 'system of concepts-system of language-system of law' could represent a tool enabling one to explain, develop and improve the social constructions of the human world.

REFERENCES

J. L. AUSTIN, *Philosophical Papers*, Clarendon Press, Oxford, 1961

F. BAMBERGER, *Untersuchungen zur Entstehung des Wertproblems in der Philosophie des 19. Jahrhunderts* (Studies on origin of the problem of values in the philosophy of the 19th cent.), vol. I. Lotze, Max Niemeyer Verlag, Halle, 1924

D. BLUMENWITZ/G.H. GORNIG/D. MURSWIEK (Ed.), *Die Europäische Union als Wertegemeinschaft* (The European Union as community of values), Dunker&Humblot, Berlin, 2005

T. BORSCHE (Ed.), *Klassiker der Sprachphilosophie. Von Plato bis Chomsky* (Classics of the philosophy of law. From Plato to Chomsky), C.H. Beck, München, 1996

J. A. FODOR, *Concepts. Where cognitive sciences went wrong*, Oxford Univ. Press., Oxford, NY, 1998

G. FREGE, *Funktion, Begriff, Bedeutung. Fünf logische Studien* (Function, Concept, Reference. Five logical studies) (Ed. G. Patzig), Van den Hoeck&Ruprecht, Göttingen, 1980

G. GABRIEL, *Grundprobleme der Erkenntnistheorie von Descartes zu Wittgenstein (*Fundamental issues of Epistemology from Descartes to Wittgenstein), UTB, Paderborn/München/Zurich/Wien, 1993

W. HALLSTEIN, *Die europäische Gemeinschaft* (The european community), Econ Verlag, Düsseldorf/Wien, 1973

P. HANNA/B. HARRISON, *Word and world. Practice and the foundation of language*, Cambridge Univ. Press, Cambridge UK, 2004;

H. HEIT (ed.), *Die Werte Europas. Verfassungspatriotismus und Wertegemeinschaft in der EU?* (Europa's values. Constitutional patriotism and community of values in the EU?), LIT Verlag, 2006

J.E. HEYDE, *Wert. Eine philosophische Grundlegung* (Value. A Philosophical foundation), Kurt-Stenger Verlag, Stuttgart, 1926

E. LASZLO/J.B. WILBUR (ed.), *Value Theory in Philosophy and Social Science*, Gordon and Breach Science Publishers, 1973

L. E. LOEB, *From Descartes to Hume,* Cornell Univ. Press, London, 1981

R. MANDRY, *Europa als Wertgemeinschaft. Eine theologish-ethische Studie zur politischen Selbstverständnis der EU* (Europe as community of values. A theological-ethical inquiry on EU's political self-understanding), Nomos Verlag, Baden Baden, 2009

C. PEACOCKE, *A study of Concepts*, The MIT Press, Cambridge, Mass., 1992

D. PFORDTEN Von der, *Rechtsphilosophie. Eine Einführung* (Philosophy of Law. An Introduction), Verlag C.H.Beck, München, 2013

D. PFORDTEN *Über Begriffe im Recht* (On Concepts in Law), ARSP, 98, IV, 2012

D. PFORDTEN *Suche nach Einsicht. Über Aufgabe und Wert der Philosophie* (Searching for knowledge. On duty and value of philosphy), Meiner, Hamburg, 2010

D. PFORDTEN ‚About Concepts in Law', in J. HAGE/D. PFORDTEN Von der, *Concepts in Law*, Springer, Dordrecht, 2009

D. PFORDTEN 'On Obligations, Norms and Rules', in M. ARASZIEWICZ (Ed.), *Problems of Normativity, Rules and Rule Following*, Springer, Cham, 2005;

A. ROSS, *Kritik der sogenannten praktischen Erkenntnis* (A criticism of the so-called practical knowledge), Meiner, Leipzig, 1933

C. SCHMITT, 'Die Tyrannei der Werte' (The Tyranny of Values), in *Säkularisation und Utopie. Ernst Forsthoff zum 65. Geburtstag*, (Secularisation and Utopia), Kohlhammer, Stuttgart/Berlin/Köln/Mainz, 1967

F. WAPLER, *Werte und das Recht* (Values and Law), Nomos Verlag, Baden Baden, 2008

L. WITTGENSTEIN, *Tractatus logico-philosophicus*, *Philosophische Untersuchungen* (Philosophical investigations); *Midwest Studies in Philosophy*, XIV, Univ. Of Notre Dame Press, Notre Dame, 1989

UNITED IN THE UNDEFINED: BALANCING CULTURAL DIVERSITY AND INTERNAL MARKET GOALS IN EUROPEAN REGULATION FOR STATE AID FOR FILMS

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1. INTRODUCTION

In his 1897 publication 'What Is Art?' Leo Tolstoy defined art as the communication of an emotion: 'Art begins when a man, with the purpose of communicating to other people a feeling he once experienced, calls it up again within himself and expresses it by certain external signs.' Though he did attend to the task and came up with some answers (from a Christian moralistic perspective), he admitted that defining what is meant by art, and especially what is good, useful art, is a virtually impossible undertaking. He did come to a conclusion that is maintained by many today, art is not pure aesthetics. Art and beauty are mystical, subjective or maybe even ungroundable, but we know art when we see it, and know when something changes us from within, the effect lies not in the art, but in society itself. This problem of the difficulty of valuing art, or here valuing the diversity of art, is also at play at the political and legal level. Instead of the artist or the thinker, it is however now the policy-maker, the lawyer and the European bureaucrat deciding what art is, and what art is important. As lawyer and writer Franz Kafka probably rightly said, 'it's only because of their stupidity that they're able to be so sure of themselves'. But our structural thinking, where we work with abstraction then valued as truth, a 'body of rules' as H.L.A. Hart said, does show us what is at play. The way we think and distinguish culture from commerce in our contemporary European society is not merely a legal reality, but has strong implications on future policy and the future Europe.

In global and in current European Union audiovisual discourse there is an ongoing discussion about in what way culture should be valued: from a market perspective or through a citizen perspective that embraces special cultural, societal or aesthetic form of valuing? This results in an ongoing inherent tension between the abstract concepts of 'culture' and 'trade' that can be led back to the tension between 'citizenship' and 'consumership' or the 'market' and the '*polis*'. On an international legal level the current debate took form in the early 1990s at the Uruguay Round of trade negotiations over the '*exception culturelle*' that seriously threatened the creation of the World Trade Organization.[451] The European Community and its member states played a key role in this diplomatic 'battle' that is still going on today[452] and on the WTO-level has seemed to have come to a (temporary) deadlock.[453] This cultural exception rhetoric meanwhile has turned into rhetoric of cultural diversity on different stages, notably at the European Union level, the World Trade Organization level and at the level of the UNESCO.

The European Union has been a major actor in this discussion leading to the adoption of the 2005 *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,* but the true effect of this convention is yet unclear. What is clear is that at an institutional and at a rhetoric and legal level, because of our general *praxis* of negative integration within the structure of the European body of rules, a situation is created in which *expressio unius est exclusio alterius*; in other words, culture and trade are still seen as two entities that exclude each other i.e., as opposites.

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[451] Sandrine Cahn and Daniel Schimmel. 'Cultural Exception: Does It Exist in Gatt and Gats Frameworks-How Does It Affect or is It Affected by the Agreement on Trips, The' (1997) 15 Cardozo Arts & Ent.LJ 281

[452] Joshua Chaffin. 'Hollande wants right to 'cultural exception'' *Financial Times* (15 March 2013)

[453] News Wires. 'EU reaches deal on French 'cultural exception' *France24* (15 June 2014)

Research on cultural diversity has mostly been done on a level of political identity, on issues of citizenship and *demos* and democratic deficit. I want to focus on the explicit institutional attempts at the past interpretations, critiques and ways of promoting the creation of European cultural identity through the maintenance of cultural diversity in film, in this context also called media pluralism by the Council of Europe. [454] This policy is failing in two ways. First on the international level, the diversity that the Union promotes is artificial and paradoxical. The policy is also failing on a national democratic level. I come to these conclusions keeping in mind the new research presented at the semi-annual Brookings Papers on Economic Activity that suggests that the traditional strategy for promoting integration has reached a Catch-22 impasse.[455] Contradicting Monnet's prediction that Europe will be 'forged by crisis'[456] they predict that instead of 'more Europe', the trend in the near future may well be the revival of nationalism to the detriment of a European identity based on acceptance of diversity.[457] In a time that the attempts to unify the European continent by economical force seem to have failed and supranational institutions are becoming increasingly unpopular among actual Europeans, it is time for new questions and new strategies: new roads of thought to address how to reconcile the consumer-oriented and the citizen-oriented approaches the EU takes. In the cultural area, and mainly in state aid for films this is however strongly limited because of the EU's limited competence and the thus necessary negative integration.

Though research has been done on this paradox in European film policy, which also concludes that the Union is following a market approach in its cultural policy, there are still no answers to basic, more abstract questions concerning policies and laws and the powers in play, the choices made and the approaches taken when it comes to the application of the cultural diversity ideal in cultural and economic law. At this level we can also speak of a Catch-22 impasse that is reflected in the stagnated WTO negotiations where the cultural diversity exception is not legislated and under constant pressure.[458] It is my strong belief that this all is very much related to the narrow concept of trade adopted by the European Union and internally creates an empty idea of culture and cultural diversity, and makes our battle for diversity that is led by our fear of globalization, quite nonsensical. This limitation of legal thought is strongly related to the limited competence and negative integration that originates from the Monnet structure of integration and current CJEU and Commission policy.

Through connecting the debate on European identity with the debate on cultural film aid, in the next chapters I will make the effort to show in what way the European Union actually values cultural film and cultural diversity, what arguments are at play, what dynamics come forth and what the lack of taking a stand in what culture and cultural diversity means results in on a practical and ideological level. To do this I will focus on the European state aid for film regulations looking both at past discourse and *modi vivendi* as at the Commission's newer Cinema Communications of 2001 and 2013 on state aid for films.

2. The Legal Framework of European State Aid for Films

2.1 Cultural diversity on the international and European level

On 20 October 2005, the 33rd UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) by a majority of 148 votes to 2. Up to the 2005 UNESCO Convention the only model for cultural diversity promotion were legal systems based on the market economy (i.e., the WTO). The CCD is a reaction to globalization, or more precisely the effects it has on

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[454] Media pluralism is however also often used to refer to having multipe media agencies to secure free speech and does not always refer to cultural diversity at all.

[455] Luigi Guiso, Paola Sapienza and Luigi Zingales. 'Monnet's Error' (Issued in April 2015) NBER Working Paper No 21121

[456] '*L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises.*" Jean Monnet. 'Mémoires, Fayard' (1976)

[457] Luigi Guiso, Paola Sapienza and Luigi Zingales, 'Monnet's Error' (Issued in April 2015)

[458] Mira Burri, 'The European Union, the World Trade Organization and Cultural Diversity' in Evangelia Psychogiopoulou (ed), *The European Union and Cultural Diversity* (Palgrave Macmillan 2014);Jurgen Habermas. 'Multiculturalism and the liberal state' (1994) 47 Stan.L.Rev. 849

culture.[459] The CCD was thus an attempt to give voice to cultural norms within public international law. This stands in contrast to the Marrakesh Agreement establishing the World Trade Organization (WTO), and thereto the belonging GATT, GATS and TRIPS Agreement and the currently negotiated TTIP Agreement.

The CDD has a dual goal, first to establish legal recognition of the dual nature of cultural goods and services as objects of trade and second, the recognition or (re)establishment of the cultural sovereignty of the Parties, giving them the right to adopt their own cultural policies.[460] These are goals we know from the cultural exception rhetoric that was at play during the WTO creation and mainly promoted by France. The cultural diversity concept however got rid of the anti-America connotations and gave the concept of new neutrality. Also it puts cultural diversity as something that can be analyzed quantitatively, through statistics, as the UNESCO practices with its Unesco Institute for Statistics (UIS). It thus removed its older anti-American ideology and protectionist ulterior motives.

The definition of cultural diversity in the Convention, that is also the first legal definition ever of cultural diversity, can be found in Article 4 CDD that refers to it as 'the manifold ways in which the culture of groups and societies find expression'. The definition is followed by the sentence: 'These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.' This gives the Convention a close relation to markets and production. Article 5 CCD gives unlimited discretion to the Parties to decide on the cultural policy they deem appropriate for the promotion of the diversity of cultural expressions. The CDD has been adopted by all Member States of the EU and also by the EU itself through Council Decision 2006/515.[461] The way this Convention as a mixed agreement will influence European law will be discussed in the thesis.

2.2 Cultural diversity on the European level

When the European Economic Treaty was drafted in 1957 there was hardly any indication that the competence of the European Union could extend to cultural matters. In 1968 the ECJ in the Italian Arts Treasures case that was started because Italian government prohibited the exportation of art treasures, the ECJ had decided that also these objects were cultural goods, leaving no room for a cultural exception or cultural diversity, and placing cultural objects under the system of market freedoms.[462] Despite there being no basis for Community action, the cultural aspect was therefore affected through laws and policies on free movement, competition law and fiscal provisions. At the Commission early entries into the cultural field were mainly symbolic. The European City of Culture programme is a well-known example of these kinds of policies. During the 1980s however through the Treaty's free movement Articles and industrial policy and education the Commission proposed a number of important new measures relating to education and the audiovisual sector.[463] In 1987 in a communication called *A Fresh Boost for Culture in the European Community*, the Commission argued that

[459] Carole Tongue. 'Why a unesco Convention on Cultural Diversity of Expression' (2009) 14 Rethinking European Media and Communications Policy 241.

[460] See Article 1 of the UNESCO CDD that defines the CDD's goals. The beforementioned goals can be find in sub (g) and (h) of this article. They can also be found in the form of Guiding principles in Article 2 under respectively paragraph 5 and 2.

[461] 2006/515/EC: Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[462] Case 7-68 Commission v Italy (Art Treasures) [1968] ESE 423.

[463] European Commission, Green paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable, COM(84) 300 final.

increased Community in the cultural sector was necessary because of the twin goals of completing the internal market by 1992 and the progression of a People's Europe to the European Union.[464]

The appropriateness of Community cultural policies was a much-discussed topic and, as mentioned before, one to which many founders had already expressed support. Other institutions echoed, for example the Heads of State or Government agreed that the Community was more than simply an economic union. This sentiment can also be found in the outcomes of the The Hague Summit of 1969[465] and the Paris Summit of 1972[466]. In the 1973 Copenhagen Summit, where the *Declaration on European Identity* was drafted, the diversity of cultures within the framework of the common European civilization was emphasized[467] and in the 1984 Fontainebleau Summit it was concluded that the Community had to adopt measures 'to strengthen and to promote its identity and its image both for its citizens and for the rest of the world'.[468] Community symbols were adopted, but there was no explicit Article available in the Treaty. Around this time the CJEU had its first case concerning the media industry: the Sacchi case was about monopoly of advertisement of a national Italian television station.[469] Though CJEU argued that a national monopoly for a national television station's advertisement revenue was not a problem, it did decide that 'in the absence of express provision to the contrary in the treaty, a television signal must, by reason of its nature, be regarded as a provision of services'.

Only in the Maastricht Treaty Article 151 TEC, now the cultural article, Article 167 TFEU was implemented. Proposals of Article 167 TFEU in a similar formulation can be traced back to 1982.[470] The Article was implemented relatively late in the Maastricht Treaty drafting process because of German opposition. Article 167 TFEU connects the cultural goals of the EU, creating a European identity and retaining or reinforcing cultural identity, with its private law goals. Article 167 TFEU paragraph 2 and 3 describe the relative competences. Paragraph 4 says that 'cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and promote diversity of its cultures'. Cees van Dam argues that when taking into account the *Tobacco* decision of the CJEU of 2000 that it must be read as that 'respecting cultural diversity ought to be taken into account when issuing harmonization measures'.[471]

Article 167 TFEU is a much-debated article because of its possible double interpretation. On the one hand the article had significant symbolic value and creates foundation for Community cultural policy. At the same time it is read as 'an attempt to block the more or less further expansion of Community law in this area'[472], the area of culture. Paragraph 1 for instance states that the Community 'shall contribute to the flowering of the cultures of the Member States', but also emphasizes that such action must be done with respect for 'national and regional diversity'. Because this article was implemented together with Article 107(3)(d) TFEU, which is discussed in subchapter 2, this twofold interpretation is reinforced. The Commission however has explained this by noting that:

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[464] European Commission, A Fresh Boost for Culture in the European Community, (1987) 20 Bull. EC, supp. 4/87, p.6

[465] Communiqué of the meeting of Heads of State or Government of the Member States at The Hague Summit (1 and 2 December 1969), Membership of the European Communities: Implications for Ireland, Laid by the Government before each House of the Oireachtas, April 1970. Dublin: The Stationery Office, April 1970, 109-112. At point 4: '[A] Europe composed of States which, in spite of their different national characteristics, are united in their essential interests […] is indispensable if a mainspring of development, progress and culture, world equilibrium and peace is to be preserved" (1970).

[466] Statement from the Paris Summit (19 to 21 October 1972), Bulletin of the European Communities. October 1972, No 10. Luxembourg: Office for official publications of the European Communities.

[467] Final Communiqué issued by the Conference Chairman (Copenhagen, 15 December 1973), Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities.

[468] Conclusions of the Fontainebleau European Council (25 and 26 June 1984), Bulletin of the European Communities. June 1984, No 6. Luxembourg: Office for official publications of the European Communities, 11-12.

[469] Case 155-73 Sacchi v Italy [1974] ECR 409.

[470] Andreas Johannes Wiesand, Kunst ohne Grenzen?: Kulturelle Identität und Freizügigkeit in Europa (DuMont 1987).

[471] Cees van Dam. 'Who is Afraid of Diversity-Cultural Diversity, European Co-Operation, and European Tort Law' (2009) 20 KCLJ 281, 301.

[472] JME Loman, *Culture and Community law: before and after Maastricht* (Kluwer Law Intl 1992) 195.

'[T]he challenge is twofold: cultural action should contribute to the flowering of national and regional identities and a the same time reinforce the feeling that, despite their cultural diversity, Europeans share a common cultural heritage and common values. The frontier-free area must provide a stimulating environment for intellectual life, cultural activities and artistic creativity for the ever-growing numbers of European citizens now demanding greater access to cultural. In the face of growing intolerance the aim will also be to help them understand, appreciate and respect other cultures in the same way as their own.'[473]

In short, the Commission explains the question of competence and the aim of the article with unity in diversity, through tolerance.

The reach of Article 167 TFEU is that of artistic cultures in all its forms, not the anthropological notion of the concept, and covers not only creation, but also everything around the creation like distribution and promotion. In this sense it promotes diversity because it is not selective. Based on a historical interpretation the words within 'common cultural heritage' however should be seen as a broad term also referring to ideas and values that are created in particular societies. Within the Union political values are also enclosed like freedom, democracy, tolerance and solidarity.[474]

Though these matters have been clarified, Article 167 TFEU remains a difficult law, mainly because of the language used. The lack of clarity makes questioning the Community objectives and priorities in the field of culture very difficult reducing it to just a token. Primarily Paragraph 4 has proven to be problematic since 'cultural aspects' offers no exact answer and 'taking into account' is the most minimalistic obligation compared to for instance the 'high level of protection for health, safety and environmental and consumer protection' of Article 114(3) TFEU. The Council itself acknowledged this and said that the implementation of paragraph 4 needs to be improved.[475] Most books discussing Article 167 TFEU talk about its implicit and explicit implications.[476]

The implicit implications are those of the active dimension of Paragraph 4. Rod Fisher of the International Intelligence on Culture institute said in a note requested by the Parliament that: 'The failure to properly implement 151(4) and its predecessor almost 15 years after introduction of the culture Article is inexcusable'.[477]

Most importantly in connection to state aid for film Article 167 TFEU has left the main question open: how to balance cultural values in cases of conflict, and sometimes more immediately compelling objectives of the Union?[478] The most straightforward observance that could be made from the Article 151 EC lay in paragraph 5, and was that it left cultural policies to the unanimity requirement, remaining vulnerable to the objection of any single national government, while audiovisual policy proposals were dealt with under the internal market competence, not subject to the unanimity rule. This has however changed with the Lisbon Treaty, but only because of the expansion of the Union.

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[473] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *New Prospects for Community Cultural Action*, COM(92) 149 final (April 29, 1992)

[474] A Fresh Boost for Culture 1987 Communication and Decision 508/2000/EC establishing the Culture 2000 programme.

[475] Council Resolution of 21 January 2002 on the Role of Culture in the Development of the European Union, OJ [2002] C 32/2, at paragraph B.

[476] For instance, Evangelia Psychogiopoulou, 'Integration of Cultural Considerations in European Union Law and Policies' (Martinus Nijhoff Publishers 2008);Rachael Craufurd Smith, *Culture and European Union Law* (Oxford University Press on Demand 2004);Ana Vrdoljak, *The cultural dimension of human rights* (Oxford University Press 2013).

[477] European Parliament, Briefing Paper on the Implementation of Article 151.4 of the EC Treaty (2007).

[478] Bruno de Witte. 'The Cultural Dimension of Community Law' (1995) 272.

2.3 State aid law for the cultural sector on the European level

Subsidies and other forms of public interventions are part of the European politician's toolkit often used for carrying out their political goals. As a result state aid law is politically quite intrusive as it lays constraints not only on the choices that politicians have, but also their principles and fundamental legal and economic ideas. State aid law can therefore be seen as a very actively political piece of law reflecting European political choices.

Film plays a central role in the functioning and shaping of modern democratic societies. Often it is not only entertaining, but also transmits social values and understanding of the other. Therefore it is subject to specific regulation in the general interest and tries to reflect common values such as pluralism, promotion of cultural and linguistic diversity. The Commission recognizes the contribution to diversify European culture and authorizes several aid schemes because of this.[479] Nowadays with new goals and the upcoming idea of cultural diversity it is said that they contribute to 'shaping European identities', forming the way of perception of the world and 'reflect the cultural diversity of the different traditions and histories of the EU Member States and regions'.[480] This 'tolerance' in the cinema however is a source of constant tension and discussion.

State aid for the film sector has existed in Europe since the Second World War to remedy structural competitive problems caused by private behavior. This, together with all the aforementioned goals and the framework of the MEDIA Programme and the European Investment Bank's i2i Audiovisual initiative, makes national state aid law particularly difficult to work with.

A general prohibition of state aid granted by States is laid down in Article 107(1). This prohibition of state aid is very broad and can be argued to place a burden upon national authorities because they lose their autonomy in devising and implementing financial schemes to sustain national, regional or local culture. It is debated that Article 107(1) TFEU does not apply to culture since it hardly ever distorts or threatens competition.[481] This could definitely be believed for small film projects, but practice has proven otherwise; also the production of film is very much related to other market activity.

Article 107(3) TFEU states that the Commission may exempt certain aid types from the general prohibition of state aid. Differently from 107(2) TFEU is thus is not a list of automatic exemption, but a mechanism that establishes that certain aid types may be considered as compatible with the internal market by the Commission and thus be exempted from the 107(1) TFEU prohibition. It attempts to strike a balance between the fundamentals of the common market and domestic cultural prerogatives giving countries freedom in their pursuit of national cultural protection.

2.4 State aid law and policy specifically for the cinema sector on the European level

2.4.1 Introduction

For some the application of state aid law to cinema was a shock, because in literature it had been argued that the Commission when checking the compatibility of national film support systems was limited in its competence and would even infringe Article 167 TFEU.[482] The CJEU however kept to its standpoint that competition provisions apply without exception to all profitable activities whether economic, cultural or social.[483] For cinema, keeping public service broadcasting under Article 106(2) out of the discussion, the only

[479] European Commission, Twenty-Fifth Report on Competition Policy (1995), 199; European Commission, Communication from the Commission on State aid for films and other audiovisual works 2001 and 2013.

[480] European Commission, Issues Paper 2011. Assessing State aid for films and other audiovisual works, point 1.

[481] Evangelia Psychogiopoulou, 'EC state aid control and cultural justifications' , vol 33 (Kluwer Law International 2006) 3, 6.

[482] Klaus Schaefer, Johannes Kreile and Sascha Gerlach. 'Nationale Filmförderung: Einfluss und Grenzen des europäischen Rechts' (2002) 3 Zeitschrift fiir Urheber-und Medienrecht 182, 184.

[483] *SIDE v. Commission,* [1995] ECR II-2501, *SIDE v Commission* [2002] ECR II-1179 and *SIDE v. Commission* [2008] ECR II-625.

way to get state aid then is Article 107(3)(d) TFEU. There however is no general policy on these state aid schemes, only official policy statements exist.

In the past, the only exception to the film industry was addressed in Article 107(3)(c) TFEU, concerning the aid 'to facilitate the development of certain economic activities'. The precedent for such exemptions was set by a decision concerning the Greek film industry; this was the only published pre-Maastricht decision.[484] Anna Herold however deducts from Competition Reports that any reference to cultural aspects of the film industry was highly unlikely and that it must have been treated as an industrial policy.[485] This changed with the implementation subparagraph (d) into Article 87(3) of the EC Treaty together with Article 151 EC.

The then new take on culture within competition law was approved by the Council in 2001 and showed a wish for national freedom for audiovisual support policies.[486] At the same time Member States requested clarification of 107(3)(d) TFEU, then Article 81(3)(d) ECC, since states' aid schemes need approval from the Commission (Article 108(3) TFEU). This resulted in the first Cinema Communication published by the Commission that built upon its earlier decision to approve a cinema aid scheme in France, the big promoter of the *exception culturelle*.[487] What was made clear is that for a film to be given state aid the state aid scheme has to pass the general legality test i.e., it has to be in accordance with the Treaty, where the focus lies on free movement requirements and the principle of non-discrimination on grounds of nationality (Articles 18, 34, 36, 45, 49, 54 and 56 TFEU). When evaluating specific cases, the Commission also has to take into account the necessity, proportionality and adequacy of the aid measure in order to assess its compatibility with the TFEU. Only after this basic procedure the Cinema Communications need to be considered.

2.4.2 Cinema Communication 2001

Within Cinema Communication 2001 four compatibility conditions were created that have to be fulfilled for state aid to be approved by the Commission. First of all, state aid must be directed at a cultural product. The cultural product has to be verifiable through national criteria. The Commission thus rejects to make a clear statement of what a cultural product is and leaves the aesthetics to the Member States. There is also no view on what is cultural. Second, the producer should be allowed to spend 20% or more of the film budget in another Member State than he gets the aid from. There is thus some form of national freedom, but a limit to the territoriality of cultural aid. The argument for this is that expenses not directly related to the cultural product, the film, for instance equipment or even car rental, should be borne in another Member State. Third is the 50%-rule: aid should be no more than 50% of the total budget of the entire production. 'Difficult' or 'low budget' films are excluded from this limit, but those definitions are, according to the subsidiarity principle, up to Member States to decide. Films produced in limited linguistic and cultural areas will also benefit from flexibility. Fourth rule is that the aid has to be given to the whole production and separate supplementary aid is therefore not allowed. This is done to keep state aid amongst Member States at the same intensity.

These guidelines have since been used to authorize national public film funding mechanisms within the EU. The European Parliament considered the rules strict.[488] Most criticism was pointed at the third rule, the 50%-rule,

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[484] European Commission, Commission decision on 21 December 1988 on aid graned by the Greek Government to the film industry for the production of Greek Films, 1989.

[485] Anna Herold, 'European Film Policies in EU and International Law. Culture and trade-marriage or misalliance?' (Europa Law Publishing 2010)

[486] Council Resolution of 12 February 2001, National aid to the film and audiovisual industries, OJ C 73, 6/3/2001, 3.

[487] European Commission, Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works 2001, 534.

[488] European Parliament, Report on the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works, 2002.

that was seen as dogmatic and purist. The Cinema Communication however was prolonged in 2004, 2007 and 2009, till 2013 when a new Communication was published.[489]

2.4.3 Cinema Communication 2013

The Cinema Communication 2013 is the result of a long process that included three public consultations. The initial proposals were rejected since the Commission wanted to stop the 'subsidy racing' that they observed for big US productions.[490][491] The film funds and some professional organizations were against any modification of the rules. After the three rounds all controversial proposals made by the Commission appear very much weakened in the final version.

Three considerable changes were made in the 2013 Communication. First of all the Cinema Communication 2013 expanded its scope focusing not only on production, but also stimulating the supply of audiovisual content ensuring that the resulting audiovisual work is properly distributed and promoted. A key argument for this change was the promotion of cultural diversity since the Commission saw that smaller films were often made, but not well distributed. The Cinema Communications now include aid covering all aspects of film creation, from story concept to delivery to the audience.

Second the new Communications refer to linguistic diversity as an important element of cultural diversity and quote the CJEU.[492] To promote this they allow for Member states to require that the film is produced in a certain language, when it is established that 'this requirement is necessary and adequate to pursue a cultural objective in the audiovisual sector, which can also favor the freedom of expression of the different social, religious, philosophical or linguistic components which exist in a given region'.[493]

Third it has implemented a stronger rule on territoriality raising it to a maximum of 160%, which would be 80% of the whole budget considering the 50%-rule. This was done because of the strong mobility of production and for the promotion of cultural diversity and national culture and languages.

The 2013 Communication was published in the Official Journal of the European Union on 15 November 2013. Member states have two years from that date to bring their aid schemes in line with this Communication.

3. How does the European Union Value Cultural Diversity?

Cultural diversity is foundational for the creation of the European Union and reflects not only in its self-portrayal (Unity in Diversity; Alle Menschen werden Brüder; and so on), but also in its legal instruments in Article 3 TEU and in Article 22 of the Charter of Fundamental Rights, and more specifically for the cultural industry in Article 167 TFEU. With the signing of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Lisbon Treaty, and the new Cinema Communication, the EU shows that it aspires to play a role in the field of culture. Because of the protectionism that is believed to come with this, many different powers and ideas are at play creating different ideologies, definitions, rules that can all be translated in different forces from different institutions resulting in a variety of goals of diversity.

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[489] European Commission, Communication from the Commission on State aid for films and other audiovisual works 2013.

[490] Martin Blaney. 'Industry disputes claims of European 'subsidy race'' *Screen Daily* (18 November 2011)

[491] Francisco Javier Cabrera Blázquez and Amélie Lépinar. 'The New Cinema Communication: All's Well that Ends Well?' (2014) 1 European Audiovisual Observatory: IRIS plus: 'The new Cinema Communication'

[492] Case C-222/07 UTECA [2009] ECR I-1407; Case C-250/06 United Pan-Europe Communications v. Belgium [2007] ECR I-11135 and Case C-6/98 ARD [1999] ECR I-7599.

[493] Case C-222/07 UTECA [2009] ECR I-1407, paragraph 34.

Cultural diversity transcends the question of stimulating domestic production and distribution. At the European level however diversity conversely seems to be seen more as a quantitative requirement for national film productions. The idea that the market-approach is overtaking the cultural diversity argument is widespread. As Herald put it: 'the Commission seems to apply a model of classical economic analysis to the audiovisual sector, which ignores, to some extent, the problematic of culture and artistic expression'.[494] Psychogiopoulou asks whether Article 167 TFEU (Article 151(4) EC) has influenced the accommodation of cultural considerations in the evaluation of state aid measures and concludes her analysis of the European cultural policy saying that: 'For the Commission, cultural elements only come into play in the context of the normal balancing between the pro-competitive and anti-competitive effects of an agreement pursuant to Article 81(3) EC [now Art. 101(3) TFEU]' [495] and 'The Commission's invasive attitude, by contrast, seeking to exert control over cases which should, arguably, escape state aid scrutiny, shows that it has 'forgotten' to give weight to the requirements of Article 151(4) EC'.[496]

What Herald and Psychogiopoulou do not discuss is that European policies support cultural diversity but do not include pluralism in its original sense of dealing with problems of democracy and minority, problems with political and societal relevance. In my thesis I want to go further than merely observe the balance the European Union strikes between market and trade, but will explain its reasons, and the resulting concepts of culture and cultural diversity that it manifests on a European and international level and see how it values cultural diversity. What makes state aid for films in Europe an interesting choice is its very limited competence in this part of cultural law, together with its legal connection to the WTO combined with the UNESCO CDD. This constant tension between conflicting values leads to controversiality of the topic, but also as aforementioned a strong political nature that will be emphasized throughout this thesis.

4. How is Cultural Diversity Approached in the Commission's State Aid Policy?

The criteria described in the Cinema Communications and the decisions the Commission takes based on these lay down the level up to which film aid within the EU under national state aid schemes is approved. The culture criterion and the language criterion that arises from the formal criterion are arguably created to promote a certain kind of culture. A higher culture could be read into the rules as Herald does, and this could be true, but much clearer is that the rules are aiming at national culture, and not a minority cultural.

4.1 The application of the Commission Guidelines on State Aid to the film sector – the culture criterion

The cultural criterion encompasses that aid must be directed at a cultural product. For this national criteria must be created, or preferably a point-based list. The definition of cultural activities is primarily a responsibility of the Member States since because of the subsidiarity principle the Commission is not supposed to express a view on such an abstract matter.[497] The Commission thus limits itself to checking whether a member state has a relevant, effective verification mechanism in place. In line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005,[498] the Commission agrees that the fact that if a movie is commercial does not prevent it from being cultural. It first seemed that the Commission merely aimed to exclude purely commercial films like advertising or pornography, but the cultural criterion has very much developed over the years.

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[494] Herold Anna. 'EU Film Policy: between Art and Commerce' (2004) European Diversity and Autonomy Papers–EDAP , 11.

[495] Anna Herold, 'European Film Policies in EU and International Law. Culture and trade-marriage or misalliance?' (Europa Law Publishing 2010), 343.

[496] ibid, 345.

[497] Francisco Javier Cabrera Blázquez and Amélie Lépinar, 'The New Cinema Communication: All's Well that Ends Well?' , vol 1 (2014).

[498] Article 4(4) UNESCO CDD.

It could be argued that truly cultural films that are considered art or art house would not even infringe EU state aid legislation since they hardly affect intra-Community trade, but there are no special funds for these films that do not adhere to the Commission. The insistence on the cultural character could have counterproductive effects on the internal market because it intensifies the Member States to implement strong territoriality policies, while at the same time offering no protection to culture, because the Commission sees itself not able to. The culture criterion could thus simply be read as a prohibition to create a film aid policy purely based on commercial aims.

The CJEU argues otherwise. In the UTECA case the question was whether it was permissible for countries (in this case Spain) to oblige television broadcasters by national legislation to commit a specific proportion of their revenue to the pre-funding of European cinematographic films and TV films of which the original language was one of the Member States' languages. The *UTECA* case asserts that the EU must be clear what it wants to achieve when requiring Member States to ensure that aid is directed at cultural products. The CJEU said that 'since language and culture are intrinsically linked […] the view cannot be taken that the objective pursued must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty'.[499]

Even though the Commission legally has no say in what is cultural and it affirms that this is the of the Member States, its competition control mechanism does put constraints on Member States' ability to formulate and implement their audiovisual support measures. What the Commission does do is put this under Article 167 TFEU, under the concepts of culture and cultural diversity. Under Article 167 TFEU however there are no constraints on culture and a narrow reading of Article 107(3)(d) TFEU would imply that it is not compatible with the way the CJEU argues culture should be understood. True cultural diversity goals thus do not seem to follow from the cultural criterion. Nor is there a coherent European idea of it or of culture itself.

4.2 The application of the Commission Guidelines on State Aid to the film sector – language within the culture criterion

Any state aid for audiovisual works needs to promote culture.[500] In the 2013 Communication it is explained that audiovisual works that are produced in a language that is linked to a certain 'social, religious, philosophical or linguistic' group in a society do this, especially when a dialect is spoken in the film. Linguistic diversity became part of culture much earlier in the *UTECA* case as well.[501] This counts for both the promotion of a language[502], as the promotion of a cultural policy.[503] In the context of 'difficult audiovisual works' the language of the film is formally addressed. When a film is produced in co-production with another European country or certain developing countries the general 50% aid maximum can be exceeded.[504] A difficult audiovisual work is defined as a film whose original version is in an official language. For countries like the Netherlands, Portugal and Ireland this could be profitable for their native languages, but territory, population, or language area have not been adequately defined by the Commission.

A clear problem of linguistic diversity arises by the use of the term official language here. More than 60 indigenous, regional, or minority languages can be identified within the borders of the European Union. Around 40 million citizens of the Union speak one of these languages regularly. Then there are also contested

[499] Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 33.

[500] European Commission, Communication from the Commission on State aid for films and other audiovisual works 2001 and 2013.

[501] Case C-222/07 *UTECA* [2009] ECR I-1407, paragraphs 27-33.

[502] Case C-250/06 *United Pan-Europe Communications v. Belgium* [2007] ECR I-11135, paragraph 43.

[503] Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 50.

[504] European Commission, Communication from the Commission on State aid for films and other audiovisual works 2001, paragraph 52 subparagraph 2.

languages, dialects and non-European languages.[505] As specified in the latest amendment of Regulation No 1 determining the languages to be used by the European Economic Community of 1958 as of 1 July 2013 there are only 24 languages that are recognized as the official languages of the European Union, none of the 60 languages is part of them, nor are dialects recognized.

The European Charter for Regional and Minority Languages that opened for signature in Strasbourg in 1992 has since been ratified by 25 countries and focuses mainly on the conservation of the languages themselves. Around that time also the Framework Convention for the Protection of National Minorities was created and opened for signature in 1995. This was the first legally binding instrument and focuses more on the individual speaking being allowed to speak his specific language than the conservation of languages themselves, but leaves the definition of what a national minority is open to the Member States. With phrases like 'sufficient demand' and 'as far as possible' it does not require a lot of commitment, but 39 Member States have ratified the document. The document has hardly any obligations and has no effect on cinema.

Linguistic human rights are in this sense legally not recognized. One does not have to take the preservation or promotion of linguistic diversity into account when weighing cultural diversity against the internal market aim. For the goal of cultural diversity as a human right and unity in diversity as a form of nation building they however are important cornerstones. Within state aid for cinema language rights or language conservation are however not valued as such, unless a language is recognized by the Union.

Cultural and linguistic diversity are very selectively used in the the Commission's regulation for state aid for films. Next to that both cultural and linguistic diversity remain undefined, so is the term culture. What is clear is that in state aid law cultural diversity is nation-based.

5. What Competences and Obligations Does the European Union have to Protect Cultural Diversity?

Under the Cinema Communications state aid schemes for audiovisual creation thus must target content that qualifies as 'cultural' on the basis of 'verifiable' national criteria. As is stated in Article 107(1) TFEU any aid granted by a Member State or through state resources, which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, is incompatible with the internal market, insofar as it affects trade between the Member States. Article 107(3)(d) TFEU makes an exception to this stating that 'aid to promote culture and heritage conservation' may be considered to be compatible with the internal market 'where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest'. This is the basis of both the European cultural diversity aims and the state aid for film policy, the Cinema Communications. It is important to place this mechanism of promoting cultural diversity into context by looking at both the competence as the obligations the Union has.

5.1 EU competences to protect cultural diversity in the film sector

When looking at the Treaties strictly it would seem that audiovisual issues are not relevant within the EU realm. There are no specific provisions in the European Treaties on audiovisual policy, and it never got mentioned up till the introduction of Article 151 of the EC Treaty, now Article 167 TFEU. The term 'audiovisual sector' only appears in this law as a mere example. There is also little to be found in the European Economic Treaty from 1957 to indicate that Community competence could extend to cultural affairs. This however is true for many fields of industry of policy in the European Union that are now very much affected by negative integration through what we call the spillover effect. The audiovisual sector has been affected too; so much that separate policies are made. On the other hand the Union of course is not allowed to enact any harmonization of the

[505] Máiréad Nic Craith. 'Linguistic heritage and language rights in Europe' (2009) Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice 45-49.

laws and regulations of the Member States. Under Article 6 TFEU it can only 'carry out supporting, coordinating and complimentary action.' The competence of the Union is thus formally limited and responsibility in this sector remains with the Member States.

The competence of the EU in protecting cultural diversity thus heavily relies on Article 167(4) TFEU. Under this article it can however not create culture policy, but only take culture and cultural diversity into account when creating other policy. It cannot be the primary aim and the policy still needs to be based on the foundational policy. Article 167 TFEU, especially paragraph 4 thus leaves room for the fundamental question: How to balance cultural values when they collide with more compelling economic objectives of the Union, for instance economic growth or market integration?[506] Though Article 167(4) is the most specific on audiovisual matters, the idea of cultural diversity also has been formally laid down in Article 3 TEU and Article 22 of the Charter of Fundamental Rights. Article 22 of the Charter of Fundamental Rights makes respect for cultural diversity a duty for all EU institutions in all actions and, arguably also for Member States when they implement EU policies.[507]

Cultural goods have thus been mainly affected by negative integration since the beginning because with the free flow of goods, persons and services there also existed a free flow of cultural goods, persons and services. One could see this as positive, since this free economic flow could mean more cultural exchange or cultural access. On the contrary, through the cultural exception idea, the free market was also seen as a threat to the diverse European cultural landscape. The CJEU has in a way acknowledged this; in the *Omega*-case a strong argument was made for subsidiarity in consideration of laws and legal measures that affect the values of the society of a EU Member State, while the authority of the CJEU is still kept over these matters.[508] It thus creates a sort of test, but leaves structural complexity and inefficiency of the EU legal system in this policy area about conflicts over competences of courts and political actors in this matter in place.

When we go to the cinema and watch a European movie this does not seem the case since every European country has its own system of film funding; there is thus a certain tolerance for public intervention in the cinema sector. This exception is made under Article 107(3)(d) TFEU, but true policy is shaped in the Cinema Communications.

5.2 EU COMPETENCES TO PROTECT AND PROMOTE LINGUISTIC DIVERSITY

Though the Union affirms its goals regarding cultural and linguistic diversity in articles 2 and 3(3) of the Treaty on European Union (TEU) and articles 11(2) and 22 of the EU Charter on Fundamental Rights (the Charter), in conjunction with article 6(1) TEU, there is no explicit competence for the EU to promote linguistic diversity. The EU cannot enact any harmonization of the laws and regulations of the Member States in the field of linguistic diversity and thus has to fall back on Articles 149 and 151 EC that do provide possibilities for a positive EU language policy.

Cultural diversity is indirectly recognized as a horizontal policy in Article 167 TFEU. In Case 42/97 on *Linguistic Diversity in the Information Society*[509] the Court had to decide whether a Decision to set up a programme to promote linguistic diversity that had been adopted under 173(3) TFEU, the legal basis for industrial policy, should have also been based on Article 167(5) TFEU. The Court ruled that this was not the case here because the predominant purpose was industrial. The general rule is now that EC legislation harmonizing national laws

[506] Herold Anna, 'EU Film Policy: between Art and Commerce' (2004), 10-14.

[507] Bruno de Witte, 'The Cultural Dimension of Community Law' (1995), 195.

[508] Case C-36/02 *Omega* [2004] ECR I-9609.

[509] Case 42/97 Promotion of linguistic diversity of the Community in the information society - Legal basis [1999] ECR I-869.

in order to facilitate free movement of persons, goods, or services can only contain language provisions to the extent that divergence between national law blocks one of the four freedoms of the internal market.

Within film linguistic diversity can thus only fall under the 'difficult movie'-exception. It is clear that there is a lot of linguistic diversity law, but the existence of a practical linguistic diversity policy is doubtful. The only linguistic diversity law that can be enforced is created through negative language policy. That there is no practical linguistic diversity policy for minority languages is a certainty.

5.3 The place of the UNESCO Convention on Cultural Diversity in European Law

The UNESCO CDD is probably revolutionary to a European politician, but not very exciting to a European lawyer. Through the wording of the Convention it offers a point of reference when discussing the boundaries between trade and culture in future WTO trade negotiations and dispute settlement procedures for the future. To give the Convention momentum the way the European Union and other Contracting Parties deal with the Convention could be very important, but the Convention does not impose enforceable responsibilities on its Contracting parties.[510]

The UNESCO CDD is a very difficult international agreement to implement into European law because its competence is shared with Member States i.e., the agreement is concluded both by the EU and by the Member States. The competences are found in the founding Treaties as interpreted by the EU courts (with the use of the Dassonville-formula). General rules on this are made clear in the Council Decision 2006/515[511], by which the Union concluded this instrument. CJEU case law has indicated that mixed agreements bind both the EU and the Member States (216(2) TFEU), but only as regards those parts falling under EU competence.[512] A mixed agreement like this can thus not initiate a EU law obligation for the Member States to implement a part of a mixed agreement competence that the EU and the Member States share and was not yet exercised by the EU.

The aspects of the UNESCO CDD that fall under EU competence entail common commercial policy (Article 207 TFEU), Union development cooperation policy (Article 211 TFEU), measures taken by the EU within its policy of cooperation with industrialized countries (Article 212 TFEU), and also the EU's attributions in the field of culture (Article 167 TFEU). Because the EU's attributions in the field of culture are both the task of the EU and of the Member States it can be expected to require joint action. Mixed agreements like the CDD thus beg for a clear determination of the borderline. The exact borders of European cultural policy, as mentioned above are vague and there is no clarifying EU communication. One thus has to look at the CJEU.

To date, there has only been one case that dealt with the UNESCO CDD, which was the aforementioned UTECA case that deals with the of permissibility of an obligation for national broadcasters to spend a portion of their revenue on pre-funding of European cinematographic films and TV films of which the original language was one of the Member States' languages. The CJEU found that this measure was in breach of the fundamental freedoms of the EU, but in this case could be legitimized. For this a test was created, saying that breach of the fundamental freedoms only can be legitimate: 'if it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective that it pursues, and does not go beyond what is necessary in order to attain it.'[513]

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[510] Christoph B. Graber. 'Substantive rights and obligations under the UNESCO convention on cultural diversity' (2008) Protection of Cultural Diversity from an International and European perspective, Hildegard Schneider and Peter van den Bossche, eds., Antwerp

[511] 2006/515/EC: Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[512] For example Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1986] ECR 3719, paragraphs 7–9 and Case C-13/00 *Commission/Ireland* [2002] ECR I-2943, paragraph 14.

[513] Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 25.

This necessity-test is quite simplistic, but it is interesting to see how the Court came to this decision. Also the difference of the response between the CJEU, the AG, and the commentary of the Commission give an interesting insight into the different roads taken and the general dynamics at play. Where the Attorney General, Juliane Kokott, mentioned the CDD and acknowledged international law, the CJEU only talked about the CDD in response to the Commissions complaints.[514] Acknowledging linguistic diversity as an important right thus seemed based on EU law and not on the UNESCO CDD. In its response to the Commission however it used the CDD to respond that language and culture are 'intrinsically linked.' [515] [516]

One can conclude from this, in combination with the clause in Article 20(2) and Article 27(3)(d) CDD saying that: 'In the event that one or more Member States of such an organization is also Party to this Convention, the organization and such Member State or States shall decide on their responsibility for the performance of their obligations under this Convention.', it seems that there will be no direct effect of the CDD on the way the Commission deals with state aid for films. It also seems that the Convention is of no large importance to the Court. On the other hand the Court did not dismiss the CDD under Article 20(1)(b), as was done in the WTO China Audiovisuals case. This leaves the door open for the CDD to have a more important place in European law in the future. CDD policies could put the relationship between national sovereignty in the cultural field as was designed in the Treaty and Community internal market even more into difficulty, but could also be a way of clarifying the European cultural diversity goals in the future.[517] The absence of the mentioning the CDD by the CJEU when dealing with cultural diversity questions could be called troublesome since the potential of the CDD is not a given, but has to be strengthened through affirmative action of the CDD parties.

Protection of cultural diversity in the European Union is in a difficult position. The Lisbon Treaty has made cultural diversity a clearer goal of the Union by putting it into Article 3 TEU and, but still a mere formal goal. Cultural diversity has also become something to take into account when looking at human rights by putting it in the Charter of Fundamental Rights and this could even affect Member States. Next to that through Article 167 TFEU cultural diversity has to be formally taken into account when creating policy, but there is no practicable way to enforce this.

Both internally and externally there has been more attention to the question of cultural diversity and more formal commitments have been made. Within the Union cultural diversity however plays an ambiguous role and when in contact with market integration cultural diversity takes second place.

6. The European Balancing Act: How does the European Union balance between negative integration and cultural and diversity in film state aid law; and what problems arise from it?

'European cultural policies foster two goals that produce conflicting effects: through state interventions in the name of `democratization' they want to broaden access to cultural goods, but through liberalization, once again in the name of `democratization' they destroy the effects of their own measures and impose limits on the access to culture.'[518]

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[514] Case C-222/07 UTECA [2009] ECR I-1407, Opinion of AG Kokott.

[515] Ibid., paragraph 36.

[516] Magdalena Lickova. '15 The CDCE in the European Union–a mixed agreement and its judicial application' (Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions Routledge, 2014) 225.

[517] Christoph Beat Graber. 'The new UNESCO Convention on Cultural Diversity: a counterbalance to the WTO?' (2006) 9(3) Journal of international economic law 553.

[518] Maja Breznik. 'Cultural Revisionism' (2004) Culture Between Neo-liberalism and Social Responsibility, Ljubljana: Peace Institute

At the heart of diversity lies the idea of democratization, a voice for everyone. Within the European Union the term cultural diversity seems to be a saying and not a doing-word and thereby becomes a muddied term in cultural policy, characterized by both its abundance and its hollowness. The ideology of 'common sense' democratization of access to cultural goods to identify with has changed to a cultural policy based on enterprise. This is exactly what we can observe in the weakness of the UNESCO CDD and in the language and cultural criteria that are laid down in state aid law. Based on the criteria in the Cinema Communications cultural diversity policy in state aid for films is only based on national culture and not citizen-based or based on identity.

What is clear from the analysis of competences is that cultural diversity policy has had a strong influence on cultural diversity within state aid for films. Because of negative integration the cultural diversity laws have to be written in a quantitative, market-oriented fashion. As has been stressed in this paper cultural products, or simply art, has a dual nature. We are currently in a situation in which there is an imbalance because cultural diversity and difficult cultural products in state aid are simply not defined. If the current situations remain, then this imbalance will only deepen while leaving sovereignty of the Member States open as a question because the Commission and CJEU are not deciding on their exact competences. At the same time the Union is basing much of its external audiovisual policy on the secretive Article 133 Committee. Member States have already given up their rights to negotiate their right to control stare own cultural state aid to the EU and will have to comply with the deals it makes within the WTO. The EU should thus do the job it has given itself through negative cultural integration, or at least take a clear legal cultural diversity stand to avoid European legal problems, international legal problems and to protect its democracy.

6.1 THE IDEA OF CULTURAL DIVERSITY

Cultural diversity transcends the question of stimulating domestic production and distribution. On the EU level state funding for the film or audiovisual industries is often seen as national pluralism. In this way there is a great diversity in the concept of cultural diversity, also amongst different European institutions.

On a more conceptual level Hegel was one of the first to think about cultural diversity. Through his theory he argues that cultural diversity cannot justify violating human rights, as the UNESCO CDD has also legislated. More importantly, he observes that diversity is in close relation to unity and autonomy. Cultural diversity facilitates social identity and the rights that come with that, which results in autonomy, which ultimately means its literal translation, self-legislation, but in the cultural realm can be seen as the opportunity to let your voice be heard as others do.[519] Cultural diversity in this sense is thus seen as a prerequisite for human rights, protection against the larger unity from a smaller unity, a minority (as an ethical imperative).[520]

The political or legal definition of cultural diversity however is vague and often unwritten, though the UNESCO has made an attempt. Because of this, cultural diversity goals have to be deducted from discussions and actions as well and rely heavily on the Commission and the CJEU.[521] The current leading ideas of cultural diversity now come forth out of two streams. The first is that of UNESCO that is more based on the theoretical post-colonial

[519] Georg Wilhelm Fredrich Hegel, *Georg Wilhelm Friedrich Hegel: The Science of Logic* (Cambridge University Press 2010)

[520] Ryszard Cholewinski. 'Migrants as Minorities: Integration and Inclusion in the Enlarged European Union*' (2005) 43(4) JCMS: Journal of Common Market Studies 695.

[521] The idea of diversity though has appeared in national constitutions of for instance South-Africa (Fourth recital), Canada (Article 27 Constitutional Act 1982) and Switzerland (Articles 2 and 69(3) Federal Constitution).

thought and the thought going against globalization.[522] The second comes forth out of the cultural exception debate that took part over the decades on a WTO-level with stronger protectionist arguments.[523]

The definition that is used in the WTO-debate looks at cultural diversity from a perspective of national cultural sovereignty and protection against foreign influence. The UNESCO-debate definition focuses on international minority protection. At first sight and in practice in this debate cultural diversity first seems to be merely a different word for cultural sovereignty or minority protection, it however is a new concept that much heavier relies on the idea of identity. Cultural diversity can thus mean both national distinctiveness (that is often called pluralism as well), and also diversity as in having multiple voices and cultures (that is argued to be the true pluralism by many as well).

To come to the real cultural diversity aims of the European Union, one thus has to make a journey through laws, conventions, and debates. First through the goals the Union sets itself through the UNESCO CDD, then the goals it sets itself through its own legislation and policy.

6.2 The rhetoric of the Commission concerning cultural diversity

In the first Cinema Communication the Commission observes that:

'The current stage of development and the special characteristics of audiovisual production within the EC, mean that it is difficult for producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. In these circumstances, the fostering of audiovisual production by the Member States plays a key role to ensure that their indigenous culture and creative capacity can be expressed, thereby reflecting the diversity and richness of European culture.'[524]

The European Union is right that the US has not ended its studio system even though in the 1948 *United States v. Paramount Pictures, Inc*[525] the Supreme Court ended the oligopoly of five big studios through vertical integration. Stock exchange analysis supports the view that the courts have not been able to dismantle a successful monopoly that would legitimize Europe's protectionist stance.[526] What it does not legitimize is the very selective use of cultural diversity. Take for example the communication on the goals for the new Creative Europe program in which it states that:

'In this respect, the Union, where necessary, supports and supplements Member States' actions to respect cultural and linguistic diversity, strengthen the competitiveness of the European cultural and creative sectors and facilitate adaptation to industrial changes, in particular through vocational training'[527]

The goals of the programme are unequivocally economic in nature. Throughout the whole program it can be read that cultural diversity and intercultural dialogue are indeed to be promoted, but in the same sentence it is made clear that 'culture as a catalyser for creativity' is understood as existing 'within the framework for growth and employment'. Culture is thus clearly framed as not existing apart from the orientation towards markets,

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[522] World Commission on Culture, *Our creative diversity: report of the World Commission on Culture and Development* (Unesco 1996)

[523] Serge Regourd, *L'exception culturelle* (Presses universitaires de France 2002)

[524] European Commission, Communication from the Commission on State aid for films and other audiovisual works 2001, Paragraph 2.

[525] United States v. Paramount Pictures, Inc. 334 U.S. 131 (1948).

[526] Arthur De Vany and Henry McMillan. 'Was the antitrust action that broke up the movie studios good for the movies? Evidence from the stock market' (2004) 6(1) American Law and Economics Review 135.

[527] European Commission, Proposal for a Regulation of the European Parliament and of the Council on establishing the Creative Europe Programme (2011), 9.

and requirements for growth.[528] This affirms the trend that we see in the Commissions approach to national state-aid for film.

6.3 The European legal problem: the problem of integration by stealth

The question is to what extent this approach is voluntary. What is now called the Monnet method of integration promotes spillovers from one economic sector to another and eventually from market integration to political integration. This political spillover would set in motion a perpetuum of institution building. This idea that negative integration will build the EU its limits are becoming more and more evident and the Union is suffering, and as mentioned in the introduction is in a Catch 22-impasse. This has caused regulatory policies to grow, while other policies like social policy and cultural policy remain largely undeveloped. Media became part of EU regulation when the CJEU decided in 1974 in the *Sacchi* case that the transmission of television fell within the scope of the EEC.[529] As mentioned earlier as well EEC involvement in media and cultural matters gained early support and in the 1975 Tindemans Report proposed greater EEC involvement in people's everyday lives. This has never happened. Cultural involvement has always been an effect of the economic rules of the EEC Treaty and the Commission has argued that it should stay this way.[530] Efforts would be focused on facilitating cross-border circulation of audiovisual cultural goods and receive special attention.[531] The Commission in a way thus has to take this market-based approach to culture and cultural diversity.

Positive integration is seen as difficult in the audiovisual industry, but there is a demand side for Community rules too in which there are several important actors. First of all the multinational or export-oriented firm tends to prefer European to national regulations. This is not only to avoid costs of meeting different regulations or dealing with the inconsistent national laws, but also to not stop progression in law-making. More visibly this has for instance happened in the United States car industry. The car industry decided to support federal regulation of air pollution not only because of the threat of different air-pollution standards, but also because they feared the domino effect that higher regulations per state could have. Professor David Vogel named this the California effect, in opposition to the race to the bottom that is called the Delaware effect. Of course, negative integration has achieved a lot in state aid for films, but the loss of welfare resulting from the potential distortion of national priorities should be taken into account in calculating the benefits and costs of positive measures.

It could thus be argued that because objectives in media policies in democratic societies are mostly non-economic, positive integration is simply necessary. There being more obstacles for positive than negative integration is a purely political problem, and one that seems to mainly lie with the Commission and the CJEU and not with the EP. The Commission however still has strategic advantages through its right to initiate legislation and because it can take juridical action against Member States. The role of the Commission over the years has changed from that of an autonomous initiator to that of a reactive initiator.[532] A more clear form of negative integration could also be imagined if there would be a clearer concept of culture and cultural diversity, which is the main problem in competence and in European credibility on the international level.

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[528] Cornelia Bruell, *Creative Europe 2014-2020: A New Programme-a New Cultural Policy as Well?* (Institut für Auslandsbeziehungen 2013)

[529] Case 155-73 *Sacchi v Italy* [1974] ECR 409.

[530] European Commission, Communication from the Commission to the Council and Parliament, *Stronger Community action in the cultural industries* 1982, 5.

[531] Ibid., 12.

[532] Paolo Ponzano and others, *The Power of Initiative of the European Commission: A Progressive Erosion?* (Notre Europe 2012)

6.4 THE INTERNATIONAL LEGAL PROBLEM

The absence of the mentioning of the UNESCO CDD by the CJEU when dealing with cultural diversity questions could be called troublesome since the potential of the CDD is not a given, but has to be strengthened through affirmative action of the CDD parties. The idea of cultural diversity, even if seen as state-based needs to be used in order to be able function against the WTO, for which the CDD was designed.

The state-based idea of cultural identity also could become problematic in the future when the more recent developments coming with the knowledge based economy and new categories of goods and services in the information age lead to the concept of cultural diversity being more and more one that can only be based on identity and not on production or market-valuing, since border or identity do not play a big role online. In times of economic globalization and geography ending through the internet the negative integration approach that is taken to culture is proving to be less and less useful to protect not only minority rights now, but in the future also European culture. The rhetoric of seeing cultural diversity as a human right would give the cultural identity aim international legal grounds – and it makes a lot of sense – but again this should then be reinforced on a EU-level.

6.5 THE DEMOCRATIC PROBLEM

The democratic problem is observed both by progressives and conservatives from different perspectives. Conservatives fear a post-political Europe, a Europe that regulates extensively, but generally fails to act as a political unit. Europe is based only on universal principles, having thrown away its particular historical experience, creating a society of individuals.[533] The progressive European thinkers see cultural diversity as a necessary good for a good democracy. Jürgen Habermas asks the questions whether citizens' identities publicly matter, and if so, how these can make a difference within the frame of a constitutional democracy and recognizes that also in this there is a liberal and a communitarian approach. Liberalism creates the ideal of blindness, in the sense of not making any difference. Communitarianism works through intervention. We seem to this have a liberal cultural diversity ideal.

Habermas argues that for a pure communitarian idea of cultural diversity is impossible with our individual freedoms and argues that the reproduction of traditions and cultural forms is an achievement that can be legally enabled, but by no means granted.[534] Note that even this is something we are not doing right now since minorities and non-official European languages are not addressed in state aid for films guidelines. A more identity-based approach to cultural diversity can thus be seen as necessary to the democratic ideal. Though from a market perspective a culturally diverse film landscape is not competitive, while mainstream content is, cultural diversity plays a very important role in sustaining European democracies. The Commission has little competence over this matter, but also does not grab the chances it has to promote identity based diversity in spite of its explicit goals mentioned in the public media protocol of the Treaty of Amsterdam from 1997, the Treaties and the UNESCO CDD and has repeatedly worked against Member States on account of alleged state aid against financing and construction models of public service media.

The undefinedness of culture or cultural diversity or the lack of competence to act on these matters in film aid is troublesome on different levels. It makes the European Union's rhetoric on the international level unbelievable and in this way there is a return to the failed *exception culturelle* idea. Next to that state-based cultural diversity creates problems of democracy. A citizen-based approach and a clarity of cultural diversity policy would thus be preferable. The question is how this can be solved. It seems reasonable for the Commission to take the obligations the Union sets itself into account. Together with the Commission already

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[533] Philippe Bénéton. 'Europe and the New Democracy' (2014) 16(1) The Hedgehog Review

[534] Jurgen Habermas, 'Multiculturalism and the liberal state' , vol 47 (HeinOnline 1994) 849

being an engineer in state aid policy and not being afraid to show its ideas on how the market should be regulated. I believe that a stronger stance towards identity-based cultural diversity is worth considering for the Commission. For this however a more clear division of competences is necessary and the cultural diversity goals within the cultural or cinema landscape should thus be more discussed and researched. With the digitalization of film production and distribution this will probably belong to the possibilities in the future.

7. Conclusion

'If we were beginning the European Community all over again,' said Jean Monnet, its founding father, 'we should begin with culture.'[535]

Early pioneers of European integration like Jean Monnet viewed economic integration as a means to achieving a higher level of European political integration through the creation of a uniquely European identity and thus avoiding future wars and conflicts. This identity would be forged through difference and be a result of the spillover effect of negative integration. It could thus be argued that Jean Monnet had an identity-based idea of cultural diversity and cultural exchange that is also leading in the current scholarly community. With the current practices of negative integration this is not happening, the spillover idea is leading to a market based idea of culture and cultural diversity.

As was shown with an analysis of the practice of the Commission in state aid European state aid is not multicultural or culturally diverse at all, but is focused on fostering the national film industry. In this way the European Union is not committing to the international ideas of cultural and linguistic diversity that it actively promotes. The main reason for this is the question of competence of the European Union in the cultural and media industries. The European Union has a mixed and very interpretable degree of regulatory competence in the audiovisual field, but has direct responsibility in issues concerning the European internal market and competition issues on a Community level. The further implementation of the culture article, Article 167 TFEU, will obviously depend on the way in which the principle of subsidiarity is dealt with. If the European Union focuses on the realization of the single market then it is very likely that further cultural diversity and intervention will not be part of the future of Europe; firstly because of its weak position in law, and second because the international community sees right through state-based cultural diversity right into its protectionist core. Together with the strong uncertainty on a European level, still poor results in diversity on the consumer side on national levels and shady rhetoric of the UNESCO CDD on an international level we can speak of a broken cultural policy when it comes to cultural diversity. In terms of sovereignty the implementation of the state-based cultural diversity goals through the Commission and the CJEU, while on the international level creating strong cultural diversity rhetoric, the democratic value of Europe's external cultural diversity approach is questionable. Looking at Habermas' theories of the cultural diversity only enforcing democracy when based on identity makes the democratic value of European internal cultural diversity approach questionable as well.

In order to regain international reliability the European Union should give clarity on both the economic future of the film industry and the future of civil rights, most importantly cultural diversity. There should be a debate on Europe's cultural diversity practice to see what its actual goals are, especially concerning minorities and where exactly the line lies between national cultural diversity - that is seen as merely strengthening the national film industries - and protectionism. Through its progressive line of thought on market management in competition and state aid law it should be observed whether it would not be possible to follow a more ideological approach, holding more strongly to the UNESCO CDD and focusing on cultural diversity based on

[535] Commission of the European Communities, Towards a European Television Policy (1984), European file, no. 19.

identity. This would mean for the Union not fearing to define culture and cultural diversity and recognizing it as important for its own revealing itself, through itself. The Commission has shown that it is possible to be progressive in its ideas on how the market should be regulated, but shall have to be clear about its competences in this field and its relation to the UNESCO CDD in order for cultural diversity to move forward.

CONTESTING CITIZENSHIP: TO WHAT EXTENT DO THE LINGUISTIC CHALLENGES OF THE POLISH MINORITY IN LITHUANIA POSE A THREAT TO THE MINORITY'S INTEGRATION?

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1. INTRODUCTION

The topic of this research comprises of the Polish minority's linguistic challenges in Lithuania and the influence of domestic conflicts on Polish integration into Lithuanian society. I will present and analyse several specific issues of conflict as case studies in this research. We shall see how domestic issues reflect different stand points of both nations. It is essential to understand that the purpose of this research is not to offend, discriminate or otherwise confront any of the parties involved, but rather to critically observe the current Polish minority situation in Lithuania from different angles, and measure the EU's power to intervene and present a solution to the conflict. Furthermore, this paper may contribute to the ongoing research on linguistic pluralism, EU citizens' and minorities' rights, and may be used as a source of information on a very particular case study on Polish minorities in Lithuania.

Specifically, I am interested in the country's political, social and legal systems assuring the maintenance and active promotion of citizens' rights and freedoms. This topic incorporates a diverse combination of aspects, including my historical relation to Lithuania and personal interests in social sciences, particularly politics, international relations, sociology and socio-economic geography. Additionally, this research is based on my bachelor thesis (Gribulyte, 2013, unpublished) and intends to apply the theoretical discussion to the case of Polish minorities in Lithuania. The issue discussed is closely related to the multi-level governance, as well as the discussion on universal and European definitions of citizenship and minority.

This research aims to identify, examine and analyse citizenship and minority rights as well as duties, and explore the complexity of defining 'citizenship' and 'minority'. Not only does this research deal with theoretical understandings and conceptual frameworks, but it also operationalises the questions to the specific case of the Polish minority in Lithuania. It shall analyse current issues of conflict with regards to the Polish minority linguistic and general rights and freedoms in Lithuania, and further address how the inability of the two parties to come to an agreement adds pressure to already shifting bilateral relations.

The purpose of this study is to measure the extent to which Polish minority linguistic issues in Lithuania influence changes in Polish-Lithuanian social, political and economic relations and investigate how, if at all, the EU intervenes in Polish-Lithuanian citizenship and identity politics. This paper intent to debate to what extent, if at all, changes in language knowledge may alter ethnic identity. By way of measuring the independent variables (EU citizenship rights, Citizenship rights of Polish minority in Lithuania, the link between language and ethnicity), I shall aim to determine the causal relationship with the dependent variable (Polish minority's position in Lithuanian society and Polish-Lithuanian social, political and economic relations). This study is based on a qualitative research, and provides a critical analysis of the academic articles and theoretical understandings. The descriptive method particularly focuses on the Polish minority situation in Lithuania by using legal documents, academic articles, news websites and reports.

The distinctiveness of this study lies behind the extensive analysis of the linguistic challenges of the Polish minority in Lithuania, the analysis of the European citizenship and minority rights and duties, as well as the influence of domestic language related disputes between the Poles and Lithuanians on Polish minority integration. Similar studies have been done before; yet, they did not put enough emphasis on the current linguistic and socio-economic minority's issues within Lithuania. Previous studies neither focused on the extent to which current domestic issues and linguistic affairs affect Polish integration to Lithuanian society nor how, if

at all, the EU intervenes in Lithuanian national minority issues. Thus, this research provides a significant contribution to the ongoing research on European citizenship, minority rights and linguistic challenges. It also presents an analysis of Polish-Lithuanian domestic relations, which consequently exert a significant impact on international relations.

Throughout much of history, international law and politics encompassed mutual relations of the states, yet individual rights were set aside. For a long time individual, as well as ethnic minorities' rights protection was purely a state's concern (Rackauskaite-Burneikiene, 2012). Significant changes occurred after the two World Wars, when it became clear that the protection of individual rights cannot be only a national concern. By discussing the universal treaties adopted after WWII that established international human rights conventions, we shall see how those have affected individuals belonging to ethnic communities (Rackauskaite-Burneikiene, 2012).

This study is therefore relevant to the ongoing discussion on European citizenship and ethnic minorities' rights and obstacles which arise as a result of plural society, as well as the lack of a universal conceptualisation of the definition of the term 'minority'. Such a universal definition would be essential due to its legal implications, which distinguish individuals from minority backgrounds and their rights and duties from natives according to their features (language, religion, culture, traditions) (Rackauskaite-Burneikiene, 2012). Therefore the status and the definition of the minority are essential in order to identify the individuals concerned and protect their rights, freedoms, and identity.

This research contributes to the historical analysis of Polish-Lithuanian bilateral relations and the long-standing disputes between the two neighbours. Before 2009 one of the major mutual concerns of two nations, Lithuania and Poland, was becoming a member of NATO and the European Union. The two states moreover felt a continuous pressure from Russia, and this very much influenced their important political considerations and decisions (Bagdonas et al., 2011). Currently, Polish-Lithuanian foreign relations are experiencing a clear shift, which is gradually distancing the neighbours even further away from one another. It is also interesting to analyse the current Polish-Lithuanian relations due to the rising uncertainty of Russia's power play.

Poland is becoming a leading nation in the region, and aims to join a club of economically and politically strong nations. Thus, Lithuania, although part of the so-called Baltic-Tigers, is becoming less strategically attractive for Polish leaders. On the other hand, Lithuania itself does not actively initiate friendly relations and shifts its focus towards the Nordic countries. Particularly Polish demands for expanding linguistic rights for national minorities in Lithuania were seen as interference with the internal affairs on the side of Lithuania (Vilnius.mfa.gov.pl, 2012). Until now, linguistic and educational matters raise major concerns and discussions between the two neighbours.

Discussions on domestic conflicts will provide interesting insights into recent tensions between the Polish minority and Lithuania. Lithuanian-Polish politicians expressed their discomfort with recently introduced reforms in education, which establish that subjects such as history and geography will be taught in Lithuanian in all ethnic minority schools. The most recent picket was organized by the representatives of the Polish minority as they disagreed with Vilnius City Administration's decision to reorganize all schools by abolishing or restructuring those schools, which do not comply with the standards. Other issues such as name and street name spelling, as well as rights to land restitution continue to foster tensions between the two nations. It is yet essential to understand that some disputes may be escalated by the politicians themselves in order to attract a larger share of voters on their side.

Poland shares long history with Lithuania and their relations are bound by a number of treaties, agreements and declarations, and the two neighbours have developed good export relations over the years (Molis, 2011). Poland is one of the most populous European nations, making it an essential strategic partner for Lithuania's economy and stability of foreign relations. It is thus interesting to analyze their current bilateral relations,

which have recently experienced a decline. Since domestic problems concerning the Polish minority seem to affect the solidity of their mutual relations, it is essential to examine the EU's position regarding ethnic minority rights and obligations. Here, a concept of citizenship becomes helpful since it provides a framework that identifies and distinguishes rights and responsibilities of people according to their nationality, race, language, and religion. The ambiguity of the definition of 'minority' shall be further discussed, as it influences the political and legal decision-making concerning the minority rights in each member state. As the minority's language use is one of the central issues of conflict between the neighbours, this paper also discusses the language-ethnicity relationship. The debate on complex language-ethnic identity relation aims to adhere to what extent, if at all, the change in knowledge of one's mother tongue may alter one's ethnic identity. Hence, by focusing on the minority's linguistic rights, freedoms, duties and obstacles, this research contributes not only to the studies on Polish-Lithuanian mutual relations, but also examines the EU and international theoretical frameworks on the citizenship and minority rights in a multicultural society. It further provides unique case studies analysing the EU's power to intervene in intra-national disputes concerning minorities.

The following three core chapters focus on the multi-dimensionality of Polish-Lithuanian relations, particularly focusing on the long-standing political-linguistic disagreements and Polish minority treatment in Lithuania. The following chapter deals with the concept of European citizenship, elaborates on ethnic minority rights, especially emphasising the absence of commonly agreed definition of national minorities, and debates the link between linguistic and ethnic identity. The chapter covering domestic issues examines the internal political, linguistic, and socio-economic tensions between the Poles and Lithuania. The last core chapter on bilateral relations illustrates the result of ever-lasting disputes between the Polish minority and Lithuanians.

2. Literature review

The existing literature on the conceptualisations of European citizenship and national identities encompasses a variety of themes. There are numerous works that analyze issues of citizens' and minorities' rights in Europe and on a global scale. Hence, this literature review aims to explore the already existing work on European citizenship and identity crisis in Eastern Europe, particularly highlighting the case of Lithuania. The literature review also seeks to investigate whether language and ethnicity have a common link with one another. It is essential to analyse whether one's understanding of his/her ethnic identity is strongly connected to the language he/she practices. The debate on the language-ethnicity relationship may therefore be of use for language and education policy makers in multilingual societies. The literature review shall further discuss increasing intergovernmental concerns about intolerance and internal discrimination between the nationals and minorities, followed by a conceptual analysis of citizenship and minority rights from an EU perspective.

The findings of this study suggest that it is yet debatable whether there is a clear link between language and ethnicity. On the one hand language is seen as an essential element to one's identity. On the other hand, literature illustrates language and ethnic identity as two separate structures independent from one other. This may suggest that further research is needed to clearly evaluate the link between linguistic and ethnic identity, and whether the shift in one's language knowledge may have a significant influence on the understanding of one's ethnicity. Further findings suggest that diverse cultures and the distinct social structures of states make defining such concepts as citizenship, national identity and minority more complicated. This poses a problem for states and governmental institutions to find universal definitions. Thus, citizenship, identity and minority issues are mainly dealt with within the state's constitutional framework. The EU cannot overrule its member states' legal structure, and only provides additional provisions, and standards as well as country reports to ascertain that human rights conventions are not violated in EU member states.

2.1 A GLANCE AT EASTERN EUROPEAN NATIONS

After European enlargement, Eastern European states contributed to the complexity of EU citizenship construction. The idea of belonging to the EU and holding European citizenship has often been used as a policy instrument to attract new member states (Dolesjova and Lopez, 2009). Other aspirations to bring about socio-economic development, foster civic and contemporary identities or assure security in a competitive region were often incorporated in the nations' agendas. The course of multiple transitions in eastern European states fostered more nationalistic attitude (Balescu, 2009). This in turn creates a challenging process of renegotiating with, tolerating and acknowledging others. The example of the Baltic States provides valuable insights into countries that developed a socio-political agenda to promote modern civic identities (Brusis, 2000). The threat of a hegemonic neighbour and historical memories of communism influence states to maintain protectionist behaviour. Rising intolerance on national levels and the apparent distinction of 'insider' and 'alien' caused social discrimination and unequal accessibility to political participation, education, social rights and job opportunities. Thus, Central and Eastern European states may find their political identity '... in the framework of an integrated Europe and not on the basis of an ethno-nationalism isolated from the integration process in Western Europe' (Petev, 1998: 93). Kuris (2009) provides an exceptional account of the case of Lithuania, which adopted a 'zero-option'. This means that Lithuanian citizenship may be granted to 'all the persons who on the day of coming into force of the law were legally permanent residents of Lithuania, irrespective of the grounds on which such their residence rested' (Kuris, 2009: 14) after they successfully passed the Lithuanian language state exam. The citizenship was therefore established not 'from above' by national consent to a citizenship to residents, but 'from below' by means of allowing individuals to freely decide on citizenship (Kuris, 2009: 14).

2.2 CITIZENSHIP AS A PRIVILEGE

The theoretical framework of citizenship is widely discussed in recent literature. Some argue the concept of citizenship has developed a long-standing sense of exclusivity (Horvath, 2007: 27). It is often referred to as a legal construction serving as an instrument to distribute burdens and benefits (Galloway, 1998: 80). Inherently, society itself stimulates group differentiated rights and multiple memberships (Singh, 2009). On the grounds of the notion of 'us' and 'other' apparent in European nations, societies shaped the process of the construction of European identity through their historical colonies (Singh, 2009).

Moreover, citizens' rights and issues of youth minority participation in political decision making are crucial when examining citizenship and minority concepts (Ekman, 2009). The citizens of the European Union, for example, have the right to move and reside freely, the right to vote, the right to petition, the right to language, and the right to access the European Parliament, Council, and Commission documents (ecb.int Art. 8, 1992). The enjoyment and exercise of these rights entail duties and responsibilities for the EU citizen (Europa, 2000). Such essential factors as gender, socioeconomic background and the selection of study program may have a substantial influence on active participation in society and knowledge of one's responsibilities (Ekman, 2009). Therefore, there is an increasing need for citizenship education, communication strategy, and practical policy applicability in districts where youth migrants represent a majority (Sullke, 2009). Improved educational and language policies may help narrowing the social distance gap, which often explains the ethnic polarisation between majority and minority in Eastern Europe (Evans and Need, 2002).

2.3 COMPLEXITY OF MINORITY DEFINITION

In spite of numerous conceptualisations of 'minorities' in international legal systems 'there is no universally agreed, legally binding definition of the term' (Capotorti, 1991: 5). Inherently, this is so because the concept of 'minority' bears rather vague and ambiguous implications while trying to encompass diverse contexts of different groups of minorities. Accordingly, international law is not yet able to establish any clear boundaries with regards to this definition. The implications of the absence of definition of 'minority' increase the possibility

for ‘unfounded, unwarranted or ‘unjust’ invocations’ of the rights (Packer, 1996: 121). This exacerbates social as well as political tensions between the nations and increases the difficulty of assessing compliance by states. The rights of national minorities also go beyond the scope of European Union law, and thus the EU does not have any legal influence on ‘group rights’ of ‘traditional minorities’ (EUFRA, 2011: 18).

Minority rights were particularly highlighted in the context of the EU enlargement in Copenhagen criterion of 1993 (EUFRA, 2011: 19). This criterion established as a prerequisite that States may only enter the EU if they assure ‘respect for and the protection of minorities’ (EUFRA, 2011: 19). The Central European Initiative (Art. 1, 2004: 24) additionally provided a more definite conceptualisation of minority rights stating minorities ‘...shall mean a group which is smaller in number than the rest of the population of a State, whose members being nationals of a State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language’. Further, the European Commission established that ‘minority rights... include the right to non-discrimination of a person belonging to a national minority; the freedom of association, to assembly, of expression, the freedom to religion; the right to use one’s language; and the effective participation in public affairs’ (EUFRA, 2011: 19). The existence of a group as a minority is established by these laws, and minority rights are distinguished accordingly. However, the lack of a universal definition of the term ‘minority’ makes it difficult to comply with those diverse minorities’, rights and responsibilities when numerous EU member states are involved.

2.4 Debating the language-ethnicity link

The aim of this chapter is to discuss the language-ethnicity link in order to later apply the theoretical background to the Polish minority case. It would be interesting to see whether the longstanding linguistic conflict between the Polish and Lithuanian nations have any substantial grounds or whether it may solely be a tool to advocate parties’ political interests. We shall see that two approaches on language and ethnic identity relationship lead us to two different means of understanding the function of language in identity politics.

Language and the values ascribed to the linguistic forms and practices play an important role in processes of nation-building (Heller, 2006). Language carries essential material and symbolic resources which themselves are constructed through social interaction, ideologies of nationalism and linguistic ideologies. By way of using language we tend to reconstruct our understanding of the world and relationships to it and to each other, whilst positioning ourselves within societal norms and structures.

Be it a whistled language of the La Gomera Island of Spain or any other spoken language across the globe – they all at their core facilitate communication and survival and are manipulated from generation to generation. Similarly to the dying whistled language of the Island of La Gomera, numerous other languages are threatened to be extinct within a couple of decades (Fishman, 2001). Declining numbers of native speakers, natural disasters, voluntary or forced assimilation, globalizing consumer culture and use of the mobile phones may account for decreasing popularity of the use of certain languages. Widespread use of English – the language that is often considered as a language of power and prestige - may also threaten the endangered languages by sweeping away the locally authentic (Pennycook, 2013). To some extent English has become a gatekeeper of social and economic progress by way of positioning itself in professional domains on an international scale. According to Pennycook (2013) English is closely linked to a large portion of national and non-national types of culture, knowledge and education, politics and global relations, and such linguistically hierarchical position of English is unlikely to change soon (Pedrioli, 2011).

Such process of symbolic language domination may be also visible on a national scale where the state language and the languages of minorities come into play. Commonly used in both private and public domains, state language may acquire a superior position over the minority’s language. Knowing the state language may open up more possibilities to successfully enter the job market or critically value country’s political affairs by way of

having a linguistic access to a wider scope of news and literature. Those with the lack of knowledge of the state language may often be put at an economic, social or political disadvantage: be it the job market opportunities, educational attainment or active political participation. Although disadvantageous, some groups may choose not to speak the state language and operate in a country using their group language. This may be due to historical, political, or cultural reasons that encourage groups to maintain or advocate their ethnic identity.

Here Joshua A. Fishman remarks that 'language is often put forward as representing the authenticity of one's group and can be used to distinguish oneself from others', (Fishman and Garcia, 2010: 20). It seems to be evident that if groups continue to practice such cultural markers of ethnicity as language, religion, dress, etc. in their behaviour, in order to distinguish themselves from the majority, they tend to be structurally restrained from the leading society. Here, linguistic diversity challenges multicultural policies and requires a sound management of linguistic differences within society (Vieytez, 2007). In some complex societies where historic, linguistic minorities and the dominant society meet, it is essential to maintain the balance between the promotion of native language and tolerance to minority's language in the public sphere (Eastman, 1984).

It is essential to acknowledge that the language-ethnicity relationship has been subject to substantial debate. Fishman argues that language is not only an instrument of cultural communication, but also a characteristic of identity and human behaviour (Fishman and Garcia, 2010), and shares a great part of its speakers identity and the local environment (Nau, et al. 2008).

Ceremonies, songs, rituals, prayers, laws and basic conversations are all practices of speech that are at the heart of ethnic identity (Fishman and Garcia, 2010). As Fishman argues, language is a symbol of a culture with which it is mostly associated, thus through language we tend to share our experiences, views, knowledge, etc. Language allows us to get acquainted with one another, and by way of practicing a language we may determine one's ethnic group (Nau, et al. 2008).

Pedrioli (2011) acknowledges that language is a component of one's ethnic identity – if language dies, the manner in which its speakers understood the world dies with it. Language is once again not only a tool for communication, but it provides us with the means to understand different realities. Here, differences in vocabulary may reflect cultural and societal characteristics; thus words can be the carrier of traditional wisdom of knowledge accumulated by a people through experience over a long time. The ways of expressing human emotions or behaviour are also language specific. For some, although living in a different community for a long time, certain terms of their native language can only be roughly translated by using the English language, and may include various implications. For example, Lithuanian word 'knygnešys' in English would mean book smuggler or book carrier. To a general person this word itself would not make much sense, and one may even doubt the necessity of this word. Yet, Lithuanian linguistic history may provide us with an explanation to the existence, necessity and meaning of this word. In the XIX century Lithuania was occupied by Russian Empire. The tsar aimed that Lithuanians forget their roots by way of banning printing of Lithuanian books in the Latin alphabet. Only printing Lithuanian books in Cyrillic was allowed at that time. Lithuanian people strongly opposed such initiative as they wanted to read Lithuanian books in the Lithuanian alphabet. People would print Lithuanian books outside of Lithuania and book smugglers would smuggle them through the border to give to the people. These smugglers deliberately tried to hide from Russian officials for those caught were sent to Siberian gulags.

Another interesing Lithuanian word that has over a 100 synonyms is a word 'eiti' or to go/walk (letyourlanguagespeak.wordpress.com, 2012). In English these synonyms would be translated simply as 'to go' with a short explanation going along with it. For example, 'typenti' – to walk in small step, 'sliūkinti' – walk slowly. To a Lithuanian such words would immediately create an image in their minds. Due to a large amount of explanatory synonyms a rich picture of walk can be created just by using the word itself (letyourlanguagespeak.wordpress.com, 2012)

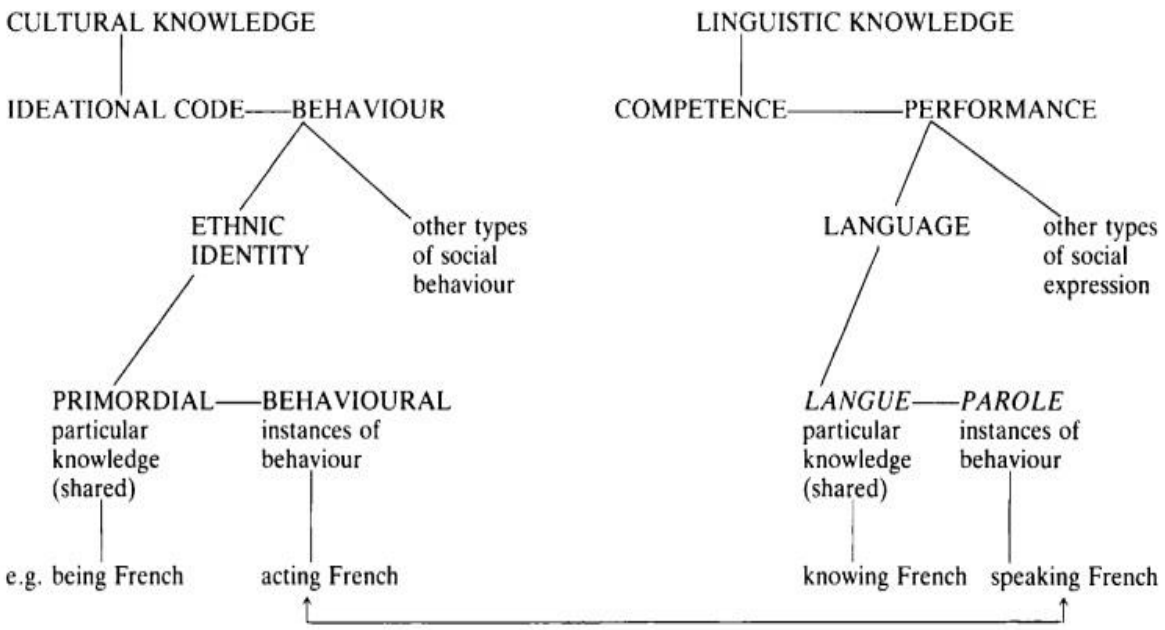
Examples given above may let us understand the importance of language distinctiveness and the social, historic and cultural meaning that the language often carries with it. Fishman argues to engage in and fully understand a particular ethno culture one must master the language thereof (Fishman and Garcia, 2010). Accordingly, only by way of speaking the language is one likely to locate oneself within that culture, actively taking part in and experiencing culture as well as understanding society's historic implications. The loss of or a shift of language firmly associated to particular culture may result in cultural change, cultural dislocation, or even destruction (Fishman and Garcia, 2010). Thus, languages could be seen as essential conceptual tools which reflect a society's past and present experience of doing, and thinking about things in certain ways.

2.5 A DIVIDED STRUCTURE OF LANGUAGE AND ETHNIC IDENTITY

A considerable amount of literature argues that the language change and change of ethnic identity are two different processes, therefore making the link between the two ever more complicated. As Fishman claims, losing the knowledge of one's language may not mean losing one's group membership, solidarity or a sense of belonging (Fishman and Garcia, 2010). Eastman claims that the language we associate ourselves with is not necessarily the language we use regularly (Eastman, 1984). This is so because the language we practice accommodates to satisfy communicative needs in dominant society (Eastman, 1984). For example, one may speak Lithuanian and Russian due to job market demands yet feel that historically he/she belongs to the Poles. As Fishman claims, people often hold on to their ethnic group identity, to maintain a historical continuity, although their culture (including language) becomes intermingled with other cultures (Fishman and Garcia, 2010). Therefore, many groups manage to continue living as distinct groups even after communicative language shift. A good example could be the Russian minority in Lithuania, which strongly associates itself with the historical events in the past and aims to maintain a minority's identity, yet has still integrated in Lithuanian society comparatively well. Learning Lithuanian and sending their children to Lithuanian schools allowed Russian families to seek better economic and social opportunities within Lithuanian society (Hogan-Brun and Ramoniene, 2008).

According to Eastman, language and ethnic identity resemble two different levels of structures - whilst language behaviour represents variable use of knowledge and is purely a mental competence, ethnic identity is more a form of social behaviour (Eastman, 1984).

Figure 1. Two different structures of cultural knowledge and linguistic knowledge.



In the figure 1. Eastman (1984) illustrates a clear explanation of the divided structure of language and ethnic identity. As it is illustrated above, ethnic identity belongs to the type of social behaviour whilst language behaviour belongs to linguistic competences (Eastman, 1984). Here language is our mental capacity, which we use according to the existing rules that are determined by the community in order to behave appropriately (Eastman, 1984). As Eastman claims: 'We know these rules and when we speak we try to live up to them; if we have them wrong our culture lets us know and we make adjustments' (1984: 269).

Thus language may transform when affected by other cultures. Some language transformations may also be forced by other cultures. For example, when Russians banned the Lithuanian language more people were forced to practice Russian. Although the influence was great as children were forced to learn Russian in schools, Lithuanian language remained the same and Lithuanians still considered themselves Lithuanians. As the table shows, behavioural-cultural language transformation does not strongly amend the structure of a certain language, nor does it change the manner in which we define ourselves (Eastman. 1984). The author gives an example of the French language: 'If a person stops speaking French that person may still act French with regard to food, dress, music and so forth and will still believe that French is the language of his or her group' (Eastman, 1984: 269).

Therefore, one's language use and knowledge may change or be substituted by another language, while ethnic identity remains the same. Although language may function as an essential element of ethnicity, its practice and competence in language may not significantly influence understanding of one's ethnic identity (Hogan-Brun and Ramoniene, 2008). Ethnic identity reflects a cultural or behavioural knowledge and relates to socio-cultural factors and is comparatively resistant to change in other than its surface behavioural characteristic. As Hogbrung (Hogan-Brun and Ramoniene, 2008) argues, minority's bicultural identity depends on the strengths of in-group identification, and that language may not be an essential component of that identification the individual chooses to preserve. Although language may be considered an element of ethnicity, the use and knowledge of language may not essentially influence self-identification (Hogan-Brun and Ramoniene, 2008).

Therefore language knowledge or lack of it does not alter our belief of who we are and how we define ourselves.

2.6 Overview of the debate

The ongoing debate on language-ethnicity link may have a valuable contribution to the development of socio-linguistic policies in complex multidimensional societies. On the one hand it is argued that language is simply imbedded in our culture through songs, rituals, stories and carries essential elements that help us define and place ourselves in a certain cultural context. Language therefore becomes one of the main factors defining and sustaining the ethnic identity. It is through the language that we shape and construct our understanding of us (of who we are) and the other. In case of loss of ethnic language to which we associate ourselves our ethnic culture and ethnic identity may be also threatened. Here, language shift or language loss may influence changes in culture and may result in the destruction of ethnic culture and ethnic identity. On the other hand, as it has been previously argued, change in language knowledge does not influence changes in our ethnicity. Language and ethnicity belong to two different structures: language – to linguistic knowledge, ethnic identity – to cultural knowledge. As Eastman argues:

'Language is a context sensitive system of knowledge manifested differently in particular speech communities. Ethnic identity is analogous to the behavioural manifestation of a particular language in a particular speech community in terms of what we believe it should be and how it is used. Like particular language, ethnic identity is specific to particular cultures and in each culture it has an underlying system of rules or beliefs (primordial) and surface behaviour aspects. The form our linguistic knowledge takes in a speech community does not change what we believe about our people (Eastman 1984: 274)'.

One may not need to speak a group language in order to belong to that group and share similar characteristics of the group behaviour. Therefore, the knowledge of one's ethnic identity does not change per se. The surface aspects of ethnic and language behaviour are subject to change. Eastman argues that the transformation of ethnic identity would encompass substitution for all the cultural characteristics of an ethnic identity (1984). This would include both, the level of belief (primordial) and use (behavioural). Eastman (1984) compares the transformation of our ethnic identity to alterations in language grammar, and claims that such primordial belief or self-identification may transform in a long-term whereas ethnic group cultural behaviour may alter greatly.

The debate provides us with two different approaches to language-ethnicity relationship and may be a valuable contribution to the government language and education policy making with regards to linguistic and cultural pluralism and assimilation. It is essential to note that the language-ethnicity relationship may vary by country. In order to develop an effective policy, one must conduct further research to understand community preferences.

Further sections focus on the complexity of citizenship and minority definitions, and later apply the theory to the Polish minority case in Lithuania. More practical issues related to linguistic and cultural pluralism in Lithuania shall be addressed. The explanatory examples aim to focus on the Poles minority position in Lithuania – minority's rights, duties and freedoms, as well as its socio-economic and political position in Lithuanian society.

3. Scholarly challenges

The existing literature provides a variety of explanations for the meanings of citizenship, minority and identity. Thus, before sequential analysis of the Lithuanian case, it is important to define the concepts mentioned above.

Citizenship is no longer a coherent definition framed within certain boundaries (Delanty, 2007). Multi-level identities create a challenge for the traditional model of nationality and European citizenship rights (Delanty,

2007). Thus, when discussing the concept of citizenship, it seems to be important to refer to Dominique Leydet , who offers a multi-dimensional way of conceptualising the term at hand (Leydet 2011). Accordingly, a citizen is a member of a political community who possesses the rights and is aware of the duties and responsibilities for the community (Leydet, 2011). Since citizenship is 'a status often imposed on an individual by a state' (Galloway, 1998: 67), it incorporates three core features: legal status, political participation and distinctive identity (Leydet, 2011). The first element encompasses the citizen as a legal individual free to take actions according to the law and able to claim his rights for protection (Leydet, 2011). The second feature on the other hand, refers to citizens acting as political agents and actively taking part in society's political institutions, whilst the last element covers citizenship as membership in the political community that fosters and maintains distinct identities (Leydet, 2011). Despite the complexity of defining 'citizenship', the concept incorporates its core components, namely rights, duties, active participation and distinctive identity, and is thus a useful theoretical contribution to the further analysis of this research (Leydet, 2011).

Minorities, on the other hand, aim to maintain their identity, traditions and solidarity within a dominant population. Although there is no universal definition of the term minority, Capotorti provides substantial insights into its conceptualisation by referring to it as:

'a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language' (Rahman, 2012: 2)

This definition shall be further used when discussing the Poles' position in Lithuania. It is, however, more difficult to define an 'identity', or 'national identity' in the EU. Each Member State has prioritised its perceived national interests, values and identities above a single European image (Smith, 1991). Moreover, it is a relatively complex and abstract concept (Carey, 2002), which cannot be constructed around spatial or temporal conceptions (Delanty, 2007). Consequentially, the definition of European identity in multicultural society could only be based around a constitutional framework according to the national laws of each state (Delanty, 2007: 301).

Here, one should recognise the complexity of dealing with the concepts mentioned above. As is extensively discussed in the literature, dealing with abstract definitions may foster confusion and disagreements between different schools of thought. In order to avoid such confusion, the provided definitions shall be further used when contemplating the issue of the Polish minority in Lithuania.

3.1 Theoretical framework of citizenship: rights and duties

The European Union is the most advanced arrangement of transnational political institutions on earth (Painter, 1998). The EU functions and mediates on a transnational level and promotes diversity, equality and solidarity among its Member States. The recent financial crisis, however, caused an escalation of the 'democratic deficit' discourse focusing on EU institutions - lack of trust, transparency and accountability (Painter, 1998). Another perspective of analyzing the EU is to consider it as a comprehensive political system and its development of the transnational democracy over time.

A majority of democratically-run systems of governance exhibit the notion of citizenship. This chapter will therefore discuss the multilayered nature of European citizenship, reflecting upon the local, regional, national and European concepts. Painter (1998: 1) argues 'since citizenship cannot be wholly divorced from the identity, care needs to be taken to ensure that any definition of European identity is inclusive and supportive of ethnic and cultural difference'. Both nationality and citizenship correspond to two distinct kinds of membership which

are closely linked despite their different foundations (Delanty, 2007). Therefore, it is essential to analyse the concept of multi-level citizenship and emphasise the different rights that derive from them, or lack thereof. Before starting the discussion on the concepts mentioned above, it is important to explain the uniqueness of this chapter. The emphasis shall firstly lie on the conceptual complexities of citizenship, identities and minorities. A second part shall focus on case-specific issues related to citizenship and Polish minorities in Lithuania. Consequently, the nature of this chapter comprise of two different ways of studying citizenship: one shall deal with theoretical difficulties of definitions and their implications on international, EU and national levels; another shall apply these theoretical foundations to the Lithuanian-Polish identity politics.

In Europe, there is an increasing need to encourage the development of multi-level identities and forms of citizenship due to the multiple and overlapping communities (Painter, 1998). Communities, such as neighbourhoods, cities, states, or the European Union itself may also entail various categories defined by gender, social class, age, language, etc. The dimensions of multi-layer citizenship are not separate but interlinked (Delanty, 2007). European citizenship incorporates formal membership of the EU, whereas national citizenship covers the membership of regional and national communities (Kivisto and Faist, 2007). The nature of multi-level European citizenship becomes one of the major barriers for turning a legal form of European citizenship into a social practice. Different polities may derive from these levels. As Delanty (2007) states, European citizenship concerns the EU polity on both national and transnational levels, while cosmopolitan citizenship does not have a precise relation with a particular polity. Membership in these overlapping communities is often defined by rights, obligations and responsibilities stemming from belonging to the community. Some rules may be unwritten or social rules, such as tradition, etiquette, clothing, etc. Yet, in a social structure, they are often obligatory when defining 'nativeness' or 'othering' aliens. Other rules, however, may be defined by law. Such regulations frequently outline the rights of a citizen, migrant or tourist to access social and health services in a state. Rules moreover include obligations and responsibilities-or legal rules—such as wearing a seat belt while driving a car. These types of rules are often followed by sanctions in case of a refusal to comply. Some rights may also encompass both, rights and responsibilities. For example, freedom and independence belong to this category. In order to maintain freedom and independence, numerous laws must be implemented to constrain the reckless behaviour of an individual. Rights to freedom and duties to its maintenance eventually became laws. Generally, the laws in society have several distinct functions: to protect citizenship rights and resolve conflicts, and to realise social change in a community, as well as implement policies. The law serves as an instrument to develop and protect identity, increase transparency, predictability, accountability, equality and solidarity within the state.

These communities and identities essentially include and protect people, but also tend to exclude the outsiders (Mohanty and Tandon, 2006). Those excluded could originate from neighbouring countries, they may practice different religions, or hold a citizenship of a larger unit, for example Europe. Natives, on the other hand, are the ones with identity, status, holding a passport that gives them access to political, social, civil, and economic rights, as well as duties of citizens. Outsiders lack all these entitlements. Therefore, citizenship embraces not only protection, but inequality and discrimination as well. Equality may originate between those who do hold a citizenship and own a passport. However, between those who do own and the ones that do not, inequality and prejudice may arise.

The multi-level citizenship of the EU embodies citizens both as members of the EU and of their national community. However, it may exclude both, the non-EU citizens and members holding an EU passport (Goudappel, 2010). Although the EU aims to treat its own citizens as equally as possible, it also enhanced its own legitimacy over that of member states. This has been mainly done through implementation of EU legislation and the case law of the European Court of Justice, which bears the ability to override parts of respective national law. Concurrently, the EU is confronted with the rights and duties of non-EU citizens travelling to and around the European Member States. The European Union has therefore implemented firm limitations for non-EU citizens. Among such are the criteria for reaching full EU membership status (Goudappel,

2010). Since the movement of third-country nationals is also a national issue, the EU is obliged to negotiate and adhere to the interests of the member states. Due to the increasing citizens' (EU and non-EU) mobility into other communities, the contrast between the insider and outsider becomes more apparent. Especially between those who are aware of European rights, and those who are not.

Citizenship rights may also have a multi-dimensional character. A common distinction is made between negative and positive rights. Negative rights are often referred to 'freedom from' something that constrains one's liberty, for instance, from fear, hunger, want, or slavery (Bowie and Simon, 2008). The conceptual framework of positive rights, or 'freedom to' something implies freedom to speech, freedom to use one's preferred language in private life, political participation, economic activity, social interaction, etc. The European Union has established a wide range of freedoms, including freedom of movement of goods, services, capital and labour. Additionally, the EU Charter of Fundamental Rights distinguishes civil, political, social and economic rights. These rights signify distinct roles of the EU citizens. Principally, all these rights are inter-related, and 'everyone regardless of gender, status or origins should have access to them without discrimination' (Fonteneu, 2002: 5). The entitlements and duties citizens have in interpersonal relations are often recognised as civil rights. Such civil rights encompass physical and mental integrity, marriage, divorce, privacy, property rights, religion, and others.

Political rights, on the other hand, include individual's (citizens and companies) rights in their relation to the state. These entail such rights as freedom of speech, citizenship, the right to political participation, to hold public office, to vote. Generally, political rights comprise various issues established in public law, including constitutional, administrative and criminal law.

The development of political rights has recently been afforded more attention on the EU level. Since the establishment of the EU2020 growth strategy, ideas of the United States of Europe and a more integrated economic as well as political union became more apparent. The political union would account for more uniform policies, rights and duties among the EU member states. According to Shaw (2007: 2549) '[C]omplete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a *European Union*'. It is yet debatable whether, if at all, the political union will go hand in hand with economic union and social cohesion strategies of the EU 2020. This process may be time consuming due to the diversity of national policy. Since the member states would be politically united and supervised by the EU governmental bodies, the political union may also have a significant impact on the states' sovereign power and decision-making process. A uniform policy framework may also have a substantial effect on national minority rights. These are currently regarded as to the member states' discretion. Uniform policies would thus amend national legal structures (Goudappel, 2010). Some nations, such as Poland and Lithuania, have entered bilateral treaties agreeing on the specific treatment of their national minorities. Uniform policies would thus disregard states' historical past and bilateral agreements. Therefore, it seems to be essential to assess short term and long term consequences of political union and introduction of uniform policies before shifting towards it.

Fundamental social rights are the rights to which a citizen is entitled to as a member of a community. According to Butt et al. (2002), such rights can only be effective if the state takes up the responsibility to protect the individual and its surroundings (Butt et al., 2002). Social rights do not account for freedom from the state, but for freedom 'with the State's assistance' (Butt et al., 2002: 38). Examples of such are the right to education and training, the right to social security and health insurance, etc. Yet, it is debatable whether or not social rights should be introduced to national constitutions. On the other hand, the majority of national constitutions address certain standards of living conditions. The complexity increases because of possible legal amendments, as well as future economic and social changes, which may result in unfulfilled constitutional provisions (Butt et al., 2002). Fundamental social rights can be further subdivided into substantive and procedural, or formal, rights. Substantive rights cover such rights as social security, the right to a minimum wage, a pension, etc. Rights concerning the freedom of workers and students to fair and just working

conditions, the right to strike and to establish associations are outlined within the framework of Charter of Fundamental Rights of European Union (European Convention, 2010).

Economic rights, moreover, include the rights concerning economic transactions. Economic rights establish freedom to exchange property and cover property rights and freedom to contract, among other things. Initially, these rights aim to assure relative equality between the transaction's partners by limiting freedom to trade and contract (Barzel, 2002). This is necessary because rising markets may be abused by powerful opportunistic people who operate information to their advantage, and create imbalance in the financial sector.

Since the EU pays particular attention to the establishment and maintenance of its internal market, it has also put a strong emphasis on economic rights. Some of these rights are actively protected by the Community and the EU itself. For example, visitors from outside the EU have a right to ask for a refund of VAT paid on goods purchased in the European Union. This information may often be found at airport information offices and billboards.

Occasionally the categories of civil, social, political and economic rights may intersect (Barzel, 2002). For example, the freedom of association is at the same time a civil right to protection from discrimination on grounds such as race, national origin, religion, etc. A freedom of thought may coincide with the political right to vote, or the right to participate in civil society.

The conceptual framework of citizenship has eliminated the societal differences by establishing equal rights and duties of all people in the state. At the same time Delanty (2007: 71), argues that although citizenship cannot be completely separated from the state, the 'Europeanization of citizenship has unleashed citizenship from the project of the state'. Citizenship itself has constructed a new form of inequality, which distinguishes between the citizens endowed with rights and non-citizens lacking these entitlements. Moreover, the ability to access such rights may be subject to the socio-economic positions of individuals. These often vary by nation, yet common characteristics of class division are based on ascribed statuses. Examples of such may be gender, race, command of the dominant language, achievements in education, positioning in the labour market, networking abilities, etc. These, among many others have a tendency to affect the access to certain citizenship rights.

3.2 Conceptual understandings of minority definition

Access to a societal culture is indispensable to individual freedom (Kymlicka, 2011). In many states such access is often assured by human rights, citizenship rights, minority rights, etc. Equal rights to all people can only be assured, if nations establish common definitions, which conform to the national laws. Ambiguous and vague definitions, on the other hand, create discrepancy between the national and universal laws. Consequently, the complexity of the cases increases, resulting in a number of individuals litigating national governments for discrimination on the grounds of ethnicity, race or religion. The definition of minority is one of those examples, which is not universally agreed upon and does not constitute a legally binding term. Some states prefer imprecise definitions of minority, while others are too restrictive definitions resulting in large groups of people not falling within the definition. Such diversity of states' preferences with regards to minority rights and conceptualization increases complexity and creates a challenge when formulating a universal application of rights. Therefore, this section further examines the complexity of the definition of minority and presents the existing frameworks that protect minorities on both, international and European levels.

The growth and expansion of international law instantaneously incorporated minorities as a matter of international concern. International law, however, historically has faced numerous challenges with regards to minority issues and the very definition of the group. It is yet debatable whether there can be found a universal definition of national minorities (Malloy, 2005). Since the international law instruments are concerned with a wide range of states, a definition should also encompass broad and general terms. However, each nation

distinguishes itself with rather particular characteristics, thus it seems to be impossible to clearly define national minority (Malloy, 2005). Additionally, constructing a definition creates a dilemma of whether to include objective or subjective criteria. According to Malloy (2005), objective elements of minority may lead to discrimination, whereas subjective elements may result in societal segregation. Wheatley (2005) provides us with the distinction between objective and subjective. Subjective elements encompass a significant group comprising a numerical minority of the population. Members of the group are in a non-dominant position. They hold a citizenship of the state and are different from the rest of the population. Objective, on the other hand is the sense of solidarity or the will of the group to protect and maintain its culture, traditions, language and religion (Akermark, 1997). The contributions made so far at various debates propose thought-provoking insights towards an appropriate definition. The broadest conceptualisation in theory and in practice was reached in the definition of a minority by Capotorti (1991) (See page 18, 2.1.4 Scholarly Challenges).

Another substantial contribution to defining minority has been made by Jennifer Jackson Preece. She defines minority as:

'a group numerically inferior to the rest of the population of a state, in a non-dominant position, well-defined and historically established on the territory of the state, whose members-being nationals of the state-possess ethnic, religious, linguistic or cultural characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language' (Malloy, 2005: 19).

The definition of 'national minority' appears to be a particularly European term, which is mostly addressed in the European Framework Convention for the Protection of National Minorities (1994) and a number of other European instruments overseeing the protection of national minority rights (Rahman, 2012). National minority in a European framework always refers to a 'group rooted in the territory of a state, whose ethno-cultural features are markedly different from the rest of the society' (Rahman, 2012: 12). However, at the European level, there is no legally binding definition of national minority. As Malloy (2005: 20) argues, national minorities are not 'static, closed homogenous groups with clear distinct boundaries of identities'. Individuals belong to different identities with a number of communities at all times (Malloy, 2005). This poses difficulties to identify national minorities in the age of globalisation, intensifying migration and mobility. Due to the disagreement between the participating states, The Council of Europe was unable to define 'minority' and failed to establish citizenship as a precondition for the protection of national minorities in the Framework Convention for the Protection of National Minorities of 1 February 1995 (Thiela, 1999). It remains to be seen whether citizenship will prevail as a criterion for defining national minorities or whether it will soon be replaced.

The first legitimate method of minority rights protection was established by the League of Nations after the First World War. The intergovernmental organisation founded in 1919 after the Paris Peace Conference. Among others, issues concerning labour conditions, just treatment of native inhabitants and protection of minorities in Europe were included in its Covenant.

The UN Charter in turn does not encompass a specific provision on minorities. It rather emphasises general human rights, and thus minority rights are considered as part of human rights. (Pentassuglia, 2002). The Universal Declaration of Human Rights (UDHR) final draft indicated the rights of 'well -defined' and 'clearly distinguished' ethnic, linguistic and other groups to establish and maintain their own schools and cultural or religious institutions, and to use their own language in the press, in public assembly and before the courts and other authorities of the state (Pentassuglia, 2002: 30). In the UN framework, the most crucial existing document dealing with minority rights is the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities promulgated in 1992. The universally non-binding Declaration does not frame minority rights to citizens but rather links these to the territoriality principle (Thiela, 1999).

According to Art. 1.1. of the Declaration, 'States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories...' (UN, 1992: 3). According to Thiela (1999), the minority rights at the universal level are often understood as basic human rights and not solely as a citizens' right.

There is a difference in protection of minority rights between the universal provisions and the European legal framework. Although the European Charter of Human Rights does not provide any specific requirements for minority rights, it does prohibit discrimination in the enjoyment of the rights and freedoms (Pentassuglia, 2002). In the legal formation on minority rights established by the Council of Europe, a 'national minority' is characterised in a manner that only citizens of the state apply to this provision (Thiela, 1999: 4). The Council of Europe Framework Convention for the Protection of National Minorities is considered to be the first multilateral treaty containing the general protection of national minorities (Pentassuglia, 2002). At the European level, the Council of Europe and the Organisation for Security and Cooperation (OSCE) are considered to be major actors with regards to the promotion and protection of minority rights (Pentassuglia, 2002). The document of the Copenhagen Meeting on the Human Dimension of 1990 encompasses numerous minority rights provisions and is considered the most comprehensive document explaining commitments in the sphere (CSCE, 1990). Although the EU has not designed a precise instrument on minority rights, the EC Treaty includes references towards respect for cultural diversity within the national and regional setting of the Community (EC, 2006: Art. 151).

International law and politics recognise national minorities as cultural communities (Malloy, 2005). Thus, national minority rights are identified as cultural rather than political rights. International society has put an emphasis on protecting national minorities in terms of human rights (Malloy, 2005: 16). The difference of national minority rights at the European level is that here the national minority protection is seen as a right of citizens. Thus, the term 'national' refers to citizenship, and as Thiela (1999: 6) states: 'the national law of most European states, including the Federal Republic of Germany and the Baltic states, restricts minority rights to citizens and excludes foreigners, irrespective of the duration of their legal residence'. In Europe, it is more nationalism and national identity that foster discourse of national minority rights rather than territorial attachments (Malloy, 2005). Therefore, Europe grants more substantial rights in comparison to the rights guaranteed by the UN instruments, which entail a rather broad approach to the rights of minority.

4. Operationalising the theoretical foundations of citizenship and minority

After exploring the theoretical foundations of citizenship and minority, it is now essential to operationalise these to the Polish community in Lithuania, and discuss their rights, duties and the characteristics of Poles as a national minority in Lithuania. This is done by discussing the Lithuanian legislative framework with regards to the rights established by the LR Constitution (the Constitution of the Republic of Lithuania), linguistic rights and minority protection. Lithuanian legislative framework and other provisions concerning citizenship and minorities shall help apply the theoretical foundations to analyze the characteristics of a Polish minority in Lithuania. Historical background presented in this analysis is important as it illustrates how the Polish minority became a part of Lithuanian society and shows the dynamics of long-standing tensions between Poland and Lithuania. This will help understand the current Polish political agenda and the context of the ongoing disputes between Polish minorities and Lithuania.

4.1 Citizenship in Lithuania

For Lithuania, becoming independent also meant the challenge of reconstructing its form of citizenship and identity. To erase tensions with its neighbours and foster bilateral cooperation, Lithuania chose the 'zero-option'. This implies that Lithuanian citizenship could be granted to all individuals who, on the day law coming into force, were legal permanent residents of Lithuania and passed the Lithuanian language test. The 1989 Law

set a two year time period during which every permanent legal resident could decide whether or not to acquire Lithuanian citizenship. As a result, the community of citizens was established not 'from above' by means of the centralised granting of citizenship to residents but 'from below' by means of the free decisions of individuals (Kuris, 2009). Current Lithuanian legal framework provides numerous other ways of acquiring Lithuanian citizenship: by birth; by being granted citizenship of the Republic of Lithuania (by naturalisation); by voicing one's option or on other grounds, as provided by international treaties with the Republic of Lithuania; other grounds provided by this law. Moreover, maintaining another state's citizenship alongside Lithuanian citizenship was not tolerated since the adoption of the first law on citizenship. Such prohibition of multiple citizenships was—and still is—interpreted as formally prohibiting Lithuanian citizens from simultaneously having Lithuanian citizenship alongside a second (Kuris, 2009). Additionally, Lithuanian citizenship policy making is squeezed into the framework which is determined by the Constitutional Court. The court therefore unwillingly became a national policy maker (Kuris, 2009). Currently, the Constitutional Court enjoys power in shaping the boundaries within which citizenship policy may be formulated. Problems pertaining to citizenship have shifted from the policy domain to the legal sphere, where matters of citizenship have become more constitutional issues rather than matters of policy (Kuris, 2009).

4.2 Legal provisions of citizenship and minority rights in Lithuania

The Lithuanian Constitution does not include any definition of minority (Kallonen, 2004). Consequently, the Council of Europe's Framework Convention for Protection of National Minorities formally approved by Lithuania in 2000 applies to all different ethnic communities on the state's territory (Kallonen, 2004). Present minorities in Lithuania are considered as autochtons—early inhabitants—since their territorial characteristics may be traced from medieval to contemporary history. Due to historical reasons, ethnic groups such as the Poles live in and around the capital Vilnius. Additionally, the treaty on Friendly Relations and Good Neighbourly Cooperation (1994) signed between Poland and Lithuania provides the definition of 'national minority', which commits both parties to protect rights and maintain cultural differences of ethnic communities.

The 1989 Lithuanian Law on National Minorities expired in 2010, and has not been replaced by any other provision (Tylec, 2012). Since there are no legal documents providing for an exceptional protection of the national minorities, the LR Constitution guarantees equal human rights and freedoms to all individuals (Kallonen, 2004). The Constitution of the Republic of Lithuania Article 37 states that 'citizens belonging to ethnic communities shall have the right to foster their language, culture, and customs' (LR Constitution, Art. 37). Kasatkina (2003: 9) claims '...ethnic group, minority and diaspora can be viewed as terms that characterise the specificity of the social groups based on ethnicity'. According to article 45 (LR Constitution, Art. 45) 'Ethnic communities of citizens shall independently manage the affairs of their ethnic culture, education, charity, and mutual assistance. Ethnic communities shall be provided with support from the state'.

The LR Constitution in Article 117 further states that 'court hearings in the Republic of Lithuania shall be conducted in the official language. Persons who have no command of Lithuanian shall be guaranteed the right to participate in the investigation and court proceedings through an interpreter' (LR Constitution, Art. 117). The Lithuanian authorities have taken the initiative to improve the implementation of the Framework Convention and have sustained their inclusive attitude towards its application. The legal structure of the Framework Convention has been supported by the implementation of other essential legislations in the sphere of education and anti-discrimination (Council of Europe, 2008). However, as the Council of Europe (2008) indicates, problems remain in the adaptation of the Framework Convention, particularly regarding the practice of minority languages in the public domain.

There are other various documents prohibiting discrimination, namely Treaty on the European Community, the Treaty on the European Union, the Constitutional Treaty and the European Charter of Fundamental Human Rights (European Parliament, 2005). The bilateral Polish-Lithuanian Declaration on Friendly Relations and Good

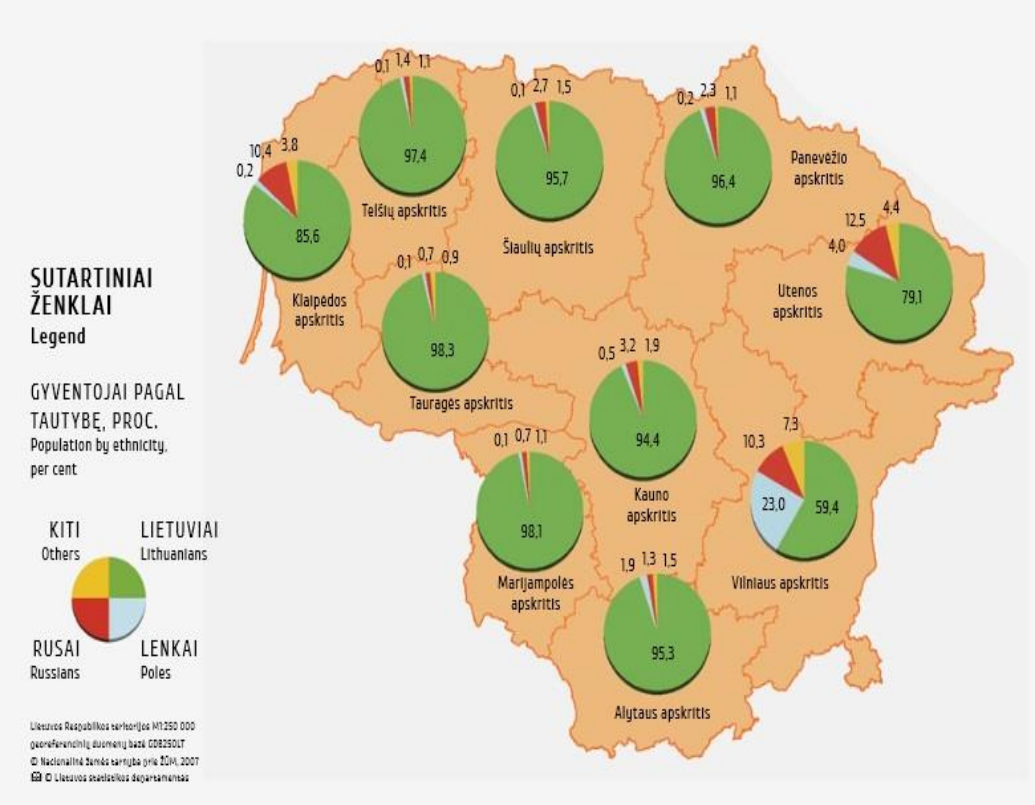
Neighbourly Cooperation (1992 and 1994) acknowledged the existence of the Polish minority in Lithuania and the Lithuanian minority in Poland.

In Lithuania all ethnic groups are regarded as national minorities (European Parliament, 2005), but the state has not signed the European Charter for Regional or Minority Languages. The uncompleted form of the European Charter for Regional or Minority languages accentuate the ambivalence and tensions in Polish-Lithuanian relations. Two diverging provisions, namely the Law on National Minorities and the Law on the State language create legal uncertainty. Despite the guarantees provided by the Law on National Minorities, the provisions of the Law on the State Language concerning the mandatory use of Lithuanian in public are prioritised.

After briefly summarising the legal framework of minorities in Lithuania, it is now essential to examine the Polish minority position within Lithuanian society. This shall be done by appraising their characteristics, rights and freedoms, as well as responsibilities established by the national legal framework of Lithuania. It is apparent the Lithuanian Constitution does not contain the definition of national minorities. Thus, ethnic groups' rights are covered by the citizenship rights. The Poles have equal fundamental rights to Lithuanian citizens, and more specific rights to study in their own language in Lithuania. In case of disputes concerning rights to use different alphabet in Lithuanian official documents, it obliges minorities to comply with the Consitution's legal implications, which establishes Lithuanian as an official language.

Capotorti (1991) provides with certain characteristics of a minority that will be used to analyze the Polish community in Lithuania. The Polish minority is numerically inferior, since it accounts for 6.6% (240,000) of the total Lithuanian population. Further following Capotori's (1991) definition, the Polish community seems to share a sense of solidarity by historically establishing themselves as ethnic groups in particular regions in Lithuania. According to the Lithuanian Census of 2011, the Polish minority resides around Vilnius (23.0%), Utena (4.0%), and Alytus (1.9%) districts.

Figure 2. Population by ethnicity in percentage. The map indicates population distribution by ethnicity in 2011, where Lithuanians accounted for 84.2 per cent of the country's population, Poles-6.6 per cent, Russians-5.8 per cent.



Although minorities have the right to political participation, the Poles represent a non-dominant decision-making position in Lithuanian political matters. However, recent events have shown that the Poles are seeking for more decision-making power in the national Parliament of Lithuania. A Polish minority party has joined three additional Lithuanian parties seeking the President's support to form a government: 'The addition boosts the coalition's weight in the 141-member parliament to 85 votes from 77, giving it enough to override some presidential vetoes, call early elections and impeach top officials' (Bradley, 2012). This phenomenon indicates a proactive Polish approach towards their political rights and participation in Lithuanian society.

The Polish community is recognised as an ethnic group, maintaining its religious beliefs and fostering linguistic and cultural practices. The Poles, as other minorities, have a right to establish their religious institutions, set up businesses and cultural organisations, as well as use their language in education, cultural events and on the radio or television (Matulionis et al., 2011). According to UNHCR, the State Language Law (2007) allows for ethnic communities' languages to be used in local governments besides Lithuanian in areas where national minorities are compactly settled. The Law allows for minorities to use their native language in education, culture and mass media. There are also regular broadcasts in national minority languages on national and regional private radio and television stations. In 2000, Lithuania also ratified the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the UN General Assembly in 1992 (ecrgroup.eu, 2011). Initially, the Declaration further elaborates on national minority rights, prohibits discrimination, ensures full equality before the law and promotes active social, economic and political minorities' participation in society (ecrgroup.eu, 2011).

According to the LR Ministry of Culture (2013), periodicals and magazines in Polish are being published in Lithuania. Additionally, the Lithuanian National Radio and Television is broadcasting information for national minorities including the Poles. Lithuanian internet website Delfi.lt also made information available in Polish in 2012. The daily newspaper-KurierWilenski (Vilnius Courier) is being published in Polish, and the bulletin National Minorities News is dedicated to all national minorities residing in Lithuania (LR Ministry of Culture, 2013).

As far as rights to education are concerned, individuals identifying themselves with the Polish national minority have an opportunity to study (from primary to higher education) in their native language (Gira, 2011). Gira also indicates that there were 55 schools using Polish as an instruction language, 12 using Lithuanian-Polish and 4 using Lithuanian–Polish-Russian in Lithuania in 2010-2011 (2011). Currently, there are 9 public schools in Vilnius County, which offer education in Polish and 18 public schools, which offer education in Russian. Having rather exclusive rights to education, Polish minority is considered privileged in comparison to other minorities in EU member states, where minorities do not have an opportunity to study in their native language from primary to tertiary education (Zasztowt, 2011).

Although the Lithuanian Constitution does not establish a definition of minority, it does cover citizens' rights, freedoms and responsibilities, as well as comprise certain provisions providing support and maintenance of ethnic community languages, cultures and customs. After examining the current position, as well as legal and social characteristics of the Poles in Lithuania, it is possible to recognise ground features, which would establish the Polish community as a national minority in Lithuania. It has historically established itself as an ethnic community in the territory of the state and is recognised by national and international institutions as well as bilateral Polish-Lithuanian treaties. The state assures the Poles can exercise their civil, political, social and economic rights. However, since the expiration of the Law on National Minorities 1989, there is no direct legal reference to minority rights in the Lithuanian state. Even the Law on the State Language refers to ethnic communities rather than to minorities. Thus the discrepancy between European directives, international conventions and national laws is still present.

The lack of a definite concept of minorities presents a problem to create legally binding provisions for minority rights in the Lithuanian legal system and on the supranational level. Thus, the EU member states are expected to solve minority issues through bilateral agreements. This often causes disagreements between the minority representatives and national governments aiming to sustain their sovereignty. For example, in Lithuania, Constitutional provisions are the most powerful decision makers with regards to citizenship, national language and identity protection. Therefore, in case of ambiguities concerning the rights to use a different alphabet in Lithuanian official documents, it obliges minorities to comply with the Constitution's legal implications. This, as will be seen in the following chapters, often raises sensitive disputes on grounds of minority discrimination and cultural assimilation (media.efhr.eu, 2012).

It seems that the connection between the definitions of citizenship, national minorities, minorities and ethnic communities is crucial to further develop the rights, freedoms and responsibilities of numerically inferior ethnic communities. However, the issue becomes more complex when a minority demands more linguistic rights and freedoms within that society. It is here for the state to decide what measures to take and whether to adopt more restrictive regulations or adhere to the minority's demands. Restrictive legislations and reforms may raise domestic conflicts, which may in turn have direct or indirect effects on changes in the foreign relations. On the other hand, a more lenient approach towards minority's demands may pose a threat to national sovereignty (Davenport, 1995). Consequentially, it is not only a matter of conceptual discrepancies between the multi-layered governments and legal institutions. A threat to nation's security and sovereignty, as well as the manner of protective, strategic ruling becomes a determining factor to conflict resolution.

4.3 Polish-Lithuanian relations

Observing Lithuania's domestic politics and current events may help the reader understand the complexity of Polish-Lithuanian linguistic and socio-economic issues, which consequently affect the bilateral relations between the neighbours. Here it is essential to refer to the historical relation between the neighbouring countries, observe geographical changes over time and examine their consequences on growing nationalistic attitudes. The historical background is necessary to picture the development of the long-standing tensions, signed treaties and disagreements up until now. These events had a significant impact on national political decision making and resulted in various socio-economic transitions within Poland and Lithuania.

The following section aims to highlight the most important issues accelerating conflicts between the states. Amongst others, the recent educational reforms strongly affect members of the minority. Other sensitive disputes about spelling names in passports and street names in Lithuania are long-standing arguments. These incorporate legal institutions and the national constitutional court on grounds of the distinct treatment of non-native language use in public spaces and official documents. One of the presented case studies will show how national constitutional legislations are more influential than the European Court of Justice. The decisions concerning minority issues may be usually resolved on a national level. Also it is interesting to examine the ongoing debate on Polish minority representatives' agenda in the national Parliament. Increasing 'politisation' of minority matters shall be appraised here.

The section assesses the current state of minorities from legal constitutional perspective, as well as presents the current findings about the Polish-Lithuanian minorities' image in Lithuanian society. All the matters discussed above account for the analysis of the domestic Polish-Lithuanian relations. Thus, it is my intention to observe the Polish-minorities' position in Lithuania from diverse angles, encompassing past and current disputes, political objectives of their representatives, as well as legal constitutional provisions in Lithuania.

4.4 Historical background in a nutshell

A pure historiography of Polish-Lithuanian relations is hardly possible to achieve. The nations' interpretation of their mutual relations often consists of myths, legends, stereotypes and imagery (Dambrauskaite et al., 2011). A particular historical, political and geographical attention receives the Vilnius region, which currently belongs to Lithuania. The Vilnius region has instigated continuous conflicts between two neighbours for over half of a century. Both of the parties, among others Germany and Russia, were claiming their rights to the Vilnius region. Constant interventions and military seizures resulted in an increased number of foreign settlers. This gives rise to the aforementioned stereotypes, which over time have progressed even deeper between both nations (Dambrauskaite et al., 2011). It is therefore essential to introduce the historical-political perspective on the Polish-Lithuanian relations and the tensions over the Vilnius region between Poland and Lithuania. The historical background will help understand the present Polish political agenda and the continuous antagonism between the Polish minorities and Lithuanian society.

The early interaction between Poles and Lithuanians was a development of Grand Duchy of Lithuania in XII-XVIII, the largest European state in XV. Two major changes occurred in the history of the Grand Duchy, namely conversion into Catholicism and formation of a dynastic union between the Grand Duchy of Lithuania and the Crown Kingdom of Poland. As Fearon and Laitin (2006) argue, many of the former pagan elite representatives not only adopted Catholicism but also considered themselves as Polish. Therefore, the Polish language and Roman Catholicism were two important instruments to socio-economic status. Closely tied Polish-Lithuanian relations resulted in the establishment of the Polish-Lithuanian Commonwealth in the Union of Lublin in 1569. Gradual tolerance towards and acceptance of the Polish political order became means to the Polish language authority within the Union. This further resulted in a gradual increase of Polonisation. Since in 1697, Polish was established as the official language of the Union's legislature, as well as the Grand Duchy's chancellery (Fearon and Laitin, 2006). Polish identity in Lithuania developed close connotations to national conceptions. Particularly

Vilnius was—and still is—an example where the Poles were dominant the most. Nevertheless, in 1792 the newly reformed Commonwealth was overrun by Russia, and later divided by the neighbours: the Russian Empire, the Kingdom of Prussia and Austria in 1795.

Another distinct example incorporating the geopolitical Polish-Lithuanian relations seems to be clearly reflected in the aftermath of WWI. The end of World War I brought many changes and the reestablishments of those new countries' borders and regions. The mutual antipathy escalated when Lithuanian Poles asserted their aspirations to re-unite Lithuania with Poland. Consequentially, partly due to nationalisation, Lithuania imposed measures to reclaim the Polish owned land. Other course of actions taken by the Lithuanian state against Polonisation was the restriction of Polish schools, periodicals, religious services and, Polish voting rights. As Fearon and Laitin (2006: 4) argue, discrimination against Poles was rather strong, as in the Lithuanian press, Poles were often associated with the insects, or referred to the 'lice of the nation'.

The Vilnius region, similarly to the Klaipeda coastal area, has caused many negotiations between the neighbours. Already in 1920, Poland took control over Vilnius with armed forces. According to Fearon and Laitin (2006), Polish attempts to occupy Vilnius stimulated the renewal of enduring antagonism and aggression between the former partners. Lithuanian schools were closed in the former Vilnius region. Cultural activities and organisations too, were banned in the regions controlled by Poland. Therefore, the diplomatic relations between the two nations were gradually fading away.

After the Soviets took control over Lithuania in 1944, the Polish minorities located in the Vilnius district were used by Soviet authorities to balance raising nationalism by the Lithuanian elites (Snyder, 2003). The Soviets fostered Polish cultural life, and saw the Polish minority as an instrument to impede the process of Lithuania's independence. In 1990, Lithuania officially adopted the status both, *de jure* and *de facto* (Hogan-Brun and Ramoniene, 2002). Following independence in 1990, ethnic relations between Poles and Lithuanians deteriorated once again. The main points of argument were the spelling of Polish names in Lithuanian official documents, as well as restrictions on Polish-taught education in Lithuania. Additionally, one of the most troublesome debates still circulating in the present political arena is land restitution. Here, the Poles claim the Lithuanian state takes no action in resolving Polish property claims for Post-Soviet restitution (Snyder, 2003).

A historical perspective on problematic Polish-Lithuanian relations indicates enduring tensions with regards to territorial integrity, national identity, culture, politics, as well as minorities. Moreover, various disagreements fostered nationalism in both societies, creating an ever-widening gap between the neighbours. Political and cultural Polish demands for autonomy posed a threat to Lithuanian national sovereignty and identity. Such continuous pressure further raised anti-Polish sentiments within the Lithuanian society often discussed in the media nowadays. The historical background of mutual Polish-Lithuanian relations explains the cause of political disagreements and territorial division of society, both on the national and international levels.

This chapter however focuses on tensions visible on the national level only. The causal factors of the deteriorating relations between the nations encompass the historical memory of the past threats to Lithuania's national sovereignty and identity. Thus, Lithuania is taking a more protectionist stand with regards to its policies on education, as well as minority language use in legal official documents and street names. Apart from reforms on education, spelling of Polish streets and names, land restitution puts additional pressure on the mutual relations between the neighbouring states. Furthermore, a critical standpoint will articulate the raising conflict between the Poles and Lithuanians may increase political attention and support from the Polish minorities in Lithuania. The domestic political conflict may therefore result-and has resulted-in more public support for LLRA (Lietuvos Lenku Rinkimu Akcija/ the Electoral Action of Poles) and its leader Valdemar Tomasevski during the European Parliament elections in 2014 and previous general elections in 2012. The following section shall further investigate the main points of conflict mentioned above, and shall briefly observe minority's constitutional rights and duties, as well as legal provisions concerning rights to citizenship. It will present the current state of the Polish minority in Lithuania.

4.5 Reforms on education in Lithuania

The Lithuanian educational system for minorities is one of the most liberal models in Europe (Ministry of Education and Science of the Republic of Lithuania, 2011). After Lithuania became independent, the program concerning ethnic minorities did not foster any tensions or disagreements. The previous model for education allowed minorities to study in their mother tongue from first until their final school year. However, the education attainment results showed that the ethnic minority schools do relatively poorer in comparison to Lithuanian taught schools (Ministry of Education and Science of the Republic of Lithuania, 2011). It is therefore possible to conclude that ethnic minority schools are valuable to preserve minority groups and their cultural heritage. This creates a barrier to continue with the tertiary education in Lithuania (Ministry of Education and Science of the Republic of Lithuania, 2011) and limits minority integration into the labour market and society as a whole (Lithuanian Social Science Research, 2012).

Therefore, in 2011, The Parliament of Lithuania implemented reforms on education. The amended law on education established new, higher standards on the Lithuanian language education and better standards for Lithuanian language education in minority schools. The established requirements administer the following (Ministry of Education and Science of the Republic of Lithuania, 2011): more time shall be spent on Lithuanian language learning in primary and secondary minority schools. All Lithuanian schools of 11-12th grade shall have equal Lithuanian language and literature programs. Additionally, subjects such as Lithuanian history, geography, as well as civil rights shall be taught in Lithuanian. In 2013, Lithuanian Sate language and literature exams will be of equal structure and standards for all students in Lithuania, yet Polish students will be allowed to make more mistakes. The reforms on education have raised concerns and opposition from the minority groups, since these amendments are seen as instruments for discrimination and assimilation. The Lithuanian government, however, argues the transition to stricter standards and regulations on Lithuanian language education are to preserve *status quo*, and shall be adhered by all primary and secondary education institutions in Lithuania (Ministry of Education and Science of the Republic of Lithuania, 2011).

The school dispute started in 2012 after Lithuania implemented a new law on education. Polish media, officials and other political institutions claim that such amendments in Lithuanian education law will be disadvantageous to the students attending schools where classes are taught in Polish. The main concern about such rapid changes concerns the difficulty for minority students to make up for these language differences in just two years. Poles also speak out about budget cuts and the lack of textbooks in minority schools.

According to LietuvosRytas (2011) Polish media in Poland assert these changes as Lithuanian President Dalia Grybauskaite's political strategy shifting towards nationalism, which is addressed as gradual minority integration into Lithuanian society. The Lithuanian President Dalia Grybauskaite's official position, however, is to assure that minorities have equal rights as Lithuanians, feel like equal citizens, become more integrated into Lithuanian society, have an equal say in political decision making, and better opportunities on the labour market (LietuvosRytas, 2011).

The most recent dispute rests between the representatives of the Poles in Lithuania and the Vilnius City Administration, as the city aims to reorganize minority schools. The reorganization would take place in such minority and Lithuanian schools, which do not have enough students attending classes. Although Poles accentuate this action as linguistic discrimination against minorities, the President Mrs. Dalia Grybauskaite argues that the schools are being reorganized due to the decreasing student enrolment not only in minority schools, but in Lithuanian schools as well (lrytas.lt, 2015). Zasztowt (2011) claims, that, in comparison to other foreign countries, and especially compared to Belarus or Ukraine, the educational system in Lithuania is favourable to the Polish minority; for example, Lithuania offers Polish students the opportunity to attend education from school to university level (Dambrauskaite et al., 2011). As the school reorganization is currently ongoing and the final decisions will be made by September 2015, it is yet not clear in which direction the Polish-Lithuanian domestic relations will turn.

4.6 THE SPELLING SYSTEM USED FOR PERSONAL NAMES AND PLACE NAMES

Another distinctive conflict between Lithuania and the Polish minority relates to the spelling practices used for personal names and street-names.

Figure 3. Example of a street in Lithuania (Medaus street/Miodowaulica/Honey street), where the bilingual table is used against the Lithuanian laws.

According to Lithuanian laws, personal names in official documents have to be spelt in Lithuanian. The bilingual tables for street names are against Lithuanian laws. Lithuania has agreed to solve the issue of the spelling system for the personal names, yet the members of the Lithuanian Parliament holding a nationalistic standpoint discarded such changes, and the issue concerning the spelling system has not been solved since (Dambrauskaite et al., 2011). This raised concerns by Poles who felt discriminated against by the Lithuanian spelling system, and wished their names to be spelt in Polish. This case and its outcomes shall be further investigated in the section 3.9. We shall see how limited EU governmental power is with regards to the minority disputes between the two states.

4.7 LAND REFORM

Another row between two states is about restitution of property in the Vilnius region confiscated in the Soviet era. The ethnically Polish district was ruled by Poland before the war. That complicates the land titles often used in either Polish or Lithuanian only. Other disputes are about the rules limiting the use of Polish in advertisements and street signs (The Economist, 2012).

After WWI Poland and Lithuania tried to come to an agreement concerning the rights to the Vilnius region. Evidently, Poland would not acknowledge Lithuanian sovereignty over contemporary Vilnius (Gira, 2011). Lithuania, on the other hand, was ready to claim its rights over Vilnius. Therefore, Lithuanians considered enacting a land reform and confiscating the estates whose owners had not come back after WWI. In Lithuania, restitution of land property rights adheres to an ordinary procedure, which is equally applicable to all plaintiffs (Gira, 2011). Moreover, any priority rights to any national minority are provided in Lithuania. Nevertheless, opposing arguments remain present: 'it has turned out that it is easier for Lithuanians from Kaunas or Siauliai to transfer the plots to the vicinity of Vilnius than for Poles who have lived here for centuries to receive the land of their grandparents' (BBC Monitoring International Reports, 2006). Moreover, the land prices around Vilnius are several times higher than in the provinces. Poles argue that although the Lithuanian law gives priority to former owners in claiming land restitution, ethnic Lithuanian citizens have more chances to make claims in the region of Vilnius (Plazynski, 2010). Gira (2011), on the other hand, presents numerous reasons why the restitution of land property rights in Lithuania has been delayed, and distinguished five different points.

Firstly, the land was nationalised during the Soviet occupation, and direct rights to land have been constrained or proven to be not feasible at all. Around 800,000 requests for property rights restitution were made after Lithuania became independent. This further impeded the process of finding relevant documents, since some plaintiffs did not have all the required records. Another issue brings about the specificity of Vilnius district. As Gira (2011) argues, the region lacks official documents verifying the property rights of individuals. Financial constraints on land reform projects additionally hinder the legal procedures. Although the process of the restitution of the land rights seems to be rather slow, the Lithuanian Government recognises the issue of land reform as one of its priorities and it therefore aims to complete the process of the land reform in Vilnius district (Gira, 2011).

4.8 The Polish party in the Parliament: EAPL (Electoral Action of Poles in Lithuania)

As the issues concerning the Polish minority have recently become more 'politicised', it is possible to see parties' tendency to keep the problems unresolved. This may be a well thought-out strategy on the part of Polish politicians to maintain their political power in the Seimas. Thus, the Polish political party and its agenda shall be further observed here. Electoral Action of Poles in Lithuania (EAPL) is a political party in Lithuania, which has joined a ruling centre-left coalition that will govern the country. It represents the Polish minority and also positions itself as Christian democratic. It has eight seats in the Seimas, one seat in the European Parliament, and ten seats in coalition with the Russian Alliance in the Vilnius City Municipality and belongs to a minority group in the Vilnius City Council. In the 2012 elections, EAPL for the first time qualified for professional representations seats and in 2015, V. Tomasevski unsuccessfully participated in the City of Vilnius mayor elections.

As T. Janeliunas (lithuaniatribune, 2013) argues, the EAPL is not looking for solutions but only wants to escalate the problem, which would help keep the focus of public attention on the EAPL. The party only needs to generate a sense of tension, because this helps win elections. Such activity, according to political scientist T. Janeliunas (lithuaniatribune, 2013) will do nothing to actually help the Polish minority in Lithuania. If Lithuanian-Polish relations are positive on a domestic level, the political tension decreases. This results in lower political gesticulation and poses a threat to party's ability to win elections.

V. Tomasevski won the European Parliament elections held in 2014. It is often noticed on the media that the linguistic issues and matters concerning Polish minority are extensively pronounced just before the elections. Here, the reasons to raise political tensions between Lithuanians and Polish minorities are rather evident. Escalating domestic conflicts would help the EAPL foster Polish minority political activity and increase the party's chances to obtain more votes, be it municipal or parliamentarian elections.

It is yet debatable whether it is historical memory of the threat to sovereignty and the feeling of Lithuanian nationalism (Clark, 2006) or continuous minority demands for more rights that pose a threat to Lithuanian national sovereignty and foreign affairs. Thus, it remains to be seen how these neighbourly relations will play off in the future domestic politics and shared foreign strategies between Lithuania and Poland.

4.9 The Image of the Poles in Lithuanian society

Polish is the Western Slavic language with the largest number of speakers (approximately 46 million) (Mercator-Education, 2006). Polish is the official language of Poland, yet a considerable number of clustered Polish minorities are found in Lithuania, Belarus, Russia, Ukraine, the United States, Germany and Canada (Mercator-Education, 2006). Poles accounted for approximately 6.6 per cent (240,000) of the total Lithuanian population (Statistics Lithuania, 2011: 23). Although native Polish speakers are found all over Lithuania, 90 per cent of the Poles are concentrated in and around the capital, Vilnius, region. Lithuania has always been considered a multiethnic state, and has never had vast conflicts regarding ethnic minorities. Thus, in 1991 the

Lithuanian Parliament (Seimas) adopted a legislation proposing Lithuanian citizenship to all, who permanently lived in Lithuania at least for three years. This legislation is known as a 'zero option', allowing for a rapid integration of ethnic minorities. In this way, Lithuania avoided such problems as slow integration faced by Estonia and Latvia (Bulajeva and Hogan-Brun, 2008).

Recent public debates in Lithuania have raised numerous concerns about the image of the Polish minority in Lithuania. Both in political dialogue and media, the Polish minority representatives addressed their interests to protect the rights of national minorities in Lithuania (Lithuanian Social Research Centre, 2012). According to Lithuanian Social Research Centre (2012: 7), 'The stream of information presented to the Lithuanian society was provided in the context of 'us' (Lithuanians) and 'them' (representatives of Polish minority in Lithuania, Poles in Poland, Polish authorities)'. Within their community, Poles attain their solidarity through isolation trying to relate themselves only to the things that are Polish, i.e. 'theirs', denying everything that is Lithuanian, i.e. alien, and consequently, unpleasant (Lithuanian Social Research Centre, 2012). This is so because of their belief in the threat of Lithuanisation. Citizens who accepted such xenophobic philosophy often frame themselves into a marginal position in Lithuanian society.

Besides such cultural problems, these types of citizens encounter additional social problems. As stated Kalnius (1998) such cultural and civil non-integrity may impede the economic, political and cultural activities, thereby reducing the chances of taking more prominent positions in the governmental organisations of Lithuania, as well as decreasing the number of Polish deputies in Seimas—the parliament of Lithuania—or even diminishing their influence on the decision making in certain political institutions (Kalnius, 1998). Lithuanian Social Research Centre (2012) argues language, religion and traditions are amongst the most essential elements of the ethnicity. The research further shows that uneven integration into the Lithuanian labour market and society as a whole is mainly caused by minorities' low educational attainment and language barriers (Lithuanian Social Research Centre, 2012). Struggles to overcome language barriers and increase educational performance also have to do with the different languages used in family and in school (Hogan-Brun and Ramoniene, 2008). It is also depicted in the table below that in the family settings Poles show preference for other than Lithuanian.

Table 1. Pictures the Lithuanian language use in family settings among the Eastern and South-Eastern Polish and Russian inhabitants.

Use of Lithuanian	*With children/ grandchildren*	*With brothers and sisters/ parents and grandparents*
By Russians	27%/33%	12%/3–8%
By Poles	32%/40%	14%/4–5%

Source: Survey of Eastern and South-Eastern Lithuania Inhabitants (2002).

Another reason for lower educational attainment of the Polish minority is partly due to the Poles decision to send their kids to schools in which classes are taught in Polish only. According to Bulajeva and Hogan-Brun (Bulajeva and Hogan-Brun, 2008), Russians however, show a more pragmatic approach by choosing Lithuanian-medium schools. Polish schools are based in rural areas where educational and teacher quality are comparatively low (Bulajeva and Hogan-Brun, 2008). Finishing a Polish school or graduating from a Polish University only may further impede graduates' chances to successfully enter the job market for knowing the Lithuanian language is be linked to success in the majority of Lithuanian society (Bulajeva and Hogan-Brun, 2008). Bulajeva's and Hogan-Brun's (2008) research shows that more educated minority populations tends to send their children to Lithuanian-medium schools.

According to Lithuanian Social Research Centre (2012), the equal participation in Lithuanian economy and society is related to higher income. Already half of the Poles' respondents indicate themselves as the lower social class occupants (Lithuanian Social Research Centre, 2012). Therefore, it seems to be essential to help minorities overcome language barriers, increase attainment of education and encourage their integration to the Lithuanian society, help overcome lower class stereotypes, as well as foster the economic and political participation. However, public opinion varies, and the vast majority positively recognise the Poles as 'efficient, educated, attentive', etc. (Lithuanian Social Research Centre, 2012). The public also indicate Poland as an important political partner for Lithuania and acknowledge the importance of mutual cooperation in international security and energy areas (Lithuanian Social Research Centre, 2012).

4.10 Overview of Polish minority in Lithuania

Evidently, the current Polish-Lithuanian political tensions could be partly explained by examining it from an historical perspective. Territorial transitions, treaties and disagreements, as well as socio-economic changes influenced the development of these relations over time. Consequences of Polish-Lithuanian actions in the past are thus visible in the current domestic politics in Lithuania. The Polish minority has been present in Lithuania for centuries. In order to protect its identity, the minority has established itself as a distinct group seeking comprehension of its cultural and political presence. This has been done through the social institutions and governmental bodies aiming to protect minority rights and culture in a foreign nation. However, some states show a rather protectionist standpoint with regards to expanding minority rights. The example of Lithuania clearly indicates how the historical memory of a threat to sovereignty limits the country's actions on adhering to minority needs.

Thus, Lithuania aims to protect its sovereignty and national identity through stricter policies on language use in official documents. The Lithuanian government has implemented new reforms on education, which established higher Lithuanian language standards for minority groups. Such domestic amendments have raised Polish minority concerns, as they feel discriminated by the Lithuanian state. Other issues of spelling of street names and land restitution in Lithuania have become a long-standing conflict between the neighbours. Polish discontent about the mandatory Lithuanian alphabet use in official documents has become a multi-level issue operating on national, regional and European levels, thereby reaching such legal bodies as European Court of Justice. Although there is no universal definition of minority, numerous international conventions encompass protection of human rights and dignity and prohibit discrimination. Moreover, before entering the European Union, nations were obliged to comply with the EU standards with regards to minorities. Thus, the EU aims to assure the expansion of minority rights, as well as increase ethnic and racial tolerance in the MS.

As the research on the Polish identity in Lithuania has shown, the language barrier is one of the major causal problems for slow minority integration into society. This results in lower educational attainment, relatively lower position on the labour market, followed by the subordinate class position in society. In order to achieve faster integration, it seems to be essential to assure that minorities gain a fluent command of the Lithuanian language.

Examining Polish minority issues on the domestic level is essential to understand the current political situation in Lithuania. Rising disagreements between minorities and Lithuania pose a threat of societal division. It is crucial for both nations to come to agreement on minority issues, since deteriorating neighbour relations weaken Lithuanian and Polish sovereignty as well as national identity within the region. Moreover, domestic problems strongly influence strategic bilateral relations, which are further discussed in the following chapter. We shall see how the issues of conflict on the domestic level are manipulated to reason the changes in international political agendas.

5. Two cases: Name spelling in passports; Education reform

It is interesting to investigate a variety of cases not only for the purpose of measuring legislative power of the EU governmental bodies, but also to observe how Lithuanian state imposes Lithuanian identity to the Polish nationals residing in Lithuania. This is particularly visible in case of women with regards to the (lack of) rights to amending their surname. Generally, after the marriage women are not allowed to choose last name concealing their marital status (the Commission of the Lithuanian Language, 2003). This means that, for example, women, including non-nationals, getting married and registering their marriage in Lithuania are obliged to modify the ending of their last name. By doing so, a woman will transform her last name and lose certain alphabet characters previously indicating her identity. In case of a Polish woman getting married in Lithuania, the last name would lose diacritical modifications and any other characters that are not recognised by Lithuanian state laws. A woman is also not allowed to choose an identical to her husband's last name. Initially, last name would indicate woman's marital status in official documents as a married, not a single, woman. Men, however, are not obliged to make any changes in their forename. This poses an issue of discrimination between men and women with regards to the right to disclose their marital status. Discrimination is also visible between Lithuanian women in general. Practice shows that there are exceptional examples allowing the right to chose husband's forename. This is done by registering marriage in a foreign country. For instance, Daina Bosas-a Danish national, a well-known businesswoman in Lithuania and a wife of Lithuanian politician Antanas Bosas-has registered her marriage in Denmark. By officially registering her marriage in Denmark, she was allowed to keep her husband's forename. Aurelija Simutis-a famous Lithuanian journalist-was also allowed to keep her husband's forename. This exception was made due to the loopholes in laws. To avoid similar cases the legal framework was amended in 2001 by LR Minister of Justice (Jakstiene, 2004).

This case exhibits an example of forename modifications in Lithuanian official documents. Although it does not present a case obliging a woman to indicate her marital status, it shows how a Polish national is being obliged to comply with Lithuanian language laws and transform the characteristics of her last name.

5.1 Case I. Name spelling in passports

Malgozata Runevic-Vardyn, Lukas Pawel Wardyn v Vilnius (Case c-391/09) is one of the most recent cases concerning the spelling of forenames and surnames of citizens of the EU. It is a great example of the multilayered identity problem, where the conflict involves the Lithuanian state, a member of Polish minority holding Lithuanian passport and the European Court of Justice.

Mrs Malgozata Runevic-Vardyn is a Lithuanian national, and belongs to the Polish minority in Lithuania. The plaintiff argues her parents gave her the Polish forename Malgozata and her father's last name Runiewicz. Mrs Malgozata claimed that her birth certificate issued in 1977 used Cyrillic characters. However, the birth certificate issued in 2003 was drawn up in Lithuanian form, and her name appeared as Malgozata Runevic. Additionally, her Lithuanian passport issued in 2002 also showed her first and last name registered using Lithuanian characters.

In 2007 Mrs Malgozata married a Polish national Mr Lukasz Pawel Wardyn. On the marriage certificate his name was transcribed as Lukasz Pawel Wardyn (without diacritical modifications). Mrs Malgozata's name however, appears in the form as Malgozata-Runevic–Vardyn. A couple requested that the addition of Mr. Wardyn's surname to his wife's maiden name on the Lithuanian marriage certificate be edited to Wardyn instead of Vardyn (ECHR, 2011). Since Lithuanian characters do not include the letter 'W', or any other diacritical modifications, and the Polish *w* is pronounced as English *v*, the ECJ ruled that Mr Wadryn's wife's name appears in the form 'Malgozata Runevic-Vardyn'.

Changes in favour of plaintiff would be detrimental to the rules of the LR Constitution. In the end, the Court of Justice stated: 'as European Union law stands at present, the rules governing the form in which a person's

surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States' (European Court of Justice, 2011: 1-2). Interestingly, although the ECJ has ruled the case in favour of Lithuania, the Council of Europe criticises the amendments in the Law of State Language stating 'these measures have a negative impact on the preservation and the promotion of minority cultures and identity, of which the language is an important part' (COE, 2008: 5).

5.2 Case II. Education reform

As it is mentioned in the introductory part of this chapter, the following part aims to explore the limits of the EU governmental power when solving disputes that touch upon minority discrimination between the nations. By looking at a specific study case, which is of a multi-dimensional nature, we shall examine the rights and responsibilities of the parties involved, namely Lithuania, a member of Polish minority residing in Lithuania and the EU governmental bodies. The case mainly focused on the problem of the violation of human rights and the EU law by Lithuania as a member of the EU. The most evident finding to emerge from this study is that the Commission has no general powers with regards to national minorities. In addition, the Commission has no aptitude over matters concerning the definition of national minorities, 'the recognition of the status of minorities or their self-determination and autonomy' (EP, 2012: 3). Thus, the petition 0358/2011 filed by Tomasz Snarski (Polish) concerning the amendment of Lithuanian Education Act, which results in limitation of the school subjects taught in Polish is left for the states to resolve.

5.2.1 Petition 0358/2011

The petitioner, Tomasz Snarski referred to the amendment of Lithuanian Education Act of 2011, which would restrict the right of Polish national minority to teaching in Polish (EP, 2012). Inherently, the Act established that the state language has to be used for compulsory Lithuanian language instruction, as well as in the teaching of history and geography subjects. If the Polish schools fail to comply with the requirements, they are projected to be closed (EP, 2012). Tomasz Snarski saw this action by Lithuania as breaching numerous international agreements and conventions, namely 1966 International Covenant on Civil and Political Rights, the European Convention on Human Rights, the European Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. The petitioner thus requested the European Parliament to examine this issue and ensure the protection of the rights of the Poles in Lithuania. Additionally, Snarski appealed to assess if the new Lithuanian Education Act complies with the tenet of non-discrimination on the basis of nationality (EP, 2012).

The Commission indicated that according to the Article 165 of the Treaty on the Functioning of the European Union, MS are responsible for the content of teaching and the structure of their education systems, as well as the language policy (EP, 2012). Thus, the legal instruments mentioned by the applicant are outside the legal scope of the European Union.

Petitioner additionally indicated a worsening situation of linguistic, educational and cultural rights of the Poles in Lithuania. These rights, according to EP (2012) are not respected fully and contradict with such legal provisions as the International Covenant on Civil and Political Rights, the Framework Convention on the Protection of National Minorities, the European Convention on Human Rights, as well as the European Charter for Regional or Minority Languages. The petitioner further argued that the members of Polish minority in Lithuania are deprived of the right to use the Polish language in spelling their names, traditional local names, street names and in other public spaces. Snarski further asserts recent alterations of the Lithuanian Education Act position the Polish minority at a disadvantage (EP, 2012).

5.2.2 The European Commission's notice

As far as the Commission's power solving this issue is concerned, it does not have an authority to intervene with the Member States in the sphere of fundamental rights. It could only do so, if the European law is involved in the case. According to European law article 51 (1), the Charter relates to the Member States only when the MS are implementing European Law. According to EP (2012), on the grounds of the information provided in the petition, the issue to which the petitioner refers is not related to European Union law. Thus, the EC does not have power to follow up on the issues brought up in the petition. Nor does it have legitimate power to deal with the issues concerning minorities: 'The Commission has no competence over matters concerning the definition of what is a national minority, the recognition of the status of minorities or their self-determination and autonomy' (EP, 2012: 3). Consequentially, these matters have to be addressed by the Member States themselves.

On the other hand, the Commission is responsible to ensure that MS respect fundamental rights, including the principle of non-discrimination when implementing the European Union law. The Commission also indicates that Lithuania has submitted three reports on the position of national minorities, last one received by the Council of Europe in 2011. After visits in both countries, Lithuania and Poland, the OSCE Commissioner on National minorities has 'urged both Governments to address national minority issues in their own countries, while also working on improving their bilateral relations, including by reviving mechanisms such as the joint education experts' group' (osce.org, 2013). Finally, according to the EP (2012), the Commission remarks that the Court has arrived at the same conclusion in its initial ruling in the case of Runevic-Vardyn and Wardyn (Case C-391/09, 12 May 2011, paragraph 47), which dealt with the right to use a name in minority language.

This case presents the limitations of the legal decision-making power of EU authorities with regards to national minority rights and freedoms in the MS. The Union could only intervene if its MS implement European Law. Evidently, the multidimensional issue of national minority discrimination contradicts the established European values of diversity and equality. However, the issue of discrimination of national minorities is out of the legal scope of the EU, thus the responsibility to solve this issue is passed on to the Member States.

6. Shifting Polish-Lithuanian bilateral relations

Chapter 3 reflects on the development and consequences of long standing Polish-Lithuanian relations, underpinned by territorial divisions, disputes, treaties and declarations. Such neighbour states' bilateral relations often depended on changes in an international geopolitical arena (Dambrauskaite et al., 2011). The common threat of the Soviet power, aim for a membership in NATO and active attempts of becoming a member of the European Union have influenced numerous transitions in the nations' foreign relations. This piece however, shall analyse how linguistic, political and socio-economic issues between Poland and Lithuania affect bilateral relations. It shall further examine the extent to which current domestic conflicts between the Poles and Lithuania influence transitions in the bilateral relations. We shall see that with the current geopolitical context (notably the EU's sanctions on Russia and Russia's sanctions on the EU) it is highly important for the Baltic countries to coordinate their common position with regards to export and healthy market economy. It will become clear that domestic issues are not the only causes for shifts in Polish-Lithuanian bilateral relations. Another valid reason is that Poland as the country itself is becoming a stronger political power both within the EU and on an international scale. Thus, it seems Poland shifted its foreign agenda towards Germany, France and the US, ignoring the significance of the former CEE countries (Dambrauskaite et al., 2011). On the other hand, Lithuania itself aims to strengthen bilateral relations with the Scandinavian nations. Particularly with regards to energy supply, Lithuania is looking for ways to reduce its dependence on Russia. Integration to the Nordic-Baltic market is one of the ways to diversify the supply of energy (Vilpisauskas, 2012).

6.1 The deteriorating relations: a case on PKN Orlen

Poland expresses strong criticism towards Lithuania not ensuring equal rights for the Polish community in Lithuania (Dambrauskaite et al., 2011). The educational and language reforms and the issue of spelling of Polish surnames in Lithuanian passports were addressed as the major reasons shifting the Polish-Lithuanian bilateral relations apart. Amongst other issues, Poland criticises Lithuania for rather poor investment in climate conditions, logistics problems and delays (Dambrauskaite et al., 2011).

The deterioration of bilateral relations was even more apparent when Poland's oil company PKN Orlen and Lithuanian Railways started negotiating upon the transportation rates of oil cargos within the Lithuanian territory (15min.lt, 2012). PKN Orlen demanded to lower the transportation rates when transporting products to Latvia due to the dismantled rail tracks and other logistical problems. The Lithuanian Railways company, however, was not in favour of lowering the rates and claimed that the track is in bad condition and can cause an accident (Lithuaniatribune, 2013). In reaction to that, PKN Orlen filed a complaint to the Commission. The European Commission has informed the Lithuanian railway incumbent 'AB Lietuvos Gelezinkeliai' that 'it suspects the company of having limited competition on the rail markets in Lithuania and Latvia by removing a railway track connecting the two countries' (EC, 2015). The Commission is currently investigating, whether Lithuania has made a cartel agreement with other neighbouring states. If so, such Lithuanian actions would be in violation with EU antitrust rule (EUtoday, 2015). If evidence is unfavourable to Lithuania, the case may be passed on to the ECJ. Lithuaniatribune.com (2013) wrote, 'Polish Minister of Foreign Affairs Radoslaw Sikorski said on Wednesday that the resolution of issues of Polish ethnic minority in Lithuania would help to easier implement bilateral transport and energy projects'. Such argument evidently shows the prevalence of the Polish minority issue in Polish-Lithuanian bilateral relations. The unsolved Polish minority disputes in Lithuania therefore allow Poland to use it as leverage during the negotiations concerning bilateral policy.

Changing relations between Poland and its neighbours may be explained in a number of ways. Firstly, Poland aspires to change its identity from Central and Eastern European leader to a powerful player among Western EU nations (Dambrauskaite et al., 2011). As Dambrauskaite et al. (2011) argues, the state is also gradually changing its behavioural patterns, where the relations with smaller countries are considered as being less important. On the other hand, Poland's decreasing interest in the CEE countries may have to do with inability of the latter to compete with Poland (Dambrauskaite et al., 2011).

6.2 Polish-Lithuanian bilateral cooperation

Although certain events show that Polish-Lithuanian relations are shifting apart, it is important to consider the potential strategies that may strengthen bilateral relations between two countries and within the Baltic region. A great example could be the ongoing project Rail Baltica that aims to launch a railway connection between Finland, the Baltic States and Poland. This would stimulate regional export industries by lowering the transport costs. Rail Baltica Growth Corridor (RBGC) is an additional project that would provide a connection to Berlin, and expand the export opportunities even further. Recent news (Ministry of Transport and Communication, 2015) reported that Lithuania, Latvia and Estonia, applied for a total of about EUR 620 million of co-funding under the CEF cohesion envelope in order to develop the Rail Baltica high-speed rail project. The assessment from the EC could be expected in July, 2015 (TheBalticCourse.com, 2015).

Another recent bilateral achievement is LitPol Link HVDC electricity link between Lithuania and Poland scheduled to be finished in December 2015. According to Schmidt and Ligi (2013), 'The 500 megawatt (MW) back–to-back–HDVC converter station will help connect the 330 kilovolt (kV) Lithuanian grid to the 400 kV Polish grid, thereby integrating the electricity networks of the Baltic States with the continental European power grid and contribute to the development of an EU electricity market'. The project supported by the EU will not only facilitate energy trading between Poland and Lithuania, but it will also strengthen energy security

in the region (Schmidt and Ligi, 2013) and assure Lithuania's energy independency from Russia (world-nuclear.org, 2013).

6.3 Sanctions on Russia

Since the EU has imposed economic sanctions on Russia and Russia reacted alike, the EU markets and particularly the Baltic States were forced to look for alternative markets (15min, 2015). Such countries as Germany, Sweden, Poland, Latvia and Great Britain became 5 most attractive markets to Lithuanian production (lrytas.com, 2015).

Although facing a common threat from Russia, Polish-Lithuanian relations do not show a positive shift into stronger collaboration. As the former Lithuanian President Mr. Valdas Adamkus claims, mutual partnership is rather stubborn and precautions instead of confident and collaborative in such an unstable environment (lrytas.lt, 2015). V. Adamkus (lrytas.lt, 2015) adds that the Polish minority issues need to be solved by way of reaching a compromise between the two nations, yet the political parties should stop exaggerating the conflict and try to initiate an in-depth discussion between the countries' representatives.

6.4 Polish-Lithuanian relations: Will they improve?

When discussing Polish-Lithuanian future politics it is essential to recognize the current changes in Polish government. Recently a representative of a conservative party Mr. A. Duda has won the presidential elections. Political scientists see this event as a new opportunity to encourage mutually beneficial relations between the two neighbours (15min.lt, 2015). This is so because President of Lithuania Mrs. Dalia Grybauskaite also belongs to a right-wing party. Both presidents are strongly against the Russia's actions undertaken in Crimea and in Eastern Ukraine. Both countries have confirmed they are in talks with Washington on stationing heavy arms in warehouses in the region (euractiv.com, 2015). A. Duda (15min.lt, 2015) also encourages NATO to dislocate the permanent Allied forces in Poland. It is yet to be seen how the mutual relationships between Poland and Lithuania will turn out after the Polish parliamentary elections will take place in the fall of 2015. It seems that the Polish minority issues in Lithuania will remain the central point of debate between the neighbours (15min.lt, 2015).

6.5 Most significant reasons for the deteriorating Polish-Lithuanian bilateral relations

The aim of this chapter was to present that the ongoing transition of Polish-Lithuanian bilateral relations is not only caused by the domestic disputes, but also by changing power balances within the Central and Eastern European regions. Changing economies and geopolitical agendas account for the need to look for new strategic partners. The example of Poland clearly shows how growing power of states influence changes in foreign bilateral and international relations. On the other hand, Polish-Lithuanian bilateral relations are still dependent on bigger economic and political neighbours. It seems that a common threat often once has strengthened Polish-Lithuanian relations. Whereas currently expanding opportunities allow stronger nations to demand for more rights and to look for strategically more favourable partners.

Unsuccessful bilateral negotiations between Poland and Lithuania are often justified by Polish politicians as a consequence of an unequal and unfavourable treatment of national minorities Lithuania. What seem to be missing is mutual understanding, reliability and trust between the neighbours. The lack of concrete terms and agreements regarding national minorities foster distrust when discussing future relations. Such incoherence in Polish-Lithuanian domestic relations may reason the decline in potential policy strategies and cooperation. It is thus important to adhere the needs of the neighbouring states and search for possible compromises concerning national minority rights, while at the same time protect and maintain cultural, as well as national differences.

Although unsolved domestic issues evidently have an impact to bilateral negotiations on certain future agendas, there is more to it. Creating secured alliances and maintaining economic competitiveness is a key to states' prosperity. Thus powerful states aim to cooperate with strong partners, whilst pressing demands on their smaller allies in order to maintain the leader's position in the region. Smaller states, on the other hand, often resist complying with powerful states' demands, if they assume a threat to their identity. The unsuccessful partnership between Poland and Lithuania seems to be very much influenced by a powerful neighbour's strategic agendas. Russian actions signal that both countries need to look for other allies to ensure reliable energy supplies, markets and protect their sovereignty. Ostensibly, the unstable relations in the region, declining loyalty and trust, protectionist politics, different economic growth and changing political influence on EU and international levels may contribute to an ongoing transition in Polish-Lithuanian foreign relations.

7. CONCLUDING REMARKS

This research focuses on the debate on European citizenship and minority rights and on the position of Polish minorities in Lithuania. It is a relatively unique paper that examines the extent to which a minority's linguistic issues affect the Polish minority's integration into Lithuanian society and how the conflict impedes the two neighbours' mutual collaboration. It further analyses the language-ethnicity link and questions whether changes in language knowledge alter one's ethnic identity.

The analysis of language-ethnicity relationship may provide a substantial contribution to a mutually beneficial resolution to the Polish-Lithuanian conflict. By defining the relationship between the language and ethnic identity the policy makers may arrive at a model that both maintains minority's ethnic identity and encourages socio-economic integration.

The first approach may account for policies strongly focused on language preservation as a means to maintain minority's ethnic identity. The second approach may provide a broader understanding of ethnic identity. Language would not play a major role when shaping one's ethnic identity. Ethnicity may be seen as a combination of behavioural and conceptual aspects of a specific group. Language behaviour or the use of language may change greatly, yet the belief of who we are or an understanding of one's ethnicity may not be subject to instant changes. Thus, the educational policies in Lithuania that encourage education in the majority language may not be considered a threat to minority's ethnic identity. While learning a majority's language, a minority is still able to practice their cultural behaviour and place themselves into cultural and historic contexts of their origin. At the same time, knowledge of the majority language provides the minority with better chances to compete in a job market and assure a successful socio-economic position within society.

By contributing to the ongoing debate on European citizenship this research further examines the EU's power to intervene and solve national disputes regarding minorities. As yet, no coherent literature exists which connects abstract concepts of European citizenship, minority rights to the cases of domestic minority issues on Polish-Lithuanian relations, as well as the EU power to intervene and solve national disputes with regards to minorities.

It is important to acknowledge that the Polish minority resembles Capotorti's proposed characteristics for the definition of national minority. The Polish ethnic community is numerically smaller than the Lithuanian population. Poles have historically established themselves as an ethnic group throughout the course of territorial, economic, and political transitions within the region. As discussed, the minority has integrated into society relatively well - the group also shares a sense of solidarity, common identity and distinct language. Yet, the group faces challenges in socio-economic spheres due to low educational attainment, lack of quality teachers and resistance to educational reforms. The 1994 Treaty on Friendly Relations and Good Neighbourly Cooperation between the countries acknowledges the existence of the Polish minority in Lithuania and the

Lithuanian minority in Poland. The Treaty of 1994 commits both parties to protect minority rights, maintain cultural differences, and distinct identities.

The nature of multi-level European citizenship is one of the major obstacles for bringing the legal form of European citizenship into a social practice. As the conceptual framework of citizenship has eliminated societal differences by establishing equal rights and duties to all people in the state, it also often comprises the rights of minorities. It is clear that the LR Constitution does not contain a definition of 'national minorities'. Neither is there a universally agreed definition of national minorities in academic literature and international conventions. For example, according to the LR Constitution, legally residing members of minorities are protected by state citizenship rights.

These citizen and minority rights are often comprised of distinct categories, for example, general rights (right to vote, right to health services, etc.) and specific rights (education for a specific minority group), freedoms and duties. This distinction is particularly seen in the case of Polish minority rights in Lithuania. The right to use minority language in private and public life could be considered a general right equally applied to all minorities in Lithuania. The minority's duty is to use Lithuanian state language in the aforementioned official situations, such as passports and the spelling of street names. Special rights would encompass the right to study in Polish language from primary to the tertiary level. Since only a few minority groups have such opportunities in Lithuania, the right to education in minority language could be considered a special right. Minorities however are expected to comply with and adapt to state's legal provisions, such as reform on education in Lithuania, which establishes equal standards for the Lithuanian language exam.

Such distinct categories of rights have developed due to the overlapping identities in the European communities. The Poles in Lithuania are of Polish origin, in most cases holding Lithuanian citizenship and formal European citizenship provided by the EU. These three distinct levels entail particular rights, freedoms and duties. The lack of clear conceptualisation of 'citizenship', 'minority' and 'identity' raise ambiguity among the distinct legal frameworks of states and among individuals themselves. This results in legal, social, and political tensions between the communities and disrupts the process of European integration.

Several long-standing disputes regarding national minority rights in Lithuania remain unresolved. New reforms on education, the spelling of personal and place names, as well as land reforms are examples of domestic issues that disrupt bilateral relations between Poland and Lithuania. Polish politicians commonly use the ongoing discourse about mistreatment and discrimination of the Poles in Lithuania as a counter argument when discussing bilateral treaties and projects. It negatively affects the bilateral negotiations on energy and transport projects. Mutual distrust and an unstable relationship pose a threat to energy security and thus delays further the states' integration into European markets. It is therefore evident that the Polish minority's linguistic issues challenge bilateral relations. Essentially, both nations need to arrive at a compromise regarding the linguistic and educational rights of Polish minority in Lithuania.

As stated at the start, the aim of this research was to measure the causal relationship between the independent variables (EU citizenship rights, Citizenship rights of Polish minority in Lithuania, the link between language and ethnicity) and the dependent variable (Polish minority's position in Lithuanian society and Polish-Lithuanian social, political, and economic relations). Focusing on citizenship and minority rights on national, intra-national, and European levels, this study examined the status of Polish-Lithuanian minority rights in Lithuania. Equal treatment of minorities and citizens presents two sides. It provides protection of fundamental human rights, whilst limiting the practices of distinct identities by, for example, limiting minorities' use of their language in the spelling of passports. On the other hand, absence of a universal definition of a national minority creates an obstacle for EU states to comply with diverse minority definitions, rights and duties. It is thus debatable, whether a common definition on European citizenship and national minority would substantially improve the condition of minorities.

Although it is evident that the domestic issues have a negative effect on Polish-Lithuanian bilateral relations, it is not the only issue shifting countries' foreign policy agendas apart. Shifting power balances in the region, the growth of Poland's political and economic influence in the EU, and in the international arena, as well as new geopolitical agendas account for the ongoing transition in bilateral Polish-Lithuanian relations. While Poland is looking for partners in the West, Lithuania focuses on strategic relations with Scandinavian countries. Both states are interested in protecting their energy resources and maintaining competitiveness in the region.

The process of the reshuffling of Polish-Lithuanian bilateral relations is apparent. It does not however mean that countries reject opportunities for mutual cooperation, as it is seen in current talks about the heavy army stationing in the region. Although the EU does not intervene in domestic issues, it is trying to support bilateral cooperation between the neighbours. Several examples including LitPol Link between Poland and Lithuania shows an initiative of the two states' and the EU to foster energy trading between the neighbours and strengthen energy security within the region.

Not only does the EU promote regional cooperation in Central and Eastern Europe, but it also highlights minority rights in various conventions, amongst other Copenhagen criterion (1993) and Central European Initiative. The Council of Europe has established that a national minority is characterised in a manner that only citizens of the state apply to this provision (Thiela, 1999: 4). Citizenship in the EU defines membership in distinct communities, provides rights, obligations, freedoms and responsibilities. The European citizenship concerns the EU polity on a transnational and the national levels, yet EU governmental institutions have limited power to intervene in national minority disputes. The EU establishes and promotes citizens' and minority rights; however, it is not yet able to form precise instrument with regards to these definitions. This gives room for 'unfounded' invocations of the rights (Packer, 1996: 121) and raises social and political tensions between the overlapping communities.

Legal cases with regards to education reform and name spelling in passports presented in this research are examples of the limited power of EU legal institutions to intervene in the issues between the Polish minority and the Lithuanian state. The responsibility to solve national minority issues is passed on to the member states themselves. This is so because the EU does not have an authority to overrule laws of the national Constitution.

This research presents a unique analysis of Polish minority's linguistic challenges in Lithuanian society. By examining domestic issues between the Poles and Lithuania, it becomes clear that the Polish minority's representatives accentuate minority's linguistic discrimination as a threat to their ethnic identity in Lithuania. On the other hand Lithuanian linguistic and education policies with regards minorities are considered one of the most liberal in Europe. As discussed in the paper, the linguistic and educational problems may have become an instrument for political parties to achieve their political goals before elections. In order to solve the Polish minority linguistic and educational issues in Lithuania both countries should act in a less protectionist manner and arrive at a compromise. Lithuania should also consider allowing the bilingual street names in the areas where the Polish minority is densely inhabited, as it is done in Poland.

Coming back to the accentuated threat of linguistic discrimination to the Polish ethnic identity, further research needs to be done in order to investigate whether there is a link between language and ethnicity. The uncertainty of the language-ethnicity link leads to the ambiguity of whether the implemented educational policies in Lithuania essentially could be threatening Polish ethnic identity and called discriminative.

Changing dynamics of states' power in the region, the economic growth of Poland and its political influence in the EU, as well as in the international arena are additional factors influencing the ongoing transition in bilateral Polish-Lithuanian relations. The study's findings indicate that although the EU establishes and promotes citizenship and minority rights, it lacks the legal power to intervene and solve national disputes with regards to national minorities. Thus, the EU aims to promote regional cooperation and European integration by encouraging Poland and Lithuania to reach an agreement and resolve domestic minority issues themselves.

REFERENCES:

Akermark. S.A. (1997). Justifications of minority protection in international law. Kluwer Law International. The Hague

Bache, I., Geogre, S., Blumer, S. (2011). Politics in the European Union. Oxford University Press. USA

Bagdonas, G. et al. (2011). Lithuanian annual strategic review 2010-2011. Military Academy of Lithuania. Vilnius

Balescu, O. (2009). Reflections on European identity: the case of eastern European countries. In Dolejsioava, D., Lopez, G.A.M. European citizenship-in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

Barzel, Y. (2002). The theory of the state. Economic rights, legal rights and the scope of the state. Cambridge University Press, Cambridge.

Bowie, E. And Simon, L.R. (2008). The individual and the political order. An introduction to social and political philosophy. Rowman & Littlefield Publishers, Inc. UK

Brusis, M. (2000). Conclusions: European national identities in the accession countries- the role of the European Union.

Butt, E.M., Kubert, J. Schultz, A.CH. (2002). Fundamental social rights in Europe. European Parliament: Brussels

Carey (2002). Undivided loyalties: is national identity an obstacle to European integration? European Union Politics.

Christiansen, T. (2001). European and regional integration. In Baylis, J. and Smith, S. (eds.). The Globalization of world politics: an introduction to international relations. Oxford University Press. Oxford.

Clark, T., D. (2006). Nationalism in post - Soviet Lithuania. In Barrington, W., L. After independence. Making and protecting the nation in postcolonial and postcommunist states. University of Michigan Press. Michigan.

Conference on Security and Co-operation in Europe (1990). Document of the Copenhagen meeting of conference on human dimension of the CSCE

Council of Europe (2008). Advisory committee on the framework convention for the protection of national minorities. COE: Strasbourg.

Court of Justice of the European Union (2011). Judgment in Case C-391/09 Malgozata Runevic- Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybes administracija and Others. CVRIA: Luxembourg

Dambrauskaite, Z., Janeliunas, T., Jurkonis, V., Gira, S.V. (2011). Lithuanian- Polish bilateral relations reconsidered: a constrained bilateral agenda or an empty strategic partnership.

Davenport, C. (1995). Multi-dimensional threat perception and state repression: an inquiry into why states apply negative sanctions.

Delanty, G. (2007). Models of citizenship: defining European identity and citizenship.

Delanty, G. (2007). European citizenship: a critical assessment

Dolejsioava, D., Lopez, G.A.M. (2009). European citizenship - in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

Dolejsiova, D. (2009). Introduction: Europe, citizenship and young people. In Dolejsioava, D., Lopez, G.A.M. European citizenship - in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

Dutiniene, I. (2004). Search for European identity by Lithuanians and ethnic minorities.

Ekman, T. (2009). Democratic ideals and practices in educational practice: the effects of schooling on political attitudes among secondary school students in Sweden. In Dolejsioava, D., Lopez, G.A.M. European citizenship - in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

European Court of Human Rights (2011). European anti- discrimination case law. Compilation of recent decisions. ECHR

European Community (2006). Consolidated version of the treaty on European Union and of the treaty establishing the European Community. Official Journal of the European Union

European Convention (2010). Charter of fundamental rights of the European Union.

European Parliament (2005). Review of the situation of national and ethnic minorities in the selected member states.

European Union Agency for Fundamental Rights (2010). Respect for and protection of persons belonging to minorities 2008 - 2010. Publications Office of the European Union. Luxembourg

Evans, G., Need, A. (2002). Explaining ethnic polarization over attitudes towards minority rights in Eastern Europe: a multilevel analysis. Academic Press. Oxford.

Fearon, D., J. and Laitin, D., D. (2006). Lithuania. Stanford University.

Fonteneu, G. (2002). Social rights in Europe.

Francesco Capotorti (1991) Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. New York: United Nations.

Fuksiewicz, A. (2011). The Polish Parliament under the Lisbon Treaty- adaptation to the institutional reform.

Gaetano, P. (2002). Minorities in international law: an introductory study. Council of Europe Publishing. Strasbourg

Galbreath, J.D., Lasas, A., Lamoreaux, W. J. (2008). Continuity and change in the Baltic Sea Region. Comparing foreign policies. Editions Rodopi B.V. Amsterdam

Galloway, J.D. (1998). Citizenship: a jurisprudential paradox. In La Torre, M. European citizenship. An institutional challenge. Kluwer Law International. The Hague.

Gira, S.,V. (2011). Lithuanian- Polish bilateral relations: the issues of dispute.

Goudappel, F. (2010). The effects of EU citizenship: economic, social and political rights in a time of Constitutional change. Asser Press. The Netherlands

Hoffmann, S. (1966): Obstinate or Obsolete: the Fate of the Nation State and the Case of Western Europe.

Horvath, E. (2007). Mandating identity: citizenship, kinship laws and plural nationalisty in the European Union. Kluwer Law International.

Jakstiene, R. (2004). Do Lithuanian women have the right to choose a surname with a male ending?

Kallonen, M. (2004). Minority protection and linguistic rights in Lithuania. EURAC research

Kalnius, P. (1998). Etniniai procesai pietryciu Lietuvoje XX a. antroje puseje=: Ethnic Processes in Southeastern Lithuania in the 2nd half of the 20th c. Zara. Vilnius

Kasatkina, N. (2003). The adaptation of ethnic minority groups: defining the problem (case of Lithuania).

Kazlauskaite, R. (2011). Common past, divided memories: historical memory of the Polish minority members in Lithuania

Kivisto, P. And Faist, Th. (2007). Citizenship: discourse, theory, and transnational prospects. Blackwell Publishing. Oxford.

Kuris, E. (2009). EUDO Citizenship Observatory. Country report: Lithuania. Badia Fiesolana. Italy

Kymlicka, W. (2011). Multicultural citizenship. A liberal theory of minority rights. Clarendon Press. Oxford

Leydet, D. (2011). Citizenship

Lithuanian Social Research Centre (2012). Tyrimas apie Lietuvos lenku ir Lenkijos ivaizdi Lietuvos visuomeneje. Lietuvoje gyvenanciu lenku bendruomene atstovaujanciu ekspertu, kookybinis tyrimas. Lietuvos Socialiniu Tyrimu Centras. Vilnius

Malloy, H. T. (2005). National minority rights in Europe. Oxford University Press. New York

Matulionis, A.,Beresneviciute, V., Leoncikas, T., Frejute- Rakauskiene, M., Sliavaite, K., Sutiniene, I., Zilinskaite, V., Heinrich, G., H., Alekseeva, O. (2011). Interplay of European, national and regional identities: nations between states along the new Eastern borders and the European Union.

McLaren, L.M. (2002). Public support for the European Union: cost/ benefit analysis or perceived cultural threat?

Mercator - Education: European Network for Regional Minority Languages and Education (2006). The Polish language in education in Lithuania. The Netherlands

Ministry of Education and Science of the Republic of Lithuania (2011). Tautiniu mazumu svietimo politika: kur einama? Lodvila, Vilnius

Mohanty, R. And Tandon, R. (2006). Participatory citizenship. Idenitty, exclusion, inclusion. Sage Publications India Pvt Ltd. New Dehli.

Molis, A. (2011). Transforming the EU- Russia energy relations: the Baltic States' vision

O'Connor, K. (2006). Culture and customs of the Baltic States. Greenwood Press. Westport Page 123

Painter, J. (1998). Multi- level citizenship, identity and regions in contemporary Europe

Petev, V. (1998). Citizenship and raison d'Etat. The quest for identity in Central and Eastern Europe. In La Torre, M. European citizenship. An institutional challenge. Kluwer Law International. The Hague.

Rackauskaite- Burneikiene, A. (2012). Tautinems mazumoms priklausanciu asmenu kalbines garantijos: tarptautiniu standartu igyvendinimas Lietuvos Respublikoje. Mykolo Riomerio Universitetas

Schmidt, Th. and Ligi, A. (2013). Press release. ABB wins $110 million power order to interconnect Lithuania and Poland.

Shaw, J. (2007). E.U. Citizenship and political rights in an evolving European Union. 75 Fordham L. Rev. 2549 (2007)

Singh, S.(2009). Understandings of European citizenship: a post - colonial perspective. In Dolejsioava, D., Lopez, G.A.M. (2009). European citizenship - in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

Smith, A., D. (1991) National identity and the idea of European unity

Snyder, T. (2003). The reconstruction of nations: Poland, Ukraine, Lithuania, Belarus, 1569- 1999. Yale University Press. USA

Snyder, T. (2003). The reconstruction of nations: Poland, Ukraine, Lithuania, Belarus, 1569- 1999. Yale University Press. USA

Statistics Lithuania (2011). Lithuanian 2011 population census in brief

Sullke, F. (2009). Strengthening opportunities for citizenship education at local level: the case of Berlin-Neukolln. In Dolejsioava, D., Lopez, G.A.M. (2009). European citizenship- in the process of construction: challenges for citizenship, citizenship education and democratic practice in Europe. Council of Europe Publishing. Strasbourg

Thiela, C. (1999). The criterion of citizenship for minorities: the example of Estonia. European Centre for Minority Issues. Flensburg

Torre, M. (1998) European citizenship. An institutional challenge. Kluwer Law International. The Hague

Tylec, E. (2012). The issue of legal discrimination. Polish minority in Lithuania.

UNHCR (2007). World directory of minorities and indigenous peoples- Lithuania: overview. Minority Rights Group International.

Valstybine Lietuviu Kalbos Komisija (2003) Nutarimas del moteru pavardziu darymo. Vilnius.

Vilpisauskas, R. (2012). The management of economic interdependencies of a small state: assessing the effectiveness of Lithuania's European policy since joining the EU.

Yanow, D. (2003). Interpretive empirical Political Science: what makes this not a subfield of qualitative methods

Zasztowt, L. (2011). Lithuanian- Polish bilateral understanding- a personal glimpse from Warsaw. In Lithuanian foreign policy review of 2011.

TREATIES AND LEGISLATIONS:

CEI (2004). Minorities and the Central European Initiative. CEI instrument for the protection of minority rights. Slovenia

ecb.int (1992). Treaty on European Union. Official journal of the European Communities.

European Parliament, the Council and the Commission (2000). Charter of Fundamental Rights of European Union. Official journal of European Communities

National Legislative Bodies (1991). Republic of Lithuania Law on Citizenship, No. VIII- 391

National Legislative Bodies (1991). Republic of Lithuania Law on Citizenship, No. VIII- 391

Republic of Lithuania Constitution. Art. 14, *§*

Republic of Lithuania Constitution, art. 37

Republic of Lithuania Constitution, art. 45

Republic of Lithuania Constitution, art. 117

Treaty on Friendly Relations and Good Neighbourly Cooperation (1994)

Union and European Court of Human Rights (2010). Charter of Fundamental Rights of European Union in Official Journal of European Union.

United Nations (1992). Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities. New York.

WEBSITES:

15min.lt (2012). PKN Orlen to reconsider its position in talks with Lithuanian Railways. Retrieved on May 21. 2013. From: http://www.15min.lt/en/article/business/pkn-orlen-to-reconsider-its-position-in-talks-with-lithuanian-railways-527-211795

15min.lt (2015). Politologas Andzejus Puksto: 'Santykiai su Lenkija yra blogi'. Retrieved on June 13, 2015, from: http://www.15min.lt/naujiena/aktualu/lietuva/politologas-andzejus-puksto-santykiai-su-lenkija-yra-blogi-56-506660

15min.lt, (2015). Rusija paskelbė visišką embargą daugumai maisto produktų iš JAV ir ES. Retrieved on May 22, 2015, from: http://www.15min.lt/naujiena/aktualu/pasaulis/rusija-skelbia-visiska-embarga-daugumai-maisto-produktu-is-jav-ir-es-57-445349

Administrator (2012). XIII Congress of the Association of Poles in Lithuania. media.efhr.eu. Retrieved 2013-03-22 From: http://media.efhr.eu/2012/05/28/xiii-congress-association-poles-lithuania/

Baltictimes.com (2013). Rail Baltica project implementation continues slowly. Retrieved on 22. May, 2013. From: http://www.baltictimes.com/news/articles/32757/

Businesson.eu (2013). Lithuania's strategies look in the Nordic direction. Retrieved on 21. May, 2013. From: http://www.businesson.eu/articles/european-market-business/lithuanias-strategists-look-nordic-direction#.UZu_SZxgEWo

BBC Monitoring International Reports (2006). Polish minority land reform, education issues in Lithuania unresolved. Retrieved 2013-03-22 From: http://www.accessmylibrary.com/article-1G1-152108384/polish-minority-land-reform.html

Bradley, B. (2012). Lithuanian coalition boosts majority as polish minority party joins up. Bloomberg.com. Retrieved May 04, 2013 from: http://www.bloomberg.com/news/2012-11-15/lithuanian-coalition-boosts-majority-as-polish-party-joins-up.html

Delfi.lt (2015). V. Adamkus: dabartiniai santykiai su Lenkija- apgailetini. Retrieved on June, 15, 2015, from: http://www.delfi.lt/news/daily/lithuania/v-adamkus-dabartiniai-santykiai-su-lenkija-apgailetini.d?id=66796250

Ecrgroup.eu (2011). Overview of international legal documents on (ethnic) minority rights. Ecrgroup.eu. Retrieved 2013-03-23 From: http://ecrgroup.eu/wp-content/uploads/2011/07/Overview-of-International-Legal-Documents-on-Minority-Rights.pdf

Embassy of the Republic of Poland in Vilnius (2012). Polish- Lithuanian cooperation. Retrieved on May 13. 2013. From: http://vilnius.mfa.gov.pl/en/bilateral_cooperation/polish_lithuanian_co_operation/

EUbusiness.com (2011). Lithuania hails EU court ruling in spat over Polish names. Retrieved 2013-03-22, from: http://www.eubusiness.com/news-eu/lithuania-poland.9x3

Euractiv.com (2015). Russia says it will respond to US military buildup in Baltics. Retrieved on June 18, 2015, from: http://www.euractiv.com/sections/europes-east/russia-says-it-will-respond-us-military-buildup-baltics-315396

European Commission (2015). Antitrust: Commission opens formal proceedings against the Lithuanian railway incumbent, AB Lietuvos Geležinkeliai. Retrieved on June 20, 2015, from: http://europa.eu/rapid/press-release_IP-13-197_en.htm

EU Today (2015). Lithuanian Railways: Commission opens Antitrust Proceedings. Retrieved on June 20, 2015, from: http://eutoday.net/news/lithuanian-railways-commission-opens-antitrust-proceedings

Kosc, W. (2012). Polish- Lithuanian education dispute spills over. Tol.org. Retrieved 2013-03-22 From: http://www.tol.org/client/article/22999-polish-lithuanian-education-dispute-spills-over.html

Letyourlanguagespeak (2012). Etwinning Project. Retrieved on May 22, 2015, from: https://letyourlanguagespeak.wordpress.com/2012/03/18/lithuanian-words-that-cannot-be-translated-into-other-languages/

Lietuvos Rytas (2011). Dienrastis 'Rzeczpospolita': Lietuvos ir Lenkijos santykiai- dugne. Lrytas.lt. Retrieved 2013-03-22 From: http://www.lrytas.lt/-13015644691300622503-dienra%C5%A1tis-rzeczpospolita-lietuvos-ir-lenkijos-santykiai-dugne.htm

Lithuaniatribune (2013). Brussels investigates Lithuania for cutting Latvian link. Retrieved on 21. May, 2013. From: http://www.15min.lt/en/article/business/pkn-orlen-to-reconsider-its-position-in-talks-with-lithuanian-railways-527-211795

Lithuaniatribune.com (2013). Sikorski links national minority issues in Lithuania with energy, transport projects. Retrieved on 22. May, 2013. From: http://www.lithuaniatribune.com/32004/sikorski-links-national-minority-issues-in-lithuania-with-energy-transport-projects-201332004/

LR Ministry of Culture (2013). National minorities. Retrieved on May 04, 2013. From: http://www.lrkm.lt/index.php?2786069838

Lrytas.com (2015). Rusija- jau nebe svarbiausia eksporto partnere. Retrieved on June, 23, 2015 from: cite: http://www.lrytas.lt/verslas/izvalgos-ir-nuomones/rusija-jau-nebe-svarbiausia-eksporto-partnere.htm

Lrytas.lt (2015). Prezidentė atmeta LLRA priekaištus dėl egzamino ir mokyklų. Retrieved on June 15, 2015, from: http://www.lrytas.lt/lietuvos-diena/aktualijos/prezidente-atmeta-llra-priekaistus-del-egzamino-ir-mokyklu.htm

Media.efhr.eu (2012). The integration of Lithuanian Poles or assimilation? Retrieved on 26. May, 2013, from: http://media.efhr.eu/2012/03/05/integration-lithuanian-poles-assimilation/

Ministry of Transport and Communications (2015). The project 'Rail Baltica': Lithuania expects the support of the European Commission. Retrieved on May 20, 2015, from: http://www.sumin.lt/en/news/13477

Plazynski, M. (2010). Observance of Polish minority rights in Lithuania. Polskiekresy.info. Retrieved 2013-03-22 From: http://www.polskiekresy.info/index.php?option=com_content&view=article&id=914%3Aobservance-of-polish-minority-rights-in-lithuania&Itemid=509

Lithuaniatribune (2013). Janeliunas: tension between Lithuania and Poland is useful to EAPL. Lithuaniatribune.com. Retrieved 2013-03-22 From: http://www.lithuaniatribune.com/29213/janeliunas-tension-between-lithuania-and-poland-is-useful-to-eapl-201329213/

The Baltic Course (2015). Comissioner: Rail Baltica will be Allocated 85% of Financing if the Project Meets the Conditions. Retrieved on June, 15. 2015, from: http://www.baltic-course.com/eng/transport/?doc=105691

The Economist (2012). Bad Blood. Polish- Lithuanian ties are ancient but increasingly acrimonious. Retrieved 2013-03-22 From: http://www.economist.com/node/21549987

Yale.edu (2008). The Covenant of the League of Nations. Retrieved in April 20, 2013 from: http://avalon.law.yale.edu/20th_century/leagcov.asp

Wbj.pl (2012). Why are Polish- Lithuanian relations so chilly? Retrieved on May 21. 2013 from: http://www.wbj.pl/article-59885-why-are-polish-lithuanian-relations-so-chilly.html

World-nuclear.org (2013). Electricity transmission grids. Retrieved on 23. May, 2013. From: http://world-nuclear.org/info/Current-and-Future-Generation/Electricity-Transmission-Grids/#.UZ34lJxgEWo

APPENDIX:

Figure 1. Eastman, C. M. (1984). Langage, Ethnic Identity and Change. In Edwards, J. (1984). Linguistic Minorities, Policies and Pluralism. Academic Press INC., London, UK. Page 268.

Figure 2. Statistics Lithuania (2011). Lietuvos gyventojai 2011 metais. Page 21.

Figure 3. media.efhr.eu (2011). Mosciszki will not remove Polish tables! Retrieved on 27. May, 2013 from: http://media.efhr.eu/2011/08/08/mosciszki-will-not-remove-polish-tables/

Table. 1. Hogan-Brun, G., Ramoniene, M. (2008). Perspectives on Language Attitudes and Use in Lithuania's Multilingual Setting. Page 433.

LINGUISTIC LANDSCAPES IN EU MEMBER STATES: POLITICS OF VISIBILITY AND PRESENCE

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PUBLIC SPACE IS A CRITICAL ARENA OF THE POLITICAL1. INTRODUCTION

By inscribing meaning into space, social groups enclose it, appropriate it and guard it as part of their identities. Through inscription of meaning, public space is constructed into social, and finally into political space. Consequently, in public space, social groups become political groups and compete for public visibility and presence. In addition, they vie for distribution of power over space and its meaning. Thus, public space is a sphere where people manifest ethnic, religious, linguistic and other collective differences and become conscious of these differences. Collective linguistic differences are a particularly significant segment of manifested collective differences, as they tend to transcend other, in-group divisions, experienced by a group claiming difference in relation to the majority population. By allowing expression of linguistic traits that highlight group differences in public space, a state essentially undertakes an effort to devolve and share symbolic power with a non-majority group. Through demonstration of their linguistic differences in public space, non-majority groups in fact become stakeholders in the state's identity.

In this paper, I wish to explore linguistic landscapes in EU member states and the enactment of public visibility and presence of non-majority linguistic groups. This article only focuses on linguistic landscapes that are shaped by official bilingual (majority/minority) place names and street names. Therefore, it only analyzes the top-down approach to bilingual signs, as opposed to the informal, often illegal, bottom-up approach of societal actors that erect bilingual signs on public or private property (see also Shohamy, 2006: 115). The aim of this EU-wide comparison is to detect patterns and modes of spatial visibility and presence of non-majority linguistic groups in public space through the employment of bilingual or multilingual street signs. Furthermore, this comparison includes an assessment of different official language policies pertaining to public visibility and presence of non-majority linguistic groups. Finally, this paper wishes to examine whether there is a convergence towards a common set of EU-wide policies on bilingual street signs because of the wide acceptance of principles enshrined in the *European Charter for Regional and Minority Languages*.

2. POLITICS OF VISIBILITY AND PRESENCE

Geographical space on its own has a neutral value, yet territory is a constructed, political and social space that is inscribed with meaning and thus provides a reference framework for social and political actions and the understanding of self and others. Territory, as Foucault said (1980: 68-69), implies the application of power in space, power through control over knowledge and meaning of space. Thus, public signs, such as street signs and place name signs, reflect spatial power relations (Blommaert, 2013: 39). Therefore, public space is an inherent political category, a dimension through which we conduct politics – a sphere in which are politicized and essentially become citizens.[536] Social and political actors try to become stakeholders in public space. Thereby, they strive to establish themselves as relevant sources of meaning and identity of space. Therefore, politics in public space always includes a struggle for visibility and presence in space. If a group that tries to achieve certain goals is not visible in public space, it cannot hope to assert itself and lay claims on public space. In order to become visible, one must be present, either physically or symbolically, in public space. As Marten, Van Mansel and Gorter (2012: 1) have put it, 'being visible may be as important for minority languages as being heard'.

[536] On politics of public space, see also Low and Lawrence-Zúñiga, 2003.

Judt and Lacorne (2004) have shown that there is an inextricable connection between politics of language and demands for rights because of collective difference. In addition, García (2012: 80, 82) indicates that the European cultural context is especially fertile for close connections between conceptions of ethnic identity and linguistic difference. Finally, we should note that regionalist movements often use language policy to further the causes of the territorial community they wish to represent and to underline the linguistic and cultural differences of their region towards the central state (see Williams, 2012).[537] The erection of bilingual street signs thus serves to mark space and turn it into territory accompanied with a regionalist identity.

3. Linguistic Landscapes

Linguistic landscapes, first defined by Landry and Bourhis (1997), arise from societal and political importance of visible language in public space. Other authors have referred to the same phenomenon as scriptorial landscapes (Gade, 2003: 430-431) or streetscapes (Kaplan & Baldauf Jr., 2008: 9). Landry and Bourhis (1997: 25, 27) assess linguistic landscapes through two functions – an informational one that marks a certain space as accessible through a certain idiom and a symbolic one – through which a group identifying with a certain language becomes present in public space and acquires agency. In this paper, I almost exclusively follow this second understanding of linguistic landscapes and consequently regard them as products of symbolic shaping of space through language. Accordingly, language conveys collective identity and makes collective differences visible through the expression of language differences. In his analysis of linguistic landscapes in Quebec and Tokyo, Backhaus (2009: 170) has shown that linguistic landscapes are constructed and not natural environments and that there is an established link between language policy and language visibility in public space. In other words, linguistic landscapes are not primordial settings, but rather a symbolically constructed public space (see Ben-Rafael et al., 2006) that serves to manifest societal and political power relations in a physical way.

The study of public signage and thus linguistic landscapes is usually confronted with three problems – the state of literacy, agency in public signage and the issue of counting (Spolsky, 2009: 29-32). If there are not enough people acquainted with the grammatically correct writing of a language or if a language does not possess a written form, it cannot be adequately placed into the linguistic landscape and thus cannot acquire importance and symbolic presence for the community it is supposed to represent. Regarding agency, linguistic landscapes can be shaped top-down through official policies backed by legislation and through bottom-up spontaneous action, including direct action and illegal, subversive practices as a reaction to official neglect or opposition to certain linguistic artefacts in public space. Finally, the issue of counting signs opens up the question of practical problems which street signs to enumerate and how to classify them. In this paper, I do not focus on the number of bilingual signs, but rather on the meaning they convey and the different practices of erecting such signs in various EU member states.

Although linguistic landscapes may be analyzed on several levels of government, the municipal level should actually be given preference, as this is the level at which the interactions between citizens and authorities are closest and where the shaping of linguistic landscapes through bilingual street sign policies are strongly connected to everyday life practices and experiences (see Backhaus, 2012: 226-227).

In terms of the struggle for visibility in public space, a language associated with a (ethnolinguistic) group does not have to be a language of everyday communication. Its introduction in public space often does not serve to enhance communication, but to highlight the physical presence of a minority identity in public space. The role of a language in the expression of ethnic minority identity is thus often largely symbolic (O'Reilly, 2003: 30). Therefore, the importance of linguistic landscapes that arise from the application of bilingual street signs lies

[537] For a comprehensive discussion of language policy and its wider implications, see also Spolsky, 2004.

not in the functionality of the added language, but in the meaning that the inhabitants of such a bilingual landscape inscribe into the added language and the street signs displayed in this language.

Legislation on linguistic landscapes depends on many geographic, historic and political factors and thus varies worldwide (Backhaus, 2009: 157). However, this article aims to examine whether EU member states show some common patterns and practices in applying policies that produce bilingual and multilingual landscapes. In order to actually execute a bilingual policy in a local setting and introduce bilingual street signs, one usually requires a broad coalition of advocacy groups and social actors working towards a common goal (see Sloboda et al., 2010), notwithstanding the various national legal frameworks providing criteria for the introduction of bilingual street signs.

We should also remember that the inclusion of minority place and street names constitutes an act of name change and creation of new socio-spatial realities. One might therefore perceive it as a threat to the existing order (see Puzey, 2009). Opponents of bilingual street signs might argue that the new, additional names lead to confusion among tourists and diminish the recognizability of a given location. Yet the struggle between supporters and opponents of bilingual street signs ultimately comes down to mutual contestation of public space – a battle over meaning, visibility and presence in space.

4. Policies of Bilingual Signs in the EU

Multilingualism and an open language policy are essential parts of the identity and self-understanding of the project of European integration. Article 3 of the consolidated text of the *Treaty on the European Union* explicitly mentions linguistic diversity (European Union, 2010: 17), while the core of EU policy on promotion and protection of language diversity is rooted in the *European Charter for Regional and Minority Languages* (ECRML), a 1992 Council of Europe treaty. The European Commission has recommended the application of the *Charter's* principles to all EU member states, albeit with no repercussions in case of non-compliance (Ammon, 2012: 588). The *Charter* provides for a number of linguistic rights, yet two provisions are crucial for our discussion of linguistic landscapes shaped by bilingual street signs. Article 7 of the *Charter* sets objectives and principles of language policy, including 'the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question' (Council of Europe, 1992: 4). Article 10 of the *Charter*, which deals with the question of regional and minority languages concerning administrative authorities and public services, encourages 'the use or adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in regional or minority languages' (Council of Europe, 1992: 9). While Article 7 of the *Charter* warns against ethnolinguistic gerrymandering,[538] Article 10 explicitly speaks of the introduction of place-names in regional and minority languages alongside official (majority) languages, thus laying the groundwork for policies of bilingual street signs. *Table 1* shows that most EU member states have signed the *Charter*, as well as ratified it and entered it into force. We may assume that those member states that have failed to sign this treaty will show greater reluctance towards introduction of bilingual street signs or will follow policies that greatly diverge from member states that are signatories to this treaty. In addition, we may expect those member states that have ratified the *Charter* to show stronger compliance with its stipulations, since this implies a higher level of adherence to the *Charter's* text (Nic Craith, 2003: 57). However, the ECRML defines neither what a 'minority', nor what a 'language' is, so that the exact application and extension of linguistic rights depends on national interpretations and established practices in

[538] Electoral gerrymandering refers to the arbitrary drawing of boundaries of electoral constituencies in order to gain favor for own party or candidate or put the competitors in a disadvantaged position. Similarly, ethnolinguistic gerrymandering includes changes to administrative borders (of a city, municipality or region) in order to fragment concentrated areas inhabited by an ethnolinguistic group that seeks to claim certain political and linguistic rights.

each of the member states (Nic Craith, 2003: 60-61).[539] On the other hand, the text of the *Charter* makes it clear that it does not apply to dialects of the official language and to immigrant languages, but to languages traditionally spoken in certain parts of the country by a non-majority group (Ammon, 2012: 588). Although one might doubt the actual effectiveness of the *Charter* in forwarding language rights in signatory states, one can certainly observe a Europe-wide increased awareness of language policy (Grin, 2003: 196). The design and application of specific policies concerning majority and minority languages has become much more prominent since the *Charter's* adoption in 1992. As Nelde (2007: 73) has noted, a single EU language policy is 'bound to fail'. However, given the general trends of globalization, identity fragmentation and the weakening of the classical European nation state rooted in a codified national culture, we can expect further movement towards acceptance of linguistic difference. This, in turn, might also include a greater acceptance of bilingual street signs as physical markers of linguistic identity and manifestations of differences, set in public space. On the contrary, some authors (Nic Craith, 2006: 186-187) have noted that the focus of EU language policy is on increased communication skills (as prerequisites for the full application of a single market and possibly a single media sphere) and not on language equality, since the history of European politics of language has always been a history of privilege and deprivation, status and shame, dominance and submission.

Beside the ECMRL, the Organization for Security and Co-operation in Europe (OSCE), of which all EU member states are part, has provided recommendations for application of linguistic rights that explicitly include bilingual signs. *The Oslo Recommendations regarding the Linguistic Rights of National Minorities*, issued in 1998, encourage public authorities to 'make provision for the display, also in the minority language, of local names, street names and other topographical indications intended for the public' in 'areas inhabited by significant numbers of persons belonging to a national minority and when there is sufficient demand' (OSCE, 1998: 5). Furthermore, the *Recommendations* claim that opposition to the 'validity of historic denominations' (i.e. historic place and street names in a minority language) 'can constitute an attempt to revise history and to assimilate minorities, thus constituting a serious threat to the identity of persons belonging to minorities' (OSCE, 1998: 15). The OSCE has, thus, made a strong endorsement for the introduction of bilingual street signs and established a clear link between prevention of establishment of such street signs and politics of suppression of minority identities. However, as we shall see from our comparison of various national practices of enactment of bilingual street signs, 'significant numbers of persons belonging to a national minority' and 'sufficient demand' are notions that are open to numerous interpretations.

[539] Thus, when dealing with member states' policies on regional and minority languages, we can recall Max Weinreich's notion that a 'language is a dialect with an army and navy.'

Table 7. EU Member States and the ECRML

Country	Signed	Ratified	Entered Into Force
Austria	1992	2001	2001
Belgium			
Bulgaria			
Croatia	1997	1997	1998
Cyprus	1992	2002	2002
Czech Republic	2000	2006	2007
Denmark	1992	2000	2001
Estonia			
Finland	1992	1994	1998
France	1999		
Germany	1992	1998	1999
Greece			
Hungary	1992	1995	1998
Ireland			
Italy	2000		
Latvia			
Lithuania			
Luxembourg	1992	2005	2005
Malta	1992		
Netherlands	1992	1996	1998
Poland	2003	2009	2009
Portugal			
Romania	1995	2008	2008
Slovakia	2001	2001	2002
Slovenia	1997	2000	2001
Spain	1002	2001	2001
Sweden	2000	2000	2000
United Kingdom	2000	2001	2001

Source: ECRML

In our comparative analysis of policies of bilingual street signs, we shall focus solely on street signs, understood as place-names and street-names on officially mandated signboards. Thus, they do not include unofficial and possibly illegal, as well as private signage in non-majority languages appearing alongside official (majority) languages. The comparison of policies of official bilingual signs in EU member states follows the ensuing criteria:

1. Does the member state enable official bilingual street signs?
2. What is the legal basis for the rights to bilingual street signs?
3. What are the prerequisites for the introduction of official bilingual street signs?
4. Is there an equal representation of majority and minority languages on street signs or is there a graphical difference between them?
5. Are there problems with the implementation of bilingual street signs?

The first criterion considers the basic question whether or not a state gives a notional opportunity for current or future introduction of official street signs that would include a non-majority language alongside the official idiom. The second point questions whether the right to bilingual street signs is entrenched in constitutional

law, minority law, language law or a special regional statute (especially in federal and devolved states). The third question asks about the requirements for the attainment of official bilingual status in a city, municipality or region. We can expect that these requirements would include a stipulated percentage of the local population that has officially declared that it belongs to a certain linguistic minority or a percentage of local inhabitants that would petition the local government to provide street signs in a given language. Furthermore, member states might opt not to require an exact percentage of current population speaking a non-majority language, but grant bilingual status and thus enable bilingual street signs based on historic criteria, i.e. on a historic connection between a territory and a language. In addition, some member states might link the right to bilingual street signs to territorial autonomy. The fourth point tries to distinguish between different visual practices of executing bilingual signs policies. We may find cases whereby both the official majority and the official minority language in a given city, municipality or region are equally visually displayed (employment of the same font, color and size). Yet, we may also find those situations in which the display of street signs in the additional, minority language is in smaller print, clearly graphically different from the street signs in the majority language. Depending on the context, we could interpret that such situations indicate that the introduction of bilingual street signs took place in a haphazard and non-consistent way. However, we may also claim that the graphical subordination of the added, minority languages conveys a specific message in such a bilingual linguistic landscape – a message that the added street signs in a minority language are not on equal footing with their majority language counterparts. Finally, we ask whether there are political and societal actors opposing bilingual street signs. In addition, we inquire whether the authorities entrusted with the enactment of bilingual street signs policy have fully implemented it or have shown reluctance and obstructive behavior. We can envisage cases where the speakers of the official majority language oppose bilingual signage and destroy or prevent the placement of street signs that include another, minority language. On the contrary, in areas where minority language speakers represent a clear demographic majority, street signs in the official, national majority language might suffer from defacement or destruction. Finally, local and regional government authorities that are responsible for the erection of bilingual street signs might be hesitant to implement such a policy in full extent. Instead, they might pursue a policy of token application of public bilingualism by putting up just a handful of bilingual street signs as opposed to full coverage of the whole area of an officially bilingual city or municipality.

Besides comparing EU member states along the aforementioned criteria, this analysis shall also look into possible differences between old member states[540] and post-communist member states. In addition, we shall examine several EU member states that are officially bilingual (or multilingual) on national level and assess specific traits of their street signs policies.

4.1 Old Member States

The overarching juxtaposition of English as a *lingua franca* of the British Isles and a former imperial language with the various Celtic idioms that suffer from decreasing numbers of active speakers drives language policies and the ensuing linguistic landscapes in both United Kingdom and the Republic of Ireland. There is no official British language policy, nor a policy on bilingual street signs. However, legislation in Wales and Scotland has enabled partial introduction of bilingual street signs.

The 1993 *Welsh Language Act* (UK National Archives, 1993) established the Welsh Language Scheme, a policy tool through which the Welsh government was empowered to introduce bilingual street signs. There was slow and inconsistent introduction of Welsh street signs alongside existing English ones since the 1960s. Welsh signs were sometimes removed in areas dominated by English-speaking residents. A direct action group called the

[540] In this case, the notion of 'old member states' refers to established democracies and not necessarily member states that have joined the EU a long time ago.

Welsh Language Society was involved in attacks on English-only street signs and public displays of rage against unilingual English signs as symbols of imperialist oppression (see Merriman & Jones, 2009). Supporters of Welsh street signs discursively constructed English-only signs as 'landscapes of oppression', while the new, bilingual signs were dubbed 'symbols of justice' (Merriman & Jones, 2009; Jones & Merriman, 2009). In western parts of Wales, where the Welsh speakers dominate (officially designated as *Y Fro Gymraeg*),[541] Welsh inscriptions are written first, followed by English ones, yet in the same size and fashion, while in the rest of the country, the places of the two idioms are reversed. The government strives to full implementation bilingual street signs over time.

The *Gaelic Language (Scotland) Act* (UK National Archives, 2005) marked a shift towards a policy of active Gaelicization of the Scottish public space. Although the Scottish government is committed to recognition of Gaelic throughout the country, most Gaelic street signs are to be found in the Highlands and the Western Isles, areas that have the highest number of first language Gaelic speakers.[542] The officially recognized Gaelic-speaking parts of Scotland are called *Gàidhealtachd*. In some parts of Scotland, such as the east and northeast, Scottish Gaelic was not historically present. Thus, the introduction of bilingual street signs could be seen as an act of linguistic innovation and expansion in public space and not a restoration of a previous linguistic state. However, ScotRail had decided to make all Scottish train stations bilingual, following the new Scottish nationalist policy (driven by the Scottish National Party) of using Gaelic as a *differentia specifica* towards England.

In Northern Ireland, the Good Friday Agreement and other post-conflict agreements that finished the decades-long interethnic conflict known as the Troubles and introduced power-sharing institutional arrangements, did not introduce official bilingual or multilingual signs, yet they did lay the groundwork for public respect for linguistic diversity. Both the Irish republican and the Ulster loyalist communities try to emphasize the language issue as a point of difference (see Muller, 2010). Although Irish is not commonly used among people who primarily identify as ethnic Irish in Northern Ireland, local councils dominated by Irish republicans have started erecting bilingual (Irish Gaelic and English) street signs. To counter this, Ulster loyalists have introduced some bilingual signs that include Ulster Scots, an idiom closely related to Lowlands Scots, a Germanic language spoken in the southern and eastern parts of Scotland. Bilingual street signs in this part of the UK clearly testify that linguistic landscapes are often shaped by the urge to mark space and display ownership over territory and not to safeguard languages threatened by declining numbers of speakers.

Recently, certain parts of England have also seen the erection of bilingual street signs. In Cornwall, supporters of language revival and regional identity have started urging local councils to erect bilingual signs in Cornish and English. The introduction of street signs in this Gaelic idiom is still rather inconsistent, yet is meet by no opposition.

Denmark does not have an official language policy and thus does not pursue an official policy on bilingualism and bilingual street signs. However, due to bilateral agreements with Germany that span several decades, local government councils in the border areas have started introducing bilingual (Danish and German) place name signs. Occasionally, these signs were removed through acts of anonymous vandalism. We can still describe bilingual signs in Denmark as token signs and not as an indication of a full policy of bilingual landscapes that would also include bilingual street name inscriptions.

The Swedish *Act on National Minorities and National Minority Languages* (Riksdag, 2009) recognizes five national minority languages (Finnish, Meänkieli, Sámi, Romani, and Yiddish). Yet, this piece of legislation does

[541] *Y Fro Gymraeg* stands for 'Welsh Language Area.'.

[542] As part of the policy of Gaelicization, the Western Isles, also known as Outer Hebrides, were officially renamed to Na h-Eileanan Siar, making this part of Scotland the only local council with a Gaelic-only official name.

not provide a clear framework for the introduction of bilingual street signs, but proclaims that the Swedish state values linguistic richness and diversity and entrusts the Swedish Transport Administration with the erection of bilingual street signs where it deems appropriate. While speakers of Romani and Yiddish are not territorially concentrated, the Finnish-speaking population is spread out in Swedish-majority areas. Therefore, the only bilingual street signs (in the form of place name signs) currently erected in Sweden are in the far north, comprising Meänkieli[543] and two variants of the Sámi language – Northern and Southern Sámi. Although the presentation of these languages is visually equal to its Swedish counterparts, they only appear on town entrances and road signs and not on the street signs themselves.

According to its *Language Act* (Ministry of Justice of Finland, 1996) Finland offers full bilingual status, including bilingual signage, to all municipalities that have more than 8 percent or 3000 speakers of a minority language. In addition, if this percentage drops to 6 percent, the local councilors may vote to renew the municipality's bilingual status nevertheless. Such legal provisions position Finland as the one EU member state that has the most flexible and forthcoming policy towards bilingual signage. This is a consequence of the complex history of language policy in this country and the co-official status of Swedish on the national level. Beside this, the autonomous Åland Islands are officially monolingual, with no Finnish street signs allowed. There are numerous bilingual communities with Finnish and Swedish street signs along the southwestern and southern coast of the country, while in the far north, there are municipalities with Northern Sámi street signs alongside Finnish ones. Finland maintains full implementation of such a bilingual policy. This includes not only place name signs, but also street name signs. All languages are displayed in the same fashion, with the majority language of a given municipality featured on the top of a given street sign.

The Netherlands are a unitary state, yet its provinces enjoy a considerable amount of autonomy. Thus, bilingual policy is enacted on provincial level, in the far north of the country. Although Frisian is a co-official language in the province of Friesland (Fryslân in Frisian), the Dutch government is not really committed to fully implementation (Cenoz & Gorter, 2006: 69). Bilingual street signs in Frisian and Dutch are constructed in such a fashion that visual equality is achieved with place name signs, while street names are usually still in Dutch only or have been change to local names, so that they are effectively unilingual (Frisian). There is no open opposition to the introduction of Frisian into the linguistic landscape, yet the slow implementation of full bilinguality may be interpreted as a sign of reluctance of the Dutch government to devolve too much symbolic power to its northern province.

Due to the federal nature of the German state, matters of bilingual street signs are determined by the respective legislatures (*Landtage*) of the federal states (*Bundesländer*). Acts passed by the Landtag of Schleswig-Holstein have enabled the introduction of bilingual street signs in areas historically inhabited by speakers of North Frisian, as well as Danish speakers. Danish-German bilingualism is also a result of bilateral state agreements in the 1950s, so that German speakers north of the border enjoy bilingual street signs, as well as Danish speakers south of the border. Reciprocity in bilingual street signs policy is usually established through bilateral state agreements that precede regional and local legislative arrangements in the respective countries. Regional legislation (Landtag of Schleswig-Holstein, 2004) defines bilingual areas as those where one can determine historic continuity of ethnolinguistic presence. In other words, bilingual street signs policy in Germany follows a territorial logic, as well as historic claims, but does not take into account current numbers of speakers of the respective regional and minority languages. Such an approach once again confirms the thesis that linguistic landscapes shaped by bilingual street signs serve to establish presence and visibility of an ethnolinguistic minority identity in public space, notwithstanding the actual merits of introduction of an additional language into administrative practice or the demands and needs of current or potential speakers of

[543] Meänkieli is a language closely related to Finnish. Descendants of Finnish-speaking reindeer hunters and woodcutters in northern parts of Sweden speak it.

the respective language. Similarly, regional legislation (Landtag of Brandenburg, 1994; Saxon Landtag, 1999) in eastern federal states defines historic communities that comprise the ethnolinguistic region of Lusatia (Lausitz in German)[544] and can thus become bilingual, with street signs in Lower and Upper Sorbian respectively. In the federal state of Lower Saxony, a single municipality (Saterland) uses bilingual street signs in German and Saterland Frisian. Apart from several cases of defacement of Sorbian signs in Lusatia, there are no problems with the implementation of bilingual street signs in Germany. When speaking about equal visual presentation of languages depicted on bilingual street signs, one can say that Germany's bilingual policy shows both signs of equality and deliberate difference. Communities that just have bilingual place names at town entrances are more common than those that also have street names written in multiple languages. Place names at town entrances show the German name in bigger letters, above the minority name in smaller print. However, where there are bilingual street names as well, both languages are depicted in the same manner.

In Austria, protection of national minorities, including introduction of bilingual street signage, was laid down through the *State Agreement*, which ended the Allied and Soviet post-World War II occupation. The *State Agreement* (Bundesgesetzblatt, 1955) spoke of settlement areas of Croats in the federal state of Burgenland and of Slovenian settlements in the states of Carinthia and Styria and the introduction of bilingual street signs. However, there were no exact provisions for the implementation of such a policy. Thus, a Law on Ethnic Groups (Bundeskanzleramt, 2015) was passed that set the threshold for the introduction of bilingual signage at 25 percent. According to this provision, bilingual street signs were introduced in numerous Croatian and Hungarian speaking communities in Burgenland. On the contrary, local citizen groups, symbolically linking the Slovenian language with Yugoslav partisans and irredentism, met the introduction of Slovenian signage in Carinthia with fierce opposition. Although there are still cases of destroyed or defaced bilingual place name signs, the opposition is less violent than during the 1970s. However, the Austrian Constitutional Court declared the 25 percent threshold as too high, lowered it to 10 percent, and ordered the introduction of bilingual signage in Carinthia. Nevertheless, there are still problems with full implementation of bilingual street signs in this part of Austria. In contrast, Burgenland, bilingual street signs, with the German inscription somewhat bigger than the Croatian or Hungarian ones, are not contested.

The ratification of the ECRML in France was thwarted by the Constitutional Council, which maintained that it had to uphold the French principles of republican unity and equality against particularistic claims made by proponents of regional and minority languages (Nic Craith, 2003: 63). Therefore, there is no commitment of the French government to introduce bilingual street signs. However, with the introduction of regions in 1982 and the subsequent move towards decentralization, regional governments have started recognizing regional and minority languages and have thus created a basis for the introduction of bilingual signage. Still, the actual application of bilingual signage depends on decisions made by local government in the respective departments (2nd tier government level) and communes (3rd tier government level). In each region, usually an official language board for the respective regional or minority idiom encourages local authorities to introduce bilingual signage. The example of Brittany shows that the introduction of bilingual signage did raise public awareness about the language and increased its social and political status, yet it was not necessarily conductive towards increased usage of the Breton language in various everyday situations (see Hornsby, 2008). On the contrary, on Corsica, an autonomous island region, Corsican street signs are used both as a strong symbol of the local national movement and serve to increase the visibility of the language and reinforce a sense of independence from mainland France (see Blackwood, 2011). Corsica is the only French region that has fully implemented bilingual street signs, while nationalist activists often cross out French inscriptions. Apart from Breton, there are also sporadic street signs in Gallo in eastern parts of Brittany. In the Pyrenees departments, there is an increase in street signs with inscriptions in Basque and Catalan alongside French ones. In the southern regions of Midi-Pyrénées, Languedoc-Roussillon, and Provence-Alpes-Côte d'Azur, there is a growing number of street

[544] Łužica in Upper Sorbian and Łužyca in Lower Sorbian.

signs in Occitan. In the old town of Nice, there are inscriptions in Niçard (an Italian dialect), while in Alsace, there are street signs in Alsatian (a German dialect). The last two examples display the importance of symbolism in the construction of linguistic landscapes. By refraining from calling these idioms Italian and German and instead referring to them by their local variants, the French government tries to guard the unity of the country and undermine any claims Italy and Germany might lay on their former territories. Finally, we must note that inscriptions in regional and minority languages on street signs in France are usually graphically different from their French counterparts.

The collapse of Franco's authoritarian regime brought about the end of centralized and Castilian-centered cultural and language policies and enabled an increase in the visibility of non-majority ethnolinguistic identities (see Beck, 1994). In the Basque Country and Navarre, the regional governments strive to promote the Basque language (Cenoz & Gorter, 2006: 69), which also affects the linguistic landscape, as the authorities wish to fully implement bilingual signage in order to highlight the differences towards the dominant Castilian language and Spaniard culture. In Catalonia, one can find both Spanish-only, Catalan-only and bilingual inscriptions, yet the regional government seeks to make the whole region bilingual. Besides Catalonia, there are Catalan street signs in the Valencian Community and on the Balearic Islands. Other regional languages that enjoy co-official status in autonomous regions and thus have the legal right to bilingual signage are Galician in Galicia and Occitan (called Aranese) in Catalonia. In addition, there are some bilingual street signs in the autonomous community of Asturias, although the Asturian language is not an officially recognized regional language. Some idioms, such as Aragonese, are contested, with supporters demanding bilingual signs and opponents claiming that the language does not possess distinctiveness. Even though Spain could be regarded as a highly decentralized country that enables public displays of ethnic and linguistic diversity, the degree of implementation of bilingual signs policy is far from complete, while the various languages are not always presented in a visually equal fashion.

Portugal is a linguistically very homogenous country. However, in the far northeast of the country, there is a community of speakers of Mirandese, a small regional language, related to the Asturian idiom in Spain. With the legal recognition by the Parliament of Portugal (Official Gazette of Portugal, 1999), Mirandese became co-official in the municipality of Miranda do Douro and thus bilingual street signs were introduced. The signs face no opposition and are graphically quite different from their Portuguese counterparts.

The Italian example shows that street signs in regional and minority languages do not serve to enhance communication, as most citizens speak Italian as their first language, but are 'a means which the local community constructs its (public) linguistic image' (Dal Negro, 2009: 207). Italy has a very rich linguistic diversity, yet most of its regional minority languages (apart from German in South Tyrol)[545] have only gained public visibility and acceptance with the process of devolution of powers to regions that started in the 1970s and matured in the 1990s. According to the *Law on Norms in Matters Concerning the Protection of Historic Linguistic Minorities* (Official Gazette of the Italian Republic, 1999), provincial governments have to introduce bilingual street signs if 15 percent of citizens of a municipality or one third of municipal councilors demand it. Apart from this law, the statutes of autonomous regions (Aosta Valley, Sardinia, Sicily, Trentino-South Tyrol and Friuli-Venezia Giulia) regulate bilingual street signs. Italy has the most varied linguistic landscape in the European Union, with 12 languages enjoying bilingual street signs status and thus becoming embedded in public space. In Aosta Valley, there are French and Franco-Provençal[546] signs; Occitan ones in Piedmont, Sardinian and Catalan on the island of Sardinia; Friulian and Slovenian in the Friuli-Venezia Giulia and Veneto regions and German and Ladin in Trentino-South Tyrol. Furthermore, there are bilingual street signs for

[545] The introduction of bilingual street signs in South Tyrol followed because of post-World War II negotiations between the Italian and Austrian governments (see more in Dal Negro, 2009: 209).

[546] This Romance tongue is also known as Arpitan or Romand (in Switzerland).

Albanian speakers in the regions of Molise, Basilicata, Calabria and Sicily, as well as street signs including Croatian inscriptions in Molise and Greek inscriptions in Calabria and Apulia. The implementation of the bilingual signs policy generally faces no obstructions[547] and local government authorities tend to follow the practice of ensuring graphical equality of all the languages included in bilingual or multilingual (some parts of Trentino-South Tyrol and Friuli-Venezia Giulia) street signs.

Greece follows a strict policy of national unity that tries to deny the existence of ethnic minorities. This policy also extends to language-related issues. Thus, there are no legal provisions for, nor attempts at erecting bilingual street signs anywhere on Greek territory. Street signs are displayed only in Greek language and alphabet, usually accompanied with an equivalent in Latin script.

4.2 Post-Communist Europe

The language policies of countries of the Visegrád Group (Poland, Czech Republic, Slovakia and Hungary) are determined by their historic experience of the linguistic patchwork of multiethnic German, Russian and Austro-Hungarian empires, but also by the legacy of forced Germanification and Russification.[548]

The introduction of German inscriptions in post-communist Poland represents a sharp change in policy, as communist Poland used to engage in removal of all signs of German language in public space (see Wolff & Cordell, 2003: 106, Wolff, 2001). The *Act on National and Ethnic Minorities and on the Regional Languages* (Sejm, 2005) allows all communes in which at least 20 percent of the population belongs to a national minority, to introduce bilingual signage. There is a complete implementation of bilingual signs, with graphical equality of both languages on display. Bilingual signage does not include only place names on town entrances, but also street name signs. In Silesia, there are German street signs, in the northern coastal region Kashubian enjoys bilingual signs, while in the east there are street signs with inscriptions in Belarusian and Ruthenian (called Lemko in Poland).

In the Czech Republic, the *Act on Rights of Members of National Minorities* (Government of the Czech Republic, 2001) offers provisions for the introduction of bilingual street signage in areas with a sizeable population of traditional (autochthonous) national minorities. However, the requirements for the introduction of street signs that would establish official bilingual landscapes are rather high. In order to erect bilingual street signs, a local community in Czech Republic would have to have at least a 10 percent of the respective ethnolinguistic minority but also receive backing by a petition signed by 40 percent of adult citizens of a given community (Zwilling, 2004: 4). While the first threshold is very low, the second one may effectively prevent the introduction of bilingual signage if members of the minority fail to mobilize enough support to file a petition. The only language enjoying official bilingual street signs in Czech Republic is Polish, in the area of Czech Teschen,[549] in the Moravian-Silesian region. In this case, we can speak of full implementation of the bilingual street sign policy, with both Czech and Polish inscriptions equally treated in terms of size and appearance.

The post-communist Slovak government saw the bottom-up, unofficial erection of Hungarian place name signs as illegal, yet in 1994 a new law enabled the introduction of bilingual street signs in areas with a sizeable ethnic minority population, albeit with inscriptions in the minority language written in a smaller and different font (Sloboda, 2009: 183-184). However, a subsequent *Law on the Use of Minority Languages* (Slovak Ministry of Culture, 1999) introduced provisions that are more equitable, so that nowadays place name signs at town or village entrances may still feature minority language inscriptions written in a separate and smaller fashion,

[547] In South Tyrol, German-speakers often object to inventions of new Italian names for previously German-only toponyms.

[548] On the linguistic history of Central Europe and its political implications, see more in Kamusella, 2009.

[549] This is the Anglicized version of town's name, in Czech it is called Český Těšín and in Polish is known as Czeski Cieszyn.

while street names are written in the same manner in both languages. Although Slovak-Hungarian relations remain somewhat strained, the shaping of bilingual landscapes was accepted as part of the broader process of Europeanization and implementation of EU policies. Besides Hungarian street signs) in the southern borderlands, there are also Ruthenian street signs in the northeastern part of Slovakia. There is full implementation of bilingual street signs and there are no formal or informal political or societal actors engaged in obstruction of this policy or vandalism against signposts.

After the collapse of communism, Hungary has experienced a strong surge in the number of citizens identifying as ethnic minorities. Between the 1991 and 2001 censuses, the number of ethnic Germans rose by more than 100 percent, although only a fraction of them indicated German as their mother tongue (Wolff & Cordell, 2003: 101). This shows that with the onset of democracy more citizens felt free to identify with an ethnic minority, notwithstanding the fact that they did not possess the cultural resources (i.e. language knowledge) to exercise this identity in full. However, as we have already noted, the demand for public visibility of a minority language does not have to be followed by actual usage of that same language. Similar to the Polish and Slovak cases, the *Act on Rights of National and Ethnic Minorities* (National Assembly of Hungary, 1993) enabled the introduction of bilingual street signs in those municipalities that have at least 20 percent of the population belonging to a recognized ethnolinguistic minority. The total number of members of ethnic minorities in Hungary is not high, yet they are usually concentrated in several small towns and rural areas, so that they manage to pass this threshold and qualify for bilingual status. Thus, there are municipalities with Croatian, German, Romanian, Serbian, Slovak, and Slovenian street signs. While the place name signs usually differ in size and font from their Hungarian equivalents, street name signs are printed in the same manner for both languages. One may say that the policy of bilingual signs has achieved full implementation in Hungary and that there no incidents involving destruction of such signage.

In 1989, all three Baltic countries adopted laws that ended the predominance of the Russian language and established Estonian, Latvian and Lithuanian as the respective state languages (Hogan-Brun, 2003: 124-125). Although they are majority languages, the new post-communist governments treated them as endangered idioms, in need of special protection. Later on, such a view served as justification for suppression of Russian in the public sphere and especially as a justification for the abolishment of Russian street signs. Since the question of language is closely linked to citizenship issues in the Baltics, especially in Estonia and Latvia (see Hogan-Brun, 2003: 129), the governments of these two countries might perceive demands for Russian bilingual street signs as a sign of failed integration of the Russian community. In Latvia, Russians are often viewed as potential traitors and are thus treated with suspicion that translates into a restrictive language policy and prohibition of bilingual street signs (see Dobson, 2001).

The post-communist Estonian governments have either removed or effaced previous Russian street signs in cities and towns. Yet, some Russian signage remains in towns where local government officials are ethnic Russians. According to the *Place Names Act* (Riigikogu, 2004); non-Estonian place names may be permitted, if proven that they have a historic origin prior to 1939, i.e. the incorporation of pre-World War II Estonia into the Soviet Union. There is a 50 percent nominal threshold for administrative bilinguality on municipality level, but according to 1939 census data. This year is taken as year zero because of the official Baltic policy that claims that the Soviet Union occupied Estonia, Latvia and Lithuania from 1941 to 1989. Thus, all immigrants from Russia, Belarus and the Ukraine are viewed as settlers that came together with occupying forces. In Noarootsi Parish, in the northwestern part of the country, there are Swedish place names, although there are no more than 200 Swedish-speaking people left in Estonia. In the southern part of Estonia, there are also bilingual street signs that include inscriptions in Võro, a language closely related to Estonian and historically regarded as a South Estonian dialect.

Latvian regulation on place names (Cabinet of Ministers of the Republic of Latvia, 2000) insists that all place names (and hence street names) have to be in Latvian. This regulation essentially forbids bilingual street signs,

yet allows street signs in the extinct Livonian language and street signs in the Latgalian language, an idiom closely related to Latvian. Latgalian is officially not considered a separate language, but only a historically different literary standard of Latvian, in usage in the southeastern part of the country. Therefore, in practice, there are no official bilingual street signs in this country. However, in parts of the country with a strong presence of Russian speakers (such as the city of Daugavpils), there remain Soviet-era bilingual (Russian-Latvian) street signs. These signs are officially not valid any more, yet still serve their purpose of marking space and conveying meaning and identity.

In Lithuania, the *Law on the State Language* (Ministry of Justice of Lithuania, 1995) stipulates that public signs may only be in the state language (Lithuanian), while ethnic minority organizations may use their languages solely for informational signs depicting their organizations. Constitutionally, Lithuanian is the only permitted officially language, while the *Law on Ethnic Minorities* practically prohibits bilingual street signs, allowing them only in areas where more than 70 percent of the population belongs to a given ethnic minority (Kallonen, 2004: 5-6). After the scrapping of the *Law on Ethnic Minorities* in 2010, bilingual street signs have *de facto* become illegal. In areas around the capital city of Vilnius, where Polish speakers form the majority, local councilors, as well as ordinary citizens, have begun erecting Polish-Lithuanian street signs on private houses, claiming that private property is exempt from Lithuanian language legislation. The Lithuanian government is still looking for a compromise solution that would satisfy the Polish community but also remain true to its proclaimed unilingual policy.

The Slovenian Constitution allows Italian and Hungarian to be co-official (including bilingual street signs) in those areas where these two ethnic minorities are autochthonous (Petričušić, 2004: 6-7). In the Slovenian coastal area, there is full implementation of bilingual (Italian and Slovenian) street signs, while in the northeastern Prekmurje region, there is full application of Hungarian-Slovenian street signs. These bilingual street signs have become an accepted part of Slovenia's linguistic landscape and thus do not suffer from opposition or destruction.

In Croatia, the *Constitutional Law on National Minorities* (Croatian Parliament, 2002) stipulates that official bilinguality has to be introduced in cities or municipalities where more than one third of the population belongs to one of the constitutionally defined national minorities. However, the Croatian legal framework does not prevent local and regional government units from introducing bilingual signage where and when they see fit, even if they do not meet this requirement. Thus, the Istrian Democratic Assembly, a regionalist party that has dominated local and regional politics in the western peninsula of Istria for more than two decades, introduced official bilinguality on regional (county) level and established bilingual street signs (Croatian and Italian) in cities and municipalities along the western and southern coast of Istria, in areas traditionally populated by Italian-speakers. In some of these communities, bilingual street signs follow the orthography of one language at the expense of the other language or include incomplete translations of toponyms. Apart from Italian, Czech and Hungarian speakers also enjoy partially implemented bilingual street signs in their respective municipalities. However, some local councils have forfeited their potential bilingual status. This includes not only the municipality of Punitovci (37% Slovak-speaking), but also many Serb-majority areas along the border to Bosnia and Herzegovina. Although usually governed by ethnic Serb parties, these communities show reluctance to ask for Serbian Cyrillic street signs out of fear from stirring ethnic animosities with the Croatian majority. After the 2011 census, the city of Vukovar, on the Croatian-Serbian border, qualified for bilingual status as the number of ethnic Serbs rose above one third. However, the erectment of bilingual street signs was met with violent opposition. Protesting war veterans openly destroyed bilingual inscriptions, interpreting them as symbols of enemy forces from the 1991-1995 Croatian War of Independence. The government has promised to enforce the application of constitutional provisions for bilingual street signs in all cities and municipalities that qualify for bilingual status.

In 2001, the *Law on Local Public Administration* (Official Gazette of Romania, 2001) enabled administrative bilinguality. According to this piece of legislation, bilingual street signs may be introduced in municipalities or cities where the share of a given ethnic minority is at least 20 percent (Constantin, 2004: 8-9). Although only the Hungarians have a sizeable population in Romania, many smaller ethnolinguistic communities have geographically concentrated settlements throughout the country. Thus, beside Hungarian, there are municipalities with bilingual street signs that include inscriptions in Bulgarian, Croatian, German, Polish, Serbian and Ukrainian. There are no problems with the implementation with this aspect of language policy and the bilingual street signs usually display both languages in the same graphical fashion.

Bulgaria is one of the few post-communist EU member states that does not allow bilingual street sign. Such a language policy is a direct result of a general national identity policy, whereby Bulgaria follows the Greek example and refuses to acknowledge the existence of ethnic (and thus ethnolinguistic) minorities. Therefore, although the Turkish ethnolinguistic community represents over 10 percent of the population and is geographically concentrated in the southern province of Kardzhali and the northeastern province of Razgrad, there are no Turkish street signs in Bulgaria.

4.3 Special Cases: Belgium, Luxembourg, Malta, Ireland and Cyprus

Belgium is constitutionally a multilingual federal state without a single majority language. However, besides monolingual areas (Dutch-speaking Flanders and French-speaking Wallonia), the Brussels Capital Region applies bilingual (French and Dutch) street signage, although over 50 percent of Brussels inhabitants speak only French at home, while less than 10 percent speak Dutch (Janssens, 2008: 5). The German-speaking areas in the east of the country have bilingual signs (German and French). In addition, there are municipalities (along the linguistic border between Flanders, Wallonia and the German-speaking eastern municipalities) that offer public services (e.g. schooling, public acts) to speakers of the non-majority language (Dutch, French or German) residing across the language border. These services also include bilingual street signage. The majority language is written above the non-majority language, in a somewhat bigger size. Any municipality that has more than 30 percent of speakers of a non-majority Belgian language has to become a municipality with language facilities. Besides the three official languages (French, Dutch and German), there are some places in Wallonia that have Walloon street signs alongside French ones, albeit written in a smaller font. The application of Walloon street signs is not universal, but rather sporadic.

According to the *Law on Language Regime* (Government of the Grand Duchy of Luxembourg, 1984), this country practices functional and not territorial multilingualism. The state language is Luxembourgish; the legal language is French, while the official languages are Luxembourgish, French and German. Thus, the whole nation is trilingual, while the linguistic landscape is plurilingual. Therefore, no push for politics of visibility of presence arises. Yet, we should note that French is the dominant feature of the linguistic landscape, while Luxembourgish is often written in a smaller font, beneath the French and/or German inscriptions.

The Irish case is a peculiar one, since Irish Gaelic is demographically a minority language, yet it is not a language associated with a non-majority group, i.e. an ethnolinguistic minority living in the Republic of Ireland. Officially recognized areas with Irish as the dominant language – *Gaeltacht*. Rapid decline of speakers, yet, whole of Republic of Ireland is officially bilingual, with bilingual place names and street names in Irish and English. Although Irish is constitutionally the first, national language of the country, it is often displayed in italics, above the English-language street names, leading to confusion. In some *Gaeltacht* areas there are monolingual, Irish-only signs. Ever since the late 19th century, Irish republican political elites have tried to strengthen the public presence of Irish Gaelic through the process of Gaelic Revival. However, despite the strong presence of Gaelic in education, national media and in public space through place and street names, the actual number of speakers of Gaelic as first language is rather low and keeps declining, although many Irish citizens do possess a certain level of command of Irish.

According to its constitution (Presidency of the Republic of Cyprus, 1960), Cyprus is officially bilingual, with both Greek and Turkish declared official languages. However, with the partition of the island as an established fact, the Cypriotic government does not extend this official bilinguality to street signs. There are very few trilingual (Greek, Turkish, and English) road signs throughout the southern part of the island, while most of the street signs are exclusively in Greek and English. In this case, English does not serve as a foreign language added for tourist purposes, but shows the persistence of British influence that stems from colonial times before 1959.

Similar to Cyprus, Malta is also constitutionally a bilingual country. The constitution proclaims Maltese the country's national language, while English is granted official status alongside it (Justice Services of Malta, 2014). All street signs are both in Maltese and English, with Maltese as the first, national language, and English as the former colonial language. However, although Italian has a long history of presence in Malta, it is nowhere to be seen on street signs.

Table 8. Bilingual Signs Policy in EU Member States

Country	Bilingual signs	Legal basis	Requirements	Equality	Implementation
Austria	YES	Constitution, Law on Ethnic Groups	25% (10%)	Yes	Partial
Belgium	YES	Constitution	30% (facilities)	Yes and No	Full
Bulgaria	NO	-	-	-	-
Croatia	YES	Constitution, Constitutional Law on National Minorities	33%	Yes	Partial
Cyprus	YES	Constitution	-	Yes	Partial
Czech Republic	YES	Act on Rights of Members of National Minorities	10%/40%	Yes	Full
Denmark	YES	local language acts	territory-based	No	Partial
Estonia	YES	Place Names Act	historic claim	Yes	Partial
Finland	YES	Language Act	8%/3000 speakers	Yes	Full
France	YES	regional language legislation, local language acts	historic claim	No	Partial
Germany	YES	regional acts on minority rights	territory-based	Yes and No	Full
Greece	NO	-	-	-	-
Hungary	YES	Act on National and Ethnic Minorities	20%	Yes and No	Full
Ireland	YES	Constitution	-	No	Full
Italy	YES	Law on Norms in Matters Concerning the Protection of Historic Linguistic Minorities, regional statutes	territory-based, 15%/33%	Yes	Full
Latvia	NO	-	-	-	-
Lithuania	NO	-	-	-	-
Luxembourg	YES	Law on Language Regime	-	No	Partial
Malta	YES	Constitution	-	Yes	Full
Netherlands	YES	Frisian Language and Culture Covenant	territory-based	Yes	Partial
Poland	YES	Act on National and Ethnic Minorities and on the Regional Languages	20%	Yes	Full
Portugal	YES	Law on Official Recognition of the Mirandese Language	territory-based	No	Full

Romania	YES	Law on Local Public Administration	20%	Yes and No	Full
Slovakia	YES	Law on the Use of Minority Languages	20%	Yes and No	Full
Slovenia	YES	Constitution	territory-based	Yes	Full
Spain	YES	Constitution, regional statutes	territory-based	No	Partial
Sweden	YES	Language Law	historic claim	Yes	Full
United Kingdom	YES	Gaelic Language (Scotland) Act, Welsh Language Act	territory-based	No	Partial

5. Conclusion

In this paper, we have tried to show the importance of bilingual street signs in shaping linguistic landscapes and making ethnolinguistic groups visible and present in public space. A comparison of various policies and practices in EU member states has revealed that there is no convergence towards common patterns of dealing with bilingual signage (*Table 2*). Yet, we could detect several features that distinguish old member states from post-communist states, federal from unitary states, as well as policies towards minority languages and policies towards regional languages. From 28 member states, 24 states allow bilingual signs, while four of them are states that are officially bilingual or multilingual on national level. Interestingly, none of the four countries that do not allow bilingual signs (Bulgaria, Greece, Latvia, and Lithuania) has signed the ECRML. Of the 20 countries that do allow bilingual street signs for regional and minority languages, four have constitutional provisions for introduction of bilingual street signs (Austria, Croatia, Slovenia, and Spain), while the other 16 countries use a combination of minority rights laws, language laws and regional and local statutes. All 20 countries stipulate some conditions for the introduction of bilingual street signs. Among old member states, these requirements are usually connected with officially proclaimed settlement areas of a respective ethnolinguistic community (historic claim) or linked to a subnational administrative unit (territory-based). Among post-communist member states, there are percentages of minority population in a given municipality that serve as thresholds for the introduction of bilingual signage. The most common threshold is 20 percent, while no country requires a municipality to be a minority-majority territorial unit (more than 50 percent) in order to qualify for bilingual signage. Out of these 20 member states with bilingual street signs, nine countries provided visual equality for all depicted languages, four did not, while seven provided partial equality. Regarding implementation, 11 cases achieved full implementation, while the other nine only partially implemented its bilingual signs policies. Considering issues with implementation, two cases stand out – the Austrian and the Croatian one. In both cases, there was violent opposition to introduction of bilingual signs in a specific language and in a specific place, while elsewhere in the country bilingual signage met no disapproval. Furthermore, in both cases the arguments raised against bilingual signage were the same – the invocation of memories of war sufferings and the anxiousness about potential irredentism.

Table 3 shows that there are numerous languages enjoying official bilingual street sign status in EU member states, including both big languages backed by nation states where that language is official, as well as small regional languages, used by only a handful of speakers. Italy enabled by far the most languages to enjoy public visibility and presence through bilingual street signs, followed by France, Romania, and Spain. *Table 4* shows that out of 24 official languages of EU member states, 16 languages enjoy bilingual sign status in at least one other member states, with German present in six countries, Hungarian in five and Croatian in four.

We can conclude by pointing out that linguistic landscapes shaped by bilingual street signs in Western Europe tend to be driven by regional governments and show lots of inconsistency and a tendency to limit bilingual signage to place name signs only. In contrast, in Eastern Europe, one is more likely to find strict rules and constitutional guarantees for bilingual signage, including street name signs.

Table 9. Languages Enjoying Bilingual Sign Status

Country	Languages enjoying official bilingual street sign status
Austria	Croatian, Hungarian, Slovenian
Croatia	Czech, Hungarian, Italian, Serbian
Czech Republic	Polish
Denmark	German
Estonia	Swedish, Võro
Finland	Swedish, Northern Sámi
France	Alsatian (German), Breton, Basque, Catalan, Corsican, Gallo, Niçard (Italian), Occitan
Germany	Danish, Lower Sorbian, North Frisian, Saterland Frisian, Upper Sorbian
Hungary	Croatian, German, Romanian, Serbian, Slovak, Slovenian
Ireland	Irish Gaelic
Italy	Albanian, Catalan, Croatian, Franco-Provençal, French, Friulian, German, Greek, Ladin, Occitan, Sardinian, Slovenian
Netherlands	Western Frisian
Poland	Belarusian, German, Kashubian, Lithuanian, Ruthenian
Portugal	Mirandese
Romania	Bulgarian, Croatian, Hungarian, German, Polish, Serbian, Ukrainian
Slovakia	Hungarian, Ruthenian
Slovenia	Hungarian, Italian
Spain	Aranese (Occitan), Asturian, Basque, Catalan, Galician
Sweden	Meänkieli, Northern Sámi, Southern Sámi
United Kingdom	Cornish, Irish Gaelic, Scottish Gaelic, Ulster Scots, Welsh

Table 10. Official EU Languages Enjoying Bilingual Signs as Minority Languages

Language	Countries
Bulgarian	Romania
Croatian	Austria, Hungary, Italy, Romania
Czech	Croatia
Danish	Germany
French	Italy
German	Denmark, France, Hungary, Italy, Poland, Romania
Greek	Italy
Hungarian	Austria, Croatia, Romania, Slovakia, Slovenia
Irish Gaelic	United Kingdom
Italian	Croatia, France, Slovenia
Lithuanian	Poland
Polish	Czech Republic, Romania
Romanian	Hungary
Slovak	Hungary
Slovenian	Austria, Hungary, Italy
Swedish	Estonia, Finland

We might argue that bilingual signage in old member states is a result of decades-long struggle of ethnolinguistic advocacy groups for visibility and presence of their idioms in public space. On the contrary, in post-communist member states the introduction of bilingual street signs was achieved as part of wider policy change during the process of Europeanization and adoption of EU-mandated minority protection schemes. In Eastern Europe, it was much easier for the Brussels administration to push through with policy proposals that included interventions in public space and its reshaping into bilingual landscapes than to achieve implementation in old member states.

In quasi-federal countries such as the United Kingdom, Spain and Italy, bilingual signage closely followed the processes of devolution and the rise of regionalist and ethnoregionalist political parties. Thus, policies of bilingual signage became a form of accommodation of centrifugal political forces and a way of management of ethnic differences and conflicts.

Both the popularity of demands for bilingual signage for a plethora of different European regional and minority languages, as well as the fierce opposition to its introduction in the Baltics, or the partial, localized and violent

protests against its implementation in Austria and Croatia, testify about the importance of visibility and presence of language artefacts for the identity and agency of ethnolinguistic groups.

REFERENCES

Ammon, U. (2012). Language Policy in the European Union (EU). In: Spolsky, B. (ed.). *The Cambridge Handbook of Language Policy*. Cambridge & New York: Cambridge University Press, pp. 570-591.

Backhaus, P. (2009). Rules and Regulations in Linguistic Landscaping: A Comparative Perspective. In: Shohamy, E. & Gorter, D. (eds). *Linguistic Landscape: Expanding the Scenery*. London & New York: Routledge, pp. 157-172.

Backhaus, P. (2012). Language Policy at the Municipal Level. In: Spolsky, B. (ed.). *The Cambridge Handbook of Language Policy*. Cambridge & New York: Cambridge University Press, pp. 226-242.

Beck, J. M. (1994). Ethnic Minorities and Post-Franco Territorial Administration in Spain: Changes in the Linguistic Landscape. *History of European Ideas*. 19 (4-6): 637-645.

Ben-Rafael, E.; Shohamy, E.; Amara, M. H. & Trumper-Hecht, N. (2006). Linguistic Landscape as Symbolic Construction of the Public Space: The Case of Israel. *International Journal of Multilingualism*. 3 (1): 7-30.

Blackwood, R. J. (2011). The linguistic landscape of Brittany and Corsica: A comparative study of the presence of France's regional languages in the public space. *Journal of French Language Studies*. 21 (2): 111-130.

Blommaert, J. (2013). Ethnography, Superdiversity and Linguistic Landscapes: Chronicles of Complexity. Clevedon, Buffalo & Toronto: Multilingual Matters Ltd.

Cenoz, J. & Gorter, D. (2006). Linguistic Landscape and Minority Languages. *International Journal of Multilingualism*. 3 (1): 67-80.

Constantin, S. (2004). Linguistic policy and national minorities in Romania. *Noves SL, Revista de Sociolingüística*. 1-12. http://www.gencat.cat/llengua/noves/noves/hm04tardor/docs/constantin.pdf

Dal Negro, S. (2009). Local Policy Modeling the Linguistic Landscape. In: Shohamy, E. & Gorter, D. (eds). *Linguistic Landscape: Expanding the Scenery*. London & New York: Routledge, pp. 206-218.

Dobson, J. (2001). Ethnic Discrimination in Latvia. In: O'Reilly, C. C. (ed.). *Language, Ethnicity and the State: Volume 2: Minority Languages: in Eastern Europe post-1989*. Basingstoke & New York: Palgrave Macmillan, pp. 155-188.

Foucault, M. (1980). Power/Knowledge: Selected Interviews and Other Writings 1972-1977. New York: Pantheon Books.

Gade, D. W. (2003). Language, Identity, and the Scriptorial Landscape in Québec and Catalonia. *The Geographical Review*. 93 (4): 429-448.

García, O. (2012). Ethnic Identity and Language Policy. In: Spolsky, B. (ed.). *The Cambridge Handbook of Language Policy*. Cambridge & New York: Cambridge University Press, pp. 79-99.

Grin, F. (2003). Language Policy Evaluation and the European Charter for Regional or Minority Languages. Basingstoke & New York: Palgrave Macmillan.

Hogan-Brun, G. (2003). Baltic National Minorities in a Transitional Setting. In: Hogan-Brun, G. & Wolff, S. (eds). *Minority Languages in Europe: Frameworks, Status, Prospects*. Basingstoke & New York: Palgrave Macmillan, pp. 120-137.

Hornsby, M. (2008). The Incongruence of the Breton Linguistic Landscape for Young Speakers of Breton. *Journal of Multilingual and Multicultural Development*. 29 (2): 127-138.

Janssens, R. (2008). Language use in Brussels and the position of Dutch: Some recent findings. *Brussels Studies: The E-Journal for Academic Research on Brussels*. http://www.brusselsstudies.be/medias/publications/EN_51_BruS13EN.pdf

Jones, R. & Merriman, P. (2009). Hot, banal and everyday nationalism: Bilingual road signs in Wales. *Political Geography*. 28 (3): 164-173.

Judt, T. & Lacorne, D. (2004). The Politics of Language. In: Judt, T. & Lacorne, D. (eds). *Language, Nation, and State: Identity Politics in a Multilingual Age*. Basingstoke & New York: Palgrave Macmillan, pp. 1-16.

Kallonen, M. (2004). Minority protection and linguistic rights in Lithuania. *Noves SL, Revista de Sociolingüística*. 1-8. http://www.gencat.cat/llengua/noves/noves/hm04tardor/docs/kallonen.pdf

Kamusella, T. (2009). *The Politics of Language and Nationalism in Modern Central Europe*. Basingstoke & New York: Palgrave Macmillan.

Kaplan, R. B. & Baldauf Jr., R. B. (2008). Language Policy and Planning in the Baltic States, Ireland and Italy: Some Common Issues. In: Kaplan, R. B. & Baldauf Jr., R. B. (eds). *Language Planning and Policy in Europe, Vol. 3: The Baltic States, Ireland and Italy*. Clevedon, Buffalo & Toronto: Multilingual Matters Ltd, pp. 6-30.

Landry, R. & Bourhis, R. Y. (1997). Linguistic Landscape and Ethnolinguistic Vitality: An Empirical Study. *Journal of Language and Social Psychology*. 16 (1): 23-49.

Low, S. M. & Lawrence-Zúñiga, D. (2003). Locating Culture. In: Low, S. M. & Lawrence-Zúñiga, D. (eds). *The Anthropology of Space and Place: Locating Culture*. Malden, MA & Oxford: Blackwell, pp. 1-48.

Marten, H. F.; Van Mensel, L. & Gorter, D. (2012). Studying Minority Languages in the Linguistic Landscape. In: Marten, H. F.; Van Mensel, L. & Gorter, D. (eds). *Minority Languages in the Linguistic Landscape*. Basingstoke & New York: Palgrave Macmillan, pp. 1-18.

Merriman, P. & Jones, R. (2009). 'Symbols of Justice': the Welsh Language Society's campaign for bilingual road signs in Wales, 1967-1980. *Journal of Historical Geography*. 35 (2): 350-375.

Muller, J. (2010). Language and Conflict in Northern Ireland and Canada: A Silent War. Basingstoke & New York: Palgrave Macmillan.

Nelde, P. H. (2007). Maintaining Multilingualism in Europe: Propositions for a European Language Policy. In: Pauwels, A.; Winter, J. & Lo Bianco, J. (eds). *Maintaining Minority Languages in Transnational Contexts*. Basingstoke & New York: Palgrave Macmillan, pp. 59-77.

Nic Craith, M. (2003). Facilitating or Generating Linguistic Diversity: The European Charter for Regional or Minority Languages. In: Hogan-Brun, G. & Wolff, S. (eds). *Minority Languages in Europe: Frameworks, Status, Prospects*. Basingstoke & New York: Palgrave Macmillan, pp. 56-72.

Nic Craith, M. (2006). Europe and the Politics of Language: Citizens, Migrants and Outsiders. Basingstoke & New York: Palgrave Macmillan.

O'Reilly, C. C. (2003). When a Language is 'Just Symbolic': Reconsidering the Significance of Language to the Politics of Identity. In: Hogan-Brun, G. & Wolff, S. (eds). *Minority Languages in Europe: Frameworks, Status, Prospects*. Basingstoke & New York: Palgrave Macmillan, pp. 16-33.

Petričušić, A. (2004). Slovenian legislative system for minority protection. *Noves SL, Revista de Sociolingüística*. 1-8. http://www.gencat.cat/llengua/noves/noves/hm04tardor/docs/petricusic.pdf

Puzey, G. (2009). Opportunity or Threat? The Role of Minority Toponyms in the Linguistic Landscape. In: Ahrens, W.; Embleton, S. & Lapierre, A. (eds). *Names in Multi-Lingual, Multi-Cultural and Multi-Ethnic Contact: Proceedings of the 23rd International Congress of Onomastic Sciences*. Toronto: York University, pp. 821-827.

Shohamy, E. (2006). *Language Policy: Hidden Agendas and New Approaches*. London & New York: Routledge.

Sloboda, M. (2009). State Ideology and Linguistic Landscape: A Comparative Analysis of (Post)communist Belarus, Czech Republic and Slovakia. In: Shohamy, E. & Gorter, D. (eds). *Linguistic Landscape: Expanding the Scenery*. London & New York: Routledge, pp. 173-188.

Sloboda, M.; Szabó-Gilinger, E.; Vigers, D. & Šimičić, L. (2010). Carrying out a language policy change: advocacy coalitions and the management of linguistic landscape. *Current Issues in Language Planning*. 11 (2): 95-113.

Spolsky, B. (2004). *Language Policy*. Cambridge & New York: Cambridge University Press.

Spolsky, B. (2009). Prolegomena to a Sociolinguistic Theory of Public Signage. In: Shohamy, E. & Gorter, D. (eds). *Linguistic Landscape: Expanding the Scenery*. London & New York: Routledge, pp. 25-39.

Williams, C. H. (2012). Language Policy, Territorialism and Regional Autonomy. In: Spolsky, B. (ed.). *The Cambridge Handbook of Language Policy*. Cambridge & New York: Cambridge University Press, pp. 174-202.

Wolff, S. (2001). From Irredentism to Constructive Reconciliation? Germany and its Minorities in Poland and the Czech Republic. In: O'Reilly, C. C. (ed.). *Language, Ethnicity and the State: Volume 2: Minority Languages: in Eastern Europe post-1989*. Basingstoke & New York: Palgrave Macmillan, pp. 66-90.

Wolff, S. & Cordell, K. (2003). Ethnic Germans as a Language Minority in Central and Eastern Europe: Legislative and Policy Frameworks in Poland, Hungary and Romania. In: Hogan-Brun, G. & Wolff, S. (eds). *Minority Languages in Europe: Frameworks, Status, Prospects*. Basingstoke & New York: Palgrave Macmillan, pp. 99-119.

Zwilling, C. (2004). Minority Protection and Language Policy in the Czech Republic. *Noves SL, Revista de Sociolingüística*. 1-8. http://www.gencat.cat/llengua/noves/noves/hm04tardor/docs/zwilling.pdf

LEGAL SOURCES

Bundesgesetzblatt (1955). *Staatsvertrag*
https://www.ris.bka.gv.at/Dokumente/BgblPdf/1955_152_0/1955_152_0.pdf

Bundeskanzleramt (2015). *Volksgruppengesetz*
https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000602

Cabinet of Ministers of the Republic of Latvia (2000). Regulation No. 294: On creating, spelling and usage of place names, names of institutions, non-governmental organizations, companies (enterprises) and titles of events. http://www.minelres.lv/NationalLegislation/Latvia/Latvia_LangRegPlaceNames_English.htm

Council of Europe (1992). *European Charter on Regional and Minority Languages*. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007bf44

County of Istria (2003). *Statute of the Istrian Region*. http://www.istra-istria.hr/index.php?id=587

Croatian Parliament (2002). *Constitutional Law on the Rights of National Minorities*. http://www.minelres.lv/NationalLegislation/Croatia/Croatia_MinRights2002_English.htm

European Union (2010). *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*. http://europa.eu/pol/pdf/consolidated-treaties_en.pdf

Government of the Czech Republic (2001). *Act on Rights of Members of National Minorities*. http://www.minelres.lv/NationalLegislation/Czech/Czech_Minorities_English.htm

Government of the Grand Duchy of Luxembourg (1984). *Law on Language Regime*. http://www.legilux.public.lu/leg/a/archives/1984/0016/a016.pdf#page=6

Justice Services of Malta (2014). *Constitution of Malta*. http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566

Landtag of Brandenburg (1994). *Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg*. http://www.landtag.brandenburg.de/sixcms/media.php/5701/Sorbengesetz.pdf

Landtag of Schleswig-Holstein (2004). *Friesisch-Gesetz*. http://www.landtag.ltsh.de/infothek/wahl15/drucks/3700/drucksache-15-3727.pdf

Ministry of Justice of Finland (1996). *Language Act*. https://www.finlex.fi/fi/laki/kaannokset/1922/en19220148.pdf

Ministry of Justice of Lithuania (1995). *Law on the State Language*. http://www.litlex.lt/Litlex/Eng/Frames/Laws/Fr_laws.htm

National Assembly of Hungary (1993). *Act LXXVII of 1993 on the Rights of National and Ethnic Minorities*. http://www.minelres.lv/NationalLegislation/Hungary/Hungary_Minorities_English.htm

Official Gazette of Portugal (1999). Lei 7/99: Reconhecimento oficial de direitos linguísticos da comunidade mirandesa. http://dre.tretas.org/dre/99574/

Official Gazette of Romania (2001). *Law No. 215: On Local Public Administration*. http://www.minelres.lv/NationalLegislation/Romania/Romania_LocAdm2001_excerpts_English.htm

Official Gazette of the Italian Republic (1999*). Legge n. 482: Norme in materia di tutela delle minoranze linguistiche storiche*. http://www.parlamento.it/parlam/leggi/99482l.htm

OSCE (1998). The Oslo Recommendations regarding the Linguistic Rights of National Minorities. http://www.osce.org/hcnm/67531?download=true

Presidency of the Republic of Cyprus (1960). http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf

Riigikogu (2004). *Place Names Act*. https://www.riigiteataja.ee/en/eli/512112013009/consolide

Riksdag (2009). *The Act on National Minorities and National Minority Languages*. https://www.coe.int/t/dg4/education/minlang/Report/PeriodicalReports/SwedenPR4_en.pdf

Saxon Landtag (1999). *Sächsisches Sorbengesetz*. http://domizna.org/fileadmin/domizna/upload/software/serbscinu_nalozowac/1999_saechs_sorbg.pdf

Sejm (2005). *Act on National and Ethnic Minorities and on the Regional Languages*. http://isap.sejm.gov.pl/Download;jsessionid=CCA982F1D34795A628926E78176472E3?id=WDU20050170141&type=3

Slovak Ministry of Culture (1999). *Law on the Use of Minority Languages*. http://www.minelres.lv/NationalLegislation/Slovakia/Slovakia_MinorLang_English.htm

UK National Archives (1993). *Welsh Language Act.* http://www.legislation.gov.uk/ukpga/1993/38/pdfs/ukpga_19930038_en.pdf

UK National Archives (2005). *Gaelic Language (Scotland) Act 2005*. http://www.legislation.gov.uk/asp/2005/7/pdfs/asp_20050007_en.pdf

PRE-LANGUAGE TESTS: A MEANS OF INTEGRATION OR BARRIER TO FAMILY REUNIFICATION?

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1. INTRODUCTION

> '(1) Does Article 41(1) of the Additional Protocol […] preclude a provision of national law […] which makes the first entry [into the Federal Republic of Germany] of a member of the family of a Turkish national […] conditional on the requirement that, prior to entry, the family member can demonstrate the ability to communicate, in a basic way, in the German language?'[550]

> '(1) (a) Can the term 'integration measures' […] be interpreted as meaning that the competent authorities of the Member States may require a member of a sponsor's family to demonstrate that he or she has knowledge of the official language of the Member State concerned at a level corresponding to level A1 of the Common European Framework of Reference for Languages, as well as a basic knowledge of the society of that Member State, before those authorities authorise that family member's entry and residence?
>
> […]
>
> (2) Does the purpose of Directive 2003/86/EC, and in particular Article 7(2) thereof, given the proportionality test […], preclude costs of EUR 350 per attempt for the examination which assesses whether the family member complies with the aforementioned integration measures, and costs of EUR 110 as a single payment for the pack to prepare for the examination?'[551]

On 10th July 2014, the European Union's Court of Justice (CJEU or the Court) delivered a judgment in response to the request for a preliminary ruling on the compatibility between the German law on the residence of foreign nationals[552] and a provision of the Additional Protocol (AA) to the Association Agreement between the European Economic Community (EEC) and Turkey.[553] The German provision establishes the conditions under which a spouse of a third-country national (TCN) shall be granted a fixed-term residence permit, while art. 41(1) of the AA - a standstill clause - prevents member states (MSs) of the European Union from introducing new measures which are liable to restrict the exercise by Turkish citizens of certain fundamental freedoms. The object of the dispute was the dismissal of a Turkish national woman's application to reunite with her husband, also a Turkish citizen. On the basis of an unlimited residence permit he was living in Germany, where he was exercising an economic activity that fell within the scope of the freedom of establishment. The permit was refused since the applicant failed to demonstrate that he possessed the required basic knowledge of the German language sufficient to be granted a visa for the purpose of family reunification. The applicant was illiterate.[554]

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[550] CJEU, *Naime Dogan v Bundesrepublik Deutschland*, C-138/13, judgment 10 July 2014, p.t 24.

[551] Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 3 April 2014, *K and A v Minister van Buitenlandse Zaken*, C-153/14.

[552] Law on the residence of foreign nationals, version resulting from the notice of 25 February 2008 (BGBl. 2008 I, p. 162), as amended by Article 2 of the Law of 21 January 2013 (BGBl. 2013 I, p. 86).

[553] Council Decision 64/732/EEC of 23 December 1963, OJ 1973 C 133.

[554] Supra note 1, p.ts 17-22. For the main points raised by the case see K. Eisele, Are Pre-departure Language Requirements for Spouses of Turkish Nationals Unlawful?, in Maastricht Journal of European and Comparative Law, (1) 2015, pp. 128-137.

The second question referred by the German judge was aimed at interrogating the Court on the preclusion of the same national provision on the basis of article 7(2) of the 2003/86/EC Directive on the right to family reunification,[555] i.e. on the ability of MSs to 'require third country nationals to comply with integration measures, in accordance with national law.' This latter question was left unanswered since it was possible for the Court to solve the case on the sole basis of the standstill clause referred to in the first question. Nevertheless, as reported in the opening of this article, the CJEU has been subsequently required to give judgment on the same issue as regards the Netherlands' similar provision addressed to selected categories of third-country nationals.

The Dutch law - precisely, the Civic Integration Abroad Act[556] - makes family reunification for TCN spouses before being allowed to enter and reside in the national territory on a provisional basis, conditional on the demonstration of having acquired a basic knowledge of the Dutch language (reading and speaking skills) as well as the Dutch society. For this purpose, a civic integration test has to be taken and passed at Dutch embassies.[557] The applicants had asked to be exempted from such obligation by alleging disabilities. Nevertheless, these were not considered serious enough to be awarded the requested dispensation.[558] Furthermore, a second question has been put in order to understand if fees for the official self-study pack *Naar Nederland* and civic examination can be considered as putting a disproportionate obstacle to exercising the right to family reunification.[559]

Why does family migration represent an interesting case study in relation to linguistic integration? In other words, why are the consequences for family members seeking reunion, rather than those for the generality of TCNs, particularly telling in regard to the potential exclusionary and discriminatory effects of pre-admission language requirements?

Several reasons stand out: firstly, it impacts on the right to family life, the fundamental nature of which has been extensively recognised.[560] Secondly, it highlights the contradiction between the requirement of language proficiency as a demonstration of a (a certain degree of, at least) capacity to integrate, or of having better prospects of an *ex-post* easy and fast integration. Paradoxically once family reunion itself has been realised, it becomes a vehicle for integration of the TCN sponsor already residing in the MS as well as for the reunited family members.

Thirdly, it brings into question our ability to assist in similar circumstances to those observed in relation to European Union citizens as regards the role assumed by the CJEU in the protection of family life. The reference is to the antecedents and the continuation of the *Zambrano*[561] line of cases through which the Court has impacted on MSs' immigration regimes. Will this case-law on pre-admission language requirements be the

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[555] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 03.10.2003, p. 0012 – 0018.

[556] TK 2003-2004, 2900.

[557] Although this could appear to be an obvious statement – the necessity of a successful language and civic test in order to be granted entry and a temporary residence permit in the country – it is worth, anyway, to provide this clarification since, in the French case, it is not required a passed language test. Although the level of knowledge of the French language and society is evaluated (integration-from-abroad instruments are in place since 2007), it is not made conditional on the grant of a visa for family reunion. Nevertheless, those TCNs who have successfully passed an integration test in their country of origin are exempted from attending the, on the contrary, compulsory language training after arrival. Y. Pascouau (in collaboration with H. Labayle*), Conditions for Family Reunification under Strain. A comparative study in nine EU member states,* King Baudouin Foundation, European Policy Centre, Odysseus Network, November 2011, p. 91.

[558] Cfr. Opinion of the Advocate General Kokott delivered on 19 March 2015, C-153/14, *Minister van Buitenlandse Zaken v K and A*, p.t 16.

[559] Ib., p.t 17.

[560] Cfr. art. 16, Universal Declaration of Human Rights, United Nations; art. 8, European Convention on Human Rights, Council of Europe; art. 19.6, European Social Charter, Council of Europe, Strasbourg, 3.V.1996, ETS no. 163; art. 12, European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977, ETS no. 093.

[561] CJEU, *Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, judgment of 8 March 2011, ECR 2011 I-01177.

forerunner for the same kind of intervention by the CJEU in protecting TCNs against the adverse effects on their fundamental rights of national immigration regimes?[562]

Lastly, it has quickly become manifestly clear that the margin of appreciation left to MSs on (pre-admission but not only) national integration requirements, and their compatibility with the objectives of the family reunification Directive - the effective exercise of the right to family reunification and its instrumentality to TCNs' integration - would have been liable to raise concerns about human rights' protection.[563] It was precisely such doubts on the possible infringements of fundamental rights that were displayed as one of the main points in the action for annulment of the 2003/86/EC Directive brought by the European Parliament (EP) three months after its adoption by the Council.[564] The EP has specifically claimed that MSs' permitted derogations from the Directive's obligations in combination with the national margin of appreciation could lead to a breach of human rights[565]. Although the contested provisions did not include art. 7(2) - on which basis the compliance with integration measures can be required to TCNs - the Court has had the occasion itself to pronounce on a strictly related point.

This was the (supposed) objective of integration which has been used to justify the possibility of MSs asking for compliance with pre-admission integration requirements to children over twelve, who arrive independently from their families, before being allowed to enter and reside in the country for purposes of family reunification.[566]

This article focuses on the grey area of linguistic integration. It concerns the impact that the use of language proficiency as a pre-admission requirement has on TCNs' rights when seeking entry into the EU for purposes of family reunification. Specifically, it concentrates on the issues touched by the three cases briefly outlined above and on the most controversial aspects of selected national integration policies as regards linguistic integration.

It may be objected that this issue does not directly impact on a discourse aiming at exploring the possible impediments created by linguistic diversity to EU citizens' rights, specifically to their right to family reunification,[567] since to them it is applicable under the more favourable terms of the 2004/38/EC Directive.[568] However, this is (generally) the case only when the right of free movement has previously been exercised.[569]

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[562] D. Thym, EU migration policy and its constitutional rationale: A cosmopolitan outlook, in Common Market Law Review, (50)2013, p. 725-726.

[563] It should be kept in mind the innovation brought by the Lisbon Treaty as regards the Court's jurisdiction: since the entry into force of the Treaty, the Court has general jurisdiction in give preliminary rulings in the area of Freedom, Security and Justice, thus in immigration matters. Cfr. Art. 10, Protocol No 36 on transitional provisions, TFEU, OJ C 326, 26.10.2012.

[564] CJEU, *EP v Council*, C-540/03, judgment of 27 June 2006, ECR 2006 I-05769. See also for an overview of the main critical points of the directive and of the relevant case law S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk, V. Moreno-Lax, *EU Immigration and Asylum Law (Text and Commentary): Second revised Edition, Volume 2: EU Immigration Law*, Leiden, 2012, pp. 247-286.

[565] The EP has based its allegations on the possible breach of the right to family life ex art. 8 ECHR and art. 7 of the CFREU, and on the right to non-discrimination on grounds of age ex art. 14 ECHR and art. 21(1) CFREU. Cfr., in particular, pts. 30-32, *supra* note.

[566] The authorship of the insertion of this provision is of the German delegation. Subsequently, Germany has reformed its national provisions on conditions for family reunification associating them with the related provisions of the Family Reunification Directive, to which restrictiveness (at least of 'may clauses') it has importantly contributed during negotiations. L. Block, S. Bonjour, *Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands*, in *European Journal of Migration and Law*, (15) 2013, p. 212.

[567] Cfr. CJEU, *Murat Dereci et al. v Bundesministerium für Inneres*, C-256/11, judgment of 15 November 2011, ECR 2011 I-11315, p.ts 54-58.

[568] Cfr. arts. 9 and ff., Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004.

[569] Keeping in mind the clarifications that has been made by the CJEU in the case *O. and B. v Minister voor Immigratie, Integratie en Asiel*, C-456/12, judgment 12 March 2014, not yet published.

On the contrary, to sedentary EU citizens national rules on family reunification apply, thus cases of reverse discrimination are liable to arise.[570]

Finally, if we agree that the following assumption valid for the national level can also be transposed at the supranational level - i.e. the government of migration is (also) a strategy of identity construction - this article contributes to the exploration of how the EU and MSs deal with the overlapping and simultaneous construction of a European and national identities, particularly in regard to and through, linguistic integration.

2. LINGUISTIC INTEGRATION CONTEXTUALISED

Language is part of the identity construction of both individuals and groups. On this assumption is founded the connection between migration, language and integration in a community.[571] It is, in fact, on the basis of the often used distinction between 'us' and 'them',[572] where the 'us' definition is based (also) on the (fictitious) domain by nationals of the (or of one of the) national official language(s), that language proficiency can be used as an indicator of integration.

Mastering the national language as a pre-admission requirement is one of the instruments adopted by some EU member states which, from the early 2000s, have started to utilise integration-from-abroad methods (officially) as an integration instrument and, implicitly, in order to exercise better control over the migration flows of non-EU citizens.[573] The required linguistic integration is, in fact, part of the more general category of the, so called, civic requirements comprising the basic knowledge of host societies' language, history and basic institutions.[574] We could say that pre-admission language and, more generally, integration requirements to be fulfilled before being allowed to enter the country, merely represent the most recent use of these instruments which have been widely utilised as a condition to acquire citizenship or a more secure residence status in the host country.[575]

The increasing use of these means to (supposedly) pursue integration of TCNs stays at the crossroads between on the one hand the spread of integration tests together with courses in national citizenship policies and on the other hand the tightening of conditions for family reunification among European states[576]. It is worthy of note that those states which have recently restrictively amended their legislation on family reunification have also acted on income requirements and the minimum age of spouses[577]. These measures both at national and EU levels have been justified by integration objectives. However, the circumstances under which pre-admission

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[570] For example, less favourable rules in relation to those applicable to non-mobile Union citizens are in force in the Netherlands and Germany. Cfr. Report of the Commission to the European Parliament and the Council on the application of the Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final, Brussels, 8.10.2008, p. 4.

[571] It has been noted that precisely because, in reality, receiving societies are more and more experiencing the dilution of their (supposedly previous) homogeneous character, their efforts have concentrated in providing a legal definition of what distinguish them – and, thus, fill with content the 'us' - and of their shared values. C. Joppke, E. Morawska, *Integrating Immigrants in Liberal Nation-States: Policies and Practices*, in C. Joppke, E. Morawska (eds), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*, New York, 2003, p. 16.

[572] B. Anderson, Us and Them?: The Dangerous Politics of Immigration Control, Oxford, 2013.

[573] To date, the European states requiring to selected categories of third-country nationals the fulfilment of a language requirement before being allowed entry and residence into the national territory are: the Netherlands, Germany, Denmark, Austria, the United Kingdom, France, Luxembourg, Liechtenstein.

[574] Cfr. Commission's Communication on a Common Agenda for an Integration Framework for the Integration of TCNs in the EU, COM (2005) 389 final, Brussels, 1.09.2005.

[575] All member states having at date a pre-admission language requirement ask for the fulfillment of the same also in order to be granted a permanent residence permit and for the acquisition of citizenship. Cfr. C. Extramiana, P. Van Avermaet, *Language requirements for adult migrants in Council of Europe member states: Report on a survey*, Language Policy Division, Education Department - DG II, Council of Europe, Strasbourg, pp. 11-12.

[576] C. Joppke, Civic Integration Policies for Immigrants in Western Europe, in West European Politics, (1)2007, p. 5.

[577] S. Bonjour, The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union, in Comparative Migration Studies, (2)2014, p. 209.

integration requirements, where present, are directed mainly, even if not always directly, towards TCNs seeking entry for family reunification or formation raises doubts about the credibility of this explanation'. On these bases, a much more realistic reason for such a target seems to be the necessity for those MSs where family-migration flows are, or have been made, particularly problematic,[578] to outsource the selection control that is made more difficult for the state to carry out once the TCN has already been admitted into the national territory.

A further argument in support of using integration requirements as an immigration control mechanism could be found in the conditionality established between their fulfilment, after the TCN has been allowed to enter the MS territory, and the granting or upkeep of social benefits.[579] Furthermore, this statement asserts the exemption from those same requirements of certain categories of TCNs with higher levels of education or professional qualifications, or that have selected (mostly Western) nationalities. By putting the responsibility for pre-admission integration requirements on migrants' shoulders – in terms of costs, time and organisation - their pre-entry integration is, therefore, transformed into a self-selection and control mechanism for the benefit of the member states' restrictive immigration policies.[580] Ultimately, even if the fulfilment of a language condition is neither a novelty nor an unreasonable or discriminatory practice *per se,* it is a certain use of the same requirement that is liable to transform it into a gatekeeper device,[581] i.e. a tool for migration government and a selection mechanism of 'the others'.

2.1 LINGUISTIC INTEGRATION AND FAMILY REUNIFICATION

The learning of a national language as an obstacle to integration is particularly visible in cases where it is made a prerequisite for granting the permit to enter the national territory for family reunification or formation purposes. Both language and family reunification are, in fact, equally significant tools for migrants' integration into the host country.[582] Thus, requiring pre-entry knowledge (although at a very basic level – A1 of the CEFR[583]) as a condition for being allowed to exercise the right to family reunification amounts to putting a double obstacle in the way of TCNs' integration.

In order to understand how the regulation of family reunification encountered at the EU level is affected and prejudiced by the development of pre-admission language proficiency requirements, we should try to consider, simultaneously, the content of EU acts on integration of TCNs, the discussion on the adoption and implementation of the family reunification Directive, and, finally, MSs' laws regulating pre-departure integration requirements.

The EU has been developing an EU framework on this matter since migration-related issues were brought into the community's pillar by the Amsterdam Treaty (1999). It is noteworthy that the family reunification Directive

[578] Ib.

[579] G. Baldi, S. Wallace Goodman, Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe, in West European Politics, (1)2015, p. 5.

[580] S. Wallace Goodman, Controlling Immigration through Language and Country Knowledge Requirements, cit., p. 240.

[581] *Supra* note, p. 235.

[582] The integration potential of family reunification for non-EU citizens already residing in an EU MS is recognised by the 2003/86/EC Directive on family reunification, where it is stated that it creates 'sociocultural stability facilitating the integration of third country nationals in the Member State.' Cfr. preamble (4), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003.

[583] The Common European Framework of Reference for Languages (CEFR). The CEFR describes foreign language proficiency at six levels: A1 and A2, B1 and B2, C1 and C2, and it also defines three 'plus' levels (A2+, B1+, B2+).

has been the first binding act to be adopted since the establishment of the area of Freedom, Security and Justice (AFSJ), as well as the first binding act on family migration at the EU level.[584]

The European Commission's original proposal in regard to this Directive dated back to 1st December 1999 and recalled the principles of the Tampere Conclusions from a couple of months earlier.[585] These had tried to set the scene in establishing the principles upon which an EU common policy on migration had to be based and was the first of a series of multi-annual programmes within this field encompassed by the AFSJ. Although the Presidency conclusions did not make any precise reference to TCNs' family reunification, the connection with family reunion was traced back to the necessity for providing TCNs with a fair treatment as well as rights and obligations similar to those granted to EU citizens: these were identified as the (would-be) aims of the EU integration policy.[586]

Alongside the ongoing establishment of an EU common immigration policy, the EU had yet to develop a (binding) common unique agenda on integration, leaving MSs to carry the main responsibility for this issue.[587] Under the terms of the Treaties, the EU need do no more than just offer an incentive and support MSs' actions directed towards TCNs' integration, thus avoiding any harmonisation of MSs' legislation or regulations[588] on this national sovereignty-sensitive matter. Nevertheless, alongside those provided by the Council of Europe (CoE) institutions currently covering the migration and integration of migrants,[589] EU principles and guidelines are also present. When investigating the relation migration-language-integration, national policies and measures as well as EU[590] and CoE acts have, therefore, to be jointly considered.

The Thessaloniki European Council of 2003, that established the 'invitation' to the Commission to present an annual report on Migration and Integration, stressed some important points that will inform the development of the EU framework on immigration and integration of TCNs. Integration was described as a two-way process where the MS plays a primary role, although national policies should be developed within a standard EU framework on the basis of common principles.[591] Nonetheless, it is in the Commission's first *Annual Report on Immigration and Integration in Europe* released in 2004[592] that we find more useful guidance for comprehending the development of MSs' policies on migration in the following years. Admission and integration policies are described as deeply related fields that have to advance in parallel. The acquisition of language skills, in particular, is identified as a key challenge and as one of the major barriers impeding a proper entry of TCNs in MSs' labour markets. It is interesting to note that, although family migration and TCNs entering MSs for humanitarian reasons are distinguished as the main source of non-EU migration flows, the report is almost totally focused on economic migration. Coherently, a trend towards the adoption of more selective employment-oriented approaches at the national level is identified[593].

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[584] Cfr. art. 63(3)(a) TCE, OJ C 340, 10.11.1997.

[585] Presidency Conclusions, Tampere European Council, 15-16 October 1999.

[586] Cfr., specifically, p. 18, *supra* note.

[587] G. Baldi, S. Wallace Goodman, Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe, cit., p. 6

[588] Cfr. art. 79.4 TFEU, OJ C 326, 26.10.2012.

[589] It is worth to be noticed that the necessity for host countries to promote and provide means for migrants (workers) to learn the national language(s) was already emphasised in 1968 by the Council of Europe. Cfr. Resolution (68)18 on the teaching of languages to migrant workers, Council of Europe.

[590] D. Kostakopoulou, *Introduction*, in Kostakopoulou, D., Ersbøll, E., Oers, R. van, *A Re-definition of Belonging?: Language and Integration Tests in Europe*, 2010, p. 16.

[591] Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003, 11638/03, Brussels 1.10.2003, p.t 31.

[592] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions*, First Annual Report on Migration and Integration*, COM (2004) 508, Brussels 16.7.2004

[593] *Supra* note, pp. 4-5.

There followed the Commission's Communication on *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union* of 2005, setting down the above mentioned EU common principles on integration. Language is therein considered as part of those pre-departure measures that would strengthen the potential for integration of admission schemes and of introductory programmes for newly-arrived migrants.[594]

What emerges from EU acts on the integration of TCNs mentioned above and has been confirmed by those that have followed this issue's progress, is the progressive endorsement at EU level of national trends towards the establishment and justifiability of pre-admission integration requirements as a means of assuring a better 'starting point' for future integration. In other words, there has been, so to speak, a phenomenon of cross-fertilisation between MSs' integration policies and EU acts on the matter adopted during the last fifteen years.[595] Although the paradigm of integration as a two-way, rather than reciprocal, process has never been officially abandoned, the focus and the content of the measures proposed have, on the contrary, progressively shifted and concentrated on the receiving societies' demands. MSs' concerns on the adverse effects of (an uncontrolled) immigration – especially as regards the high levels of unemployment among migrants and their above average reliance on social assistance schemes when compared with the native population - on the failure of previous integration policies, and the focus on their values, identities and receiving capacities have been allowed to become the drivers of national integration policies.

Of significance is the release in the same year – 2008 – of the EU Council's *European Pact on Migration and Asylum* as well as the Commission's first report on the implementation of the family reunification Directive.[596] These two acts symbolise the interplay and creeping contrast between (certain MSs within) the EU Council and the Commission. Their disagreement on the direction of family migration policies at the EU level was already visible during the difficult negotiations of the Directive itself. Thus, if we agree in identifying a process of policy learning in the spreading of pre-admission integration requirements in certain EU MSs' laws regulating family reunification,[597] the 2008 Pact mentioned above could be regarded as a codification of such restrictive practices at EU level.[598] The following communications of the Commission as the CJUE case-law have tried to re-draw some boundaries to MSs' discretion and margin of appreciation. Consequently, they could be seen as a response to those restrictive tendencies and an attempt to redirect the implementation of the right to family reunification towards its initial aim: an instrument to enhance TCNs' integration in the host country.

As anticipated above, the family reunification Directive was the first EU secondary law act to be adopted in the post-Amsterdam Treaty era on the immigration matter. Since inception, its adoption, transposition and

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[594] See, in particular, the fourth common principle: 'Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.' Cfr. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, COM (2005) 389 final, Brussels, 1.9.2005, p. 7.

[595] Partially contrary to the idea of looking at EU acts on integration as a driving force and a source of legitimation of MSs' legislation establishing pre-admission integration - linguistic and civic - requirements S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, cit., pp. 216-217.

[596] Cfr. art. 19, 2003/86/EC Directive.

[597] It has been observed that the European Integration Fund, established by the Council in 2007, has included among the TCNs that could benefit from national initiatives adopted by MS also those still in their country of origin who are complying with pre-admission measures. This has been seen as a further acknowledgement of these national practices by making them eligible for EU funding. Cfr. European Commission, Directorate-General for Justice, Freedom and Security, Final report June 2010, Synthesis of the Multi-annual and annual programs of the member states: priorities and actions of the European Fund for the integration of Third-country Nationals, 16.06.2010.

[598] The 2008 Pact, in fact, has been adopted under the French Presidency. By 2008, France, with Germany and the Netherlands were the only MSs to have adopted pre-admission language requirements for the exercise of the right to family reunification of TCNs. These have been followed by the United Kingdom, Denmark and Austria in 2010 and 2012, respectively. Y. Pascouau, cit., p. 5; S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, cit., p. 213.

application have raised a number of concerns, later exemplified by the 2008 Commission's critical report,[599] the Green paper that followed in 2011,[600] which eventually resulted in the Commission's guidance for application of the Directive published last April.[601]

The Commission's 1999 first proposal of the Directive, in fact, had not found favour with some MSs within the Council. This had led to the necessity for presentation of a second proposal to find a way out of the negotiations' impasse by introducing a series of derogations, so called 'may' clauses, as established at article 7(2) on possibly requiring the fulfilment of integration conditions to TCNs seeking family reunification in an EU MS. Even though pre-departure measures are not specifically mentioned by art. 7(2), the possibility for MSs to ask for their fulfilment as a pre-admission condition is deducible *a contrario* from the second subparagraph of the same article. In precise terms, by relying on the provision establishing the condition for refugees' family members seeking reunion, compliance with integration measures may be required only after family reunification has already been granted.[602]

Not surprisingly, the EU MSs currently asking for compliance with pre-admission integration conditions for entry into their territories to be allowed for family reunification purposes were all among the same MSs which have supported the introduction of such measures within the Directive.[603]

Contrary to what has been identified as the main dynamic for 'Europeanisation' of national immigration policies - the use of the intergovernmental mechanism at the EU level to introduce restrictive immigration laws for which adoption was impeded at the national level, particularly by the action of the judiciary – the process that led to the adoption of the family reunification directive has led to a different scenario. With the prospects of amending national laws determining the conditions for family migration, certain MSs have used the EU level's influencing and driving the negotiations of the family reunification Directive to provide the basis and the legitimation for national restrictive policies that they had already in programme to adopt. Furthermore, MSs interested in introducing integration-from abroad conditions for family migration, have not only relied on the Directive to legitimise national acts, but have also frequently quoted the examples, presented as virtuous and wise, of other MSs that were going in the same direction or were more ahead in the process of implementing such restrictive policies.[604]

In order to understand better the relevance of the cases that will be looked at in the next section, a brief look at the Dutch and German laws establishing family reunification conditions is useful. In the Dutch case the target of integration-from-abroad measures is general: applicants aged between 18 and 65 years old need to ask for a temporary residence permit to enter the country. Nevertheless, excepting the categories of exempted non-nationals, those measures are mainly directed towards TCNs asking for family reunification (or formation) with a Dutch citizen or with a TCN already residing in the country. On the contrary, the German Immigration Act (2005) has been amended to introduce the specific obligation for spouses, aiming at reuniting with a German citizen or with a TCN permanently residing in Germany, to demonstrate a basic knowledge of the German

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[599] Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM/2008/0610 final, Brussels 8.10.2008.

[600] Green paper on the right to family reunification of third-country nationals living in the EU (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

[601] The Communication followed the emerged unwillingness during the consultations of member states (except for the Netherlands) to re-open negotiations, thus, to reform the Directive. Cfr. Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014)210 final, Brussels 3.04.2014.

[602] Cfr. art. 7.2, 2003/86/EC Directive: '[…]. With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.".

[603] S. Carrera, In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU, Leiden, 2009, pp. 170-171.

[604] L. Block, S. Bonjour, cit., pp. 213-215. S. Bonjour, op. cit., pp. 211-214.

language concurrently with the application for a permanent residence permit for family reunification purposes is filled in. It seems in general terms that the main target group in both countries is, therefore, TCN spouses asking for family reunification.[605]

Interestingly, the categories of TCNs exempt from the obligation to pass the pre-admission language and civic tests are almost the same in the Netherlands and Germany. They include TCNs in possession of high educational or professional qualifications, TCNs from developed countries,[606] as well as, in the Dutch case, those who have work permits or are self-employed. Finally, neither country includes illiteracy among the cases in which an exemption could be granted.

3. Lessons to be learned from the case-law on pre-admission language requirements

The cases presented above deserve to be analysed in further detail since they provide useful insights into the current state of relations between EU law on family reunification and certain MSs' laws establishing admission and integration conditions for selected categories of TCNs.

The EP action asking for the annulment of some provisions from the 2003/86/EC Directive, and the Court's decision on the action, could be regarded as a not unexpected outcome if the troubled process that led to the Directive's adoption is considered[607]. Moreover, it could also be seen as fairly predicting the destiny of the Directive itself in the following years and, somehow, of the Court's future decisions on those cases involving its application. In brief, to limit the right to family reunification and to leave a certain discretion to MSs in its application is admissible in light of the circumstance in which, on the contrary, an 'unconditional' family reunification right would be granted.

The Court in the *EP v. Council* case found the provisions object of the case not to be in breach of fundamental rights as, on the contrary, argued by the EP. Nevertheless, a number of statements made in this judgement could be of interest for the purposes of this article.

The first provision of the Directive to be considered is the final subparagraph of art. 4(1). On its basis MSs, by way of derogation, are allowed to ask children over the age of twelve, arriving independently from their families, to comply with integration conditions before admission.[608] In this regard, the EP claimed that a pre-admission condition prevents the right to family reunification from being exercised and the lack of an EU definition of integration leaves the MS too wide a possibility for restricting the right. Furthermore, integration cannot be considered to be included in the list of objectives that, if proportionally pursued, can justify a restriction of the right to family life ex article 8(2) ECHR.

The CJEU decision, on the contrary, was not in line with EP reasoning. It found by recalling the ECtHR's case-law[609] that, although the rights to family life and family reunion are protected by EU law, states discard a

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[605] T. Strik, A. Böcker, M. Luiten, R. van Oers, *The INTEC Project: Synthesis Report, Integration and Naturalisation tests: the new way to European Citizenship*, Centre for Migration and Law (CMR), Radboud University Nijmegen, The Netherlands, December 2010, pp. 17-19.

[606] EU and EEA, Surinam, Australia, Canada, USA, Switzerland, New Zealand, Iceland, Japan and North Korea, for the Netherlands, plus Israel, Andorra, Monaco, San Marino, Honduras, Brazil and El Salvador, and spouses of the nationals who may enter the country without having to obtain a visa, for Germany.

[607] Extensively on this see S. Carrera, *In Search of the Perfect Citizen?*, cit., chapter 4 and the literature recalled at footnotes 23 and 24.

[608] The thesis that puts forward the influence of specific MSs on the content, derogations and standstill clauses of the family reunification Directive - Germany, Austria and the Netherlands - in order to legitimise their national legislations, specifically in the case of integration conditions to be applied to children over 12, could be confirmed by the provision of a German regulation requiring to children between the age of 16 to 18 to prove their capacity to integrate in the German society by demonstrating an already acquired language proficiency or, by other means, to prove that they will be able to integrate. Cfr. T. Strik, A. Böcker, M. Luiten, R. van Oers, cit., p. 19.

[609] Cfr. ECtHR, *Sen v.the Netherlands*, no. 31465/96, 21 December 2001, p.t 31; *Gül v. Switzerland*, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174, p.t 38; *Ahmut v. the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030, p.t 63.

margin of appreciation in balancing individual rights and those of the community when a decision on the entry and residence of a TCN for family reunion purposes is under consideration[610]. The Court, in particular, considers the age of the minor as a relevant significant factor when assessing, among other elements, the child's link with the cultural and linguistic environment from its country of origin. It follows that since the applicant's age is an element capable of influencing its capacity for integration, MSs have a right to ensure that it possesses at least a minimum level of integration capacity when considering the admissibility of a family reunification application. We deduce, therefore, that the fulfilment of a pre-admission integration condition is even more justifiable in the case of adult applicants. Regardless of that, in the following point the Court states that the evaluation by MSs in fulfilling a pre-entry integration requirement should be done having due consideration for the objective of the Directive: to facilitate integration through reunification with family members.[611]

A couple of final remarks on this first judgment lead us to an analysis of the following two cases. The first - obvious - consideration is that the discretion awarded to MSs cannot lead to the infringement of fundamental rights. Nevertheless, the task of providing with content integration conditions is substantially left to MSs and rather clear guidance on the content of the right to family reunification on the basis of EU law is provided[612]. By so doing, the Court delivers control of effective non infringement of fundamental rights to the later and uncertain circumstance that a national court will eventually question the compatibility of national provisions on family reunification with the Directive by requesting a preliminary ruling; thus this happens when a breach of the applicants' fundamental rights and of their right to family life and right to family reunification has already occurred[613]. Although this possibility is obviously inherent in the preliminary ruling proceeding, the seriousness of the consequences on family life and reunification is effectively exemplified in the following cases.[614]

Meanwhile, the Commission has released the first report on implementation of the family reunification Directive, where it states that pre-admission language and civic requirements are admissible as long as they serve the purpose of being a tool of integration and respect the proportionality principle.[615]

The 2011 Green Paper on the right to family reunification of TCNs living in EU MSs,[616] followed by the public consultation, recalls what had been already said in the report but, significantly, makes an additional reference to the 2011 (new) *European Agenda for the Integration of TCNs*. The Agenda specifically refers to the learning of the host MS language by the TCN as a one of the modes of 'socio-economic contribution[s]' that the migrant could provide to the integration process and, more generally, as a means of participation. In precise terms, the possession of language skills is directly connected with TCNs' job opportunities and participation in the job market.[617] Not by chance, TCNs' unemployment rates are listed among the challenges of migration and, by the Dutch government in particular, are considered as one of the main concerns in regard to the adverse effects of uncontrolled migration, we should add, of low skilled TCNs. However, a reference to pre-departure language

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[610] CJEU, *EP v Council*, *supra* note 7, p.ts 52, 54 and 66.

[611] *Ib.* p.ts. 68-69.

[612] D. Martin, Comments on European Parliament v. Council, in European Journal of Migration and Law, (9)2007, p. 148.

[613] Y. Pascouau cit., p. 109.

[614] This statement is even more alarming if we consider that national administrations concerned by cases liable to be made object of a CJEU judgement has acted in what have seemed to be a non-collaborative way, by solving the individual case at the national level, providing the visa to the applicant, in order to deprive the preliminary ruling request of its object and necessity to be answered. In this sense L. Block, S. Bonjour, cit., p. 221.

[615] Cfr. *supra* note 33, pp. 7-8.

[616] Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

[617] Although previous studies have pointed out that the impact of language courses on the access and success of TCNs on the labour market is open to question. Cfr. OECD (2007), *The Labour Market Integration of Immigrants in Germany*, in OECD, *Jobs for Immigrants (Vol. 1): Labour Market Integration in Australia, Denmark, Germany and Sweden*, OECD Publishing, Paris, pp. 208-210.

courses as an instrument of integration is named only under the provisions that countries of origin could provide to those migrants willing to migrate to EU MSs.[618]

Finally, the 2014 *Commission guidance for application of the Family Reunification Directive* confirms the admissibility of integration measures and MSs' margin of discretion as regards their content and frame, as long as they facilitate integration and do not amount to a limit in the effective exercise of the right to family reunification.

It is significant that those measures are described as instruments at the disposal of MSs to frame their legitimate requests to TCNs, who are required to make the 'necessary efforts' to integrate. Consequently, they are a means of verifying their willingness to do so. What is largely stressed is the necessity for MSs to consider the personal circumstances of the applicant when verifying the fulfilment of such measures, as well as in framing language together with integration conditions and courses. In precise terms, these should be accessible, affordable and, as long as possible, tailored to TCNs' needs. Pre-admission measures are referred to just (and timidly) at the very end of the paragraph dedicated to integration measures, where it can be seen that 'integration measures may often be more effective in the host country.'[619]

Finally, a common denominator can be found starting from the *EP v. Council* case and passing through the last two EU acts analysed here. This highlights the progressive emergence of a coherent framework originating from the admissibility of pre-admission integration requirements addressed to children over twelve seeking entry for the purposes of family reunification to end at the increasing use by MS in the margin of manoeuvre left them when determining the content and procedures of integration-from-abroad instruments. As we will see in a moment through the example of the following cases we are beginning to see a change of attitude, at least for what concerns the most visible unreasonable and disproportionate outcomes of national provisions.

In both the *Dogan* and *K and A* cases, the applicants' requests to be granted a visa for entry into and residence in Germany and the Netherlands respectively for the purpose of family reunification were dismissed because they failed to demonstrate the fulfilment of the pre-admission language requirement.

However, before entering into details, a further contextualisation of the issue is needed, since the events regarding the German and Dutch pre-admission language conditions are tellingly intertwined.[620] In fact, on a number of occasions, the attention of national courts and the CJEU had been brought to the question of the compatibility with the family reunification Directive of both countries pre-admission language conditions. Moreover, a number of *signs* coming from other MSs with similar pre-admission language requirements, and similarly not exempting Turkish citizens, make predictable the outcome of the *Dogan* judgment. Actually, Dutch and Austrian courts had already ruled that national requirements on integration and family reunification were not compatible with the EU/Turkey Association Agreement.[621] Subsequently, Turkish citizens had been exempted in both countries from the necessity to comply with pre-admission integration requirements in order to be granted family reunification. Secondly, in March 2011 a Dutch case - the *Imran* case - was decided in favour of an Afghan woman, mother of eight children, of which seven were already lawfully residing in the host MS. Her visa to reunify with her family already residing in the Netherlands had been refused because she was

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[618] Cfr. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final, Brussels, 20.7.2011, pp. 4-5, 10.

[619] See *supra* note 34, pp. 15-16.

[620] Not by chance, these same countries have been recognised as the main drivers of the negotiations, and to be sharing an identical final scope: i.e. to provide grounds to legitimise their own (restrictive) national policies in the matter of family reunification and pre-departure admission requirements. Cfr. P. W.A. Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, *Integration from abroad? Perception and impacts of pre-entry tests for third country nationals*, April 2012, p. 90, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/PROSINT/Reports/WP4_CompRep_Final_submitted.pdf

[621] Cfr. the Dutch case: LJN BR4959, and the Austrian case: VwGH 2008/22/0180.

unable, for health reasons and because of her illiteracy, to take and pass the integration test. Before the CJEU had the chance to rule on the case, national authorities granted the required visa; the case was, therefore, closed since the decision was no longer necessary. However, the first question referred is worthy of comment, since it regarded compatibility with the Directive regarding the automatic effect of refusal that follows a failed or not taken integration test in the country of origin. Furthermore, although the Court has decided not to rule on the case, the opinion of the Commission was straightforward in affirming the incompatibility with the Directive of an automatic dismissal of a visa application for family reunification purposes solely on the basis of a failed or not taken integration test without taking into proper consideration the personal circumstances of the applicant as a reason for justifying exemption from the obligation.[622]

The *Imran* case has had important effects at national level. In a similar case, the German Federal Administrative Court ruled in favour of a TCN applicant who did not fulfil the pre-entry language requirement by nevertheless granting him a visa for family reunification. Secondly, this judgement came after a case in which, on the contrary, the compatibility of the same requirements with the Constitution and EU law was affirmed.[623] However, it is relevant that the German Administrative Federal Court, although it has ruled in favour of granting the permit, expressly quoted the Commission's opinion on the above mentioned case and added that a preliminary reference is needed as regards the compatibility of the pre-admission language requirement with the family reunification Directive.[624] Similarly, in the first degree of a Dutch case the national court found the national pre-entry language requirements not to be compatible with the family reunification Directive.[625] Lastly, soon after the *Dogan* case reached the CJEU, the Commission started an infringement procedure against Germany, precisely on compatibility of the pre-entry language requirement with the 2003/86/EC Directive.[626] Nevertheless, up to the present time the government continues to insist on its compatibility.

As anticipated, the *Dogan* judgment is not relevant *per se*, as it represents a *sui generis* case, considering that the decision has a limited personal and material scope because of Turkish citizens' privileged status under the EU/Turkey Association Agreement. Moreover, the Court has ruled against the German pre-admission language requirement almost only on the basis of the standstill clause ex article 41(1) of the Additional Protocol to the AA.[627] This regards specifically the prohibition for contracting parties to introduce new restrictions to the freedom of establishment and to provide services granted to Turkish citizens. On the other hand, the Court found that the German pre-admission language requirement has had the effect of precisely worsening the conditions under which those economic fundamental freedoms could be exercised. The pejorative effect derives from tightening the conditions to exercise the right to family reunification for Turkish spouses of Turkish citizens exercising the above mentioned fundamental freedoms in German territory. As the AD Mengozzi pointed out in its opinion, there is a link of dependence between the integrity of the family and the exercise of a fundamental freedom. The Court, thus, has (implicitly) relied on the *Carpenter* case-law[628], to affirm that such an integration condition can effectively 'render less attractive' the exercise of the fundamental

[622] CJUE, *Bibi Mohammad Imran v Minister van Buitenlandse Zaken,* C-155/11 PPU, order of the Court of 10 June 2011.

[623] Cfr. BVerwG, 1 C 8.09, judgement of 30 March 2010.

[624] Cfr. BVerwG 1 C 9.10, judgement of 28 October 2011. The Court did not referred the question itself since it decided in favour of the applicant, thus the CJEU judgement was deemed not to be needed.

[625] AWb 12/9408.

[626] Cfr. Infringement n. 2013/2009, of 30.05.2013 on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification of 22 September 2003 on the right to family reunification.

[627] Cfr. art. 41(1), Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, OJ C113, 24.12.1973, p. 28.

[628] Cfr. CJEU, *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, judgment of 11 July 2002, ECR 2002 I-06279, in particular p.ts 38-39.

freedom, since the applicant would have been obliged to choose between preserving its family unity and exercising economic activity.[629]

A series of further statements made in the judgment are also relevant. Firstly, it affirmed the instrumentality of family reunification for the integration of those TCNs (in the case under consideration limited to Turkish citizens) already residing in the MS.[630] It was also concluded that obstacles to family reunification could negatively affect residence status and economic activity. This is an argument that goes in favour of the relevance for TCNs' integration of family reunification, therefore, contrary to its possible impediment by a disproportionate use of pre-admission integration requirements. However, it is also significant that the Court has recognised the legitimacy of integration promotion's objective - thus justifying the adoption of pre-admission language requirements - and 'justified by an overriding reason in the public interest.'[631] It is (just) the automatic dismissal of the application because of the failure in demonstrating the level of language knowledge required for being granted a visa, without considering the specific circumstances of the applicant - illiteracy - that make the measure not proportionate in attaining what has been considered, *per se*, to be a legitimate aim. Although the aim is legitimate, it is pursued in a disproportionate manner and hence it undermines, therefore, the object of the Directive.[632]

The second question referred dealt with the compatibility of the language requirement with the family reunification Directive. However, the Court has not responded since a statement on this point was not needed, but it has dealt with this issue in deciding the *K and A* case.[633] The outcome of this judgement is of great interest because the limitations of the personal and material scope of the *Dogan* case are not present. This means that the findings of the Court are liable to be applicable to all TCNs who find themselves in the same situation within EU MSs' territories.

From all that has been said above, and on the basis of the opinion of the AD Kokott on the *K and A* case, that there has been no departure from the previous case law of the Court on the compatibility of pre-admission language requirements with article 7(2) of the Directive comes as no surprise. In fact, it is worth highlighting again that the admissibility of those requirements has not been questioned as such in the previous cases. Instead, all decisions quoted earlier concerned cases of exemption, of automatic dismissal of the application in cases of a failed or not taken integration test, and the respect of the proportionality principle in relation to the evaluation of the applicants' personal circumstances.

The Commission's reports and opinions as well as CJEU case-law have so far progressively tried to dismantle the discriminatory use and lack of respect for the proportionality principle of integration-from-abroad instruments. Nonetheless, the extent to which these measures can be questioned as such finds a limit in MSs' autonomy regarding integration of TCNs ex article 79(4) TFEU. Thus, the content and procedures through which ex-ante and ex-post TCNs' integration is verified fall within MSs' discretion. This fact does not alter the circumstance that MSs are, in turn, limited in their autonomy by the respect of fundamental rights, general principles of EU law, and non-binding instruments that the EU has adopted to build an EU common framework progressively on TCNs integration.

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[629] Opinion of Mr Advocate General Mengozzi delivered on 30 April 2014, *Naime Dogan v Bundesrepublik Deutschland*, Case C-138/13, p.ts 31-33.

[630] CJEU, Naime Dogan v Bundesrepublik Deutschland, cit., p.t 34.

[631] *Supra* note p.t 37.

[632] It should be kept in mind, in fact, that the Court has already stated that the general rule if the Family Reunification Directive is family reunification, therefore, derogations have to be interpreted strictly and the margin of discretion left to MS should not be used in a way that undermines the objective of the same. Cfr. CJEU, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08, judgment of 4 March 2010, para. 43.

[633] CJEU, *Minister van Buitenlandse Zaken v K, A*, C-153/14, judgment of 9 July 2015, not yet published.

In considering the key issues from the *K and A* case, the Court firstly had to decide on the proportionality of automatically rejecting an admission request if the test is not taken or failed, in consideration of the strict and limited cases foreseen by the national law in which the TCN can, therefore, be exempted. Secondly, it had to set the proportionality principle against the test's costs and the preparatory study material made available by Dutch authorities: costs that have to be sustained *in toto* by the TCN every time the test is taken.

The AD has been very concise and formalistic in responding to the first issue – compatibility of pre-admission language and civic tests as such with the Directive - and has suggested leaving the *hot issues* to be determined by the national court.[634] Nevertheless, on the basis of the *Dogan* judgment, on those already decided by national courts and on a very recent judgment dealing with integration requirements imposed on (would-be or already) long-term residents,[635] the outcome of the *K and A* case was more or less predictable.

It is reasonable that the Court has been more precise than the AD in determining whether or not the potential discriminatory effects and not proportional outcomes of a too limited range of exemption cases and their excessively rigid application can lead to an infringement of the Directive's objectives. In fact, although integration requirements are not contrary to the Directive as such, a concrete consideration of the applicants' personal circumstances by national authorities is the means through which the effectiveness of the Directive is preserved.

This case concerns two almost identical proceedings between the Dutch Ministry of Foreign Affairs and the applicants, K. and A. respectively. Both their applications for a temporary residence permit on grounds of family reunification were rejected. The applicants submitted a medical certification alleging health and psychological problems, contextually requiring to be exempted from the obligation to take and pass the integration test.

The Court reaffirmed by interpreting the letter of the Directive, that MSs are not precluded from adoption of pre-entry integration measures as long as they respect the proportionality principle – do not go beyond what is necessary to achieve their aim – and do not place obstacles which could block fulfilment of the Directive's objective to promote family reunification and effectiveness. Thus, integration measures have to be framed in such a way as not to pose an unreasonable obstacle in the way of exercising the right and integration of the sponsor's family members. Is this the case as regards the Dutch law under consideration?

It is undeniable that language is a vehicle to integration, and that the reaching of a minimum level of knowledge through passing a test is not *per se* an unreasonable means of verifying its achievement before entry. The critical point is that national provisions allow TCNs to be exempted from the obligation to take and pass the test only in those cases where the hardship clause is applicable. However, the circumstances considered by such a clause are not liable to include all those specific facts that could prevent a TCN from being able to take and pass the test. This is in contrast with the provision that requires applications for family reunification to be evaluated on a case-by-case basis. The limited ambit of application of the hardship clause, therefore, transforms the maintenance of integration requirements for those cases not contributing to an unreasonable obstacle in exercising the right to family reunification.

As regards the second question, the Court has ruled in line with the AD, i.e. by stating that the amount of fees imposed on TCNs to prepare and take the test are liable to put a disproportionate obstacle in the way of

[634] Cfr. Opinion of the Advocate General Kokott, cit., p.ts 39-47.

[635] CJEU, P and S v. Commissie Sociale Zekerheid Breda, College van Burgemeester en Wethouders van de gemeente Amstelveen, C-579/13, judgment of 4 June 2015.

exercising the right if judged by the national court to be excessively elevated in relation to the concrete circumstances of the third-country nationals concerned.[636]

This outcome was anticipated by the *P and S* judgment quoted above, in which the Court found that the high fines imposed by the Dutch law on TCNs who failed or did not take the civic test are liable to undermine the achievement of the Long-Term Resident Directive's objectives.[637] Even though these two decisions do not regard the same Directive, therefore, and in one case ex-ante requirements are concerned while in the other ex-post language and integration requirements are under consideration, they share the objective of integrating TCNs in the MS of residence. Furthermore, in the *P and S* decision the Court affirms that language is fundamental and that the obligation to pass a test in order to demonstrate possession of the related knowledge is not incompatible with the objective of integration. Nonetheless, for the test to serve as a means of achieving the Directive's objective effectively, MSs must have due regard 'in particular, to the level of knowledge required to pass the civic integration examination, to the accessibility of the courses and material necessary to prepare for that examination, to the amount of fees applicable to third-country nationals as registration fees to sit that examination, or to the consideration of specific individual circumstances, such as age, illiteracy or level of education.'[638]

The outcome of the *K and A* case is further supported by the findings of the Court in the *Chackroun* case.[639] It was stated that it is contrary to the Directive to refuse family reunification without considering the personal circumstances of the sponsor when evaluating the fulfilment of the pre-admission income requirement imposed, in having stable and regular resources which are sufficient to maintain oneself together with family members without recourse to the social assistance system of the member state concerned before granting the permit to let family members enter the country.

As the AD has also stated, the value of fees imposed on TCNs in trying to comply with the pre-admission language and civic requirements risks putting a disproportionate obstacle in the way of exercising the right to family reunification. This assertion is even more founded if the context and motivations for the adoption of integration-from-abroad instruments by Dutch authorities are recalled. In fact, the Dutch policy on integration explicitly targets family migrants from selected third-countries, Turkey and Morocco, in particular. Furthermore, the government is expected to reduce family migration to a precise percentage through the use of pre-admission instruments, which are expressly considered to be a selection mechanism for only 'integrable' migrants.[640] They clearly appear, therefore, to form an implicit instrument of self-selection for would-be migrants on the basis of their economic situation and educational background, although the government affirms that these are surmountable obstacles by motivated and perseverant migrants. Eventually, it appears that whilst the MS sets the conditions, the responsibility and burden of pre-admission integration requirements as well as the means of successfully passing the related test are left totally in the charge of migrants.

4. CONCLUSION

[636] CJEU, Minister van Buitenlandse Zaken v K, A, C-153/14, p.ts 65 and 71.

[637] *Supra* note 86, p.t 50.

[638] *Ib.* p.ts 48-49.

[639] CJEU, *Chakroun*, C-578/08, cit., para. 48.

[640] P. W. A. Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, Integration from abroad? Perception and impacts of pre-entry tests for third country nationals, cit., p. 12.

This article has attempted to provide some examples, derived from the development of EU law on TCNs' integration and from CJEU case-law, on how language could be used by MSs as a selection instrument and constitute an obstacle to the exercising of a right. Specifically, it has looked at modes in which the framing of pre-admission linguistic and civic requirements by some MSs can hamper the exercising of the right to family reunification granted to TCNs willing to enter and reside in these MSs.

The benefits of pre-admission measures have proved scarce in providing the knowledge and means of more rapidly and efficiently being integrated in the host country after admission.[641] However, an increase in the spreading of these measures has been witnessed among certain MSs over the last decade. The obligation for these requirements to be fulfilled before applicants are allowed to enter the country is particularly problematic, primarily because it is not possible to tailor the courses and the tests to a persons' characteristics and needs. Rather than being an integration instrument, they are transformed, therefore, into a self-selection mechanism and a control instrument for migration flows.

The promotion of integration by TCNs is the explicit and formal objective of such measures. Nonetheless, it is possible to deduce from their being targeted on family migration mainly, and by the exemptions on the basis of nationality, the professional qualification or the economic status of applicants, that their main hidden objective is to provide MSs with a mechanism of pre-selection of *desirable* and *undesirable* migrants before they are allowed entry and residence in the national territory.

Considering the evolution of family reunification since the first draft Directive adopted by the Commission in 1999, a (not so) secret dispute is ongoing between the Commission and the CJEU regarding conception of the right to family reunification on the one hand and that of certain MSs on the other. It appears that directly from the outset, despite the progressive development of EU law on family reunification and on migration in general, these MSs are, more than looking for effective ways to promote integration of TCNs, searching for and sharing modes of legitimating their restrictive national practices.

Ultimately, only time will tell how we will see the evolution of dynamics between the EU and national level in matters of integration-from-abroad instruments in general and family migration in particular, even more if we consider the processes of policy learning observed in this and the instrumental use of EU laws to legitimise restrictive national provisions. Not by chance, MSs that have adopted such measures at the national level are those where previous migration policies have been strongly criticised.

Where this backlash has not taken place already but where anti-immigration political forces are becoming stronger, will these examples of possible modes of immigration control be taken into consideration and followed? Hopefully, recent CJEU case law and the Commission's action will work as a barrier against future discriminatory and disproportional national laws.

REFERENCES

B. Anderson, Us and Them?: The Dangerous Politics of Immigration Control, Oxford, 2013.

P. van Avermaet, M. Spotti, G. Extra, Language Testing, Migration and Citizenship: Cross-national Perspectives on Integration Regimes, 2009.

G. Baldi, S. Wallace Goodman, Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe, in West European Politics, (1) 2015.

[641] *Ib.*, p. 88.

L. Block, S. Bonjour, Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands, in European Journal of Migration and Law, (15) 2013.

S. Bonjour, The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union, in Comparative Migration Studies, (2) 2014.

S. Carrera, In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU, 2009.

Council of Europe, 2014. Linguistic Integration of Adult Migrants: Final Report on the 3rd Council of Europe Survey. Language Policy Unit, Strasbourg. Project LIAM: www.coe.int/lang-migrants.

K. Eisele, Are Pre-departure Language Requirements for Spouses of Turkish Nationals Unlawful?, in Maastricht Journal of European and Comparative Law, (1) 2015.

C. Extramiana, P. Van Avermaet, Language requirements for adult migrants in Council of Europe member states: Report on a survey, Language Policy Division, Education Department - DG II, Council of Europe, Strasbourg.

S. Wallace Goodmann, Controlling Immigration through Language and Country Knowledge Requirements, in West European Politics, (2) 2011.

C. Joppke, E. Morawska (eds), Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States, 2003.

C. Joppke, Civic Integration Policies for Immigrants in Western Europe, in West European Politics, (30) 2007.

D. Kostakopoulou, E. Ersbøll,, R. van Oers, A Re-definition of Belonging?: Language and Integration Tests in Europe, 2010.

D. Martin, Comments on European Parliament v. Council, in European Journal of Migration and Law, (9) 2007.

Y. Pascouau (in collaboration with H. Labayle), Conditions for Family Reunification under Strain. A comparative study in nine EU member states, King Baudouin Foundation, European Policy Centre, Odysseus Network, November 2011.

S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk, V. Moreno-Lax, EU Immigration and Asylum Law (Text and Commentary): Second revised Edition, Volume 2: EU Immigration Law, Leiden, 2012.

P. W. A. Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, Integration from abroad? Perception and impacts of pre-entry tests for third country nationals, April 2012, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/PROSINT/Reports/WP4_CompRep_Final_submitted.pdf

T. Strik, A. Böcker, M. Luiten, R. van Oers, The INTEC Project: Synthesis Report, Integration and Naturalisation tests: the new way to European Citizenship, Centre for Migration and Law (CMR), Radboud University Nijmegen, The Netherlands, 2010.

D. Thym, EU migration policy and its constitutional rationale: A cosmopolitan outlook, in Common Market Law Review, (50)2013, pp. 709–736.

DOCUMENTS

Resolution (68)18 on the teaching of languages to migrant workers, Council of Europe.

Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM/2008/0610 final, Brussels 8.10.2008.

European Commission, Directorate-General for Justice, Freedom and Security, Final report June 2010, Synthesis of the Multi-annual and annual programmes of the member states: priorities and actions of the European Fund for the integration of Third-country Nationals, 16.06.2010.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final, Brussels, 20.7.2011.

Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014)210 final, Brussels 3.4.2014.

TABLE OF CASES

CJEU, Mary Carpenter v Secretary of State for the Home Department, C-60/00, judgment of 11 July 2002, ECR 2002 I-06279.

CJEU, EP v Council, C-540/03, judgment of 27 June 2006, ECR 2006 I-05769.

CJEU, Rhimou Chakroun v Minister van Buitenlandse Zaken, C-578/08, judgment of 4 March 2010, ECR 2010 I-01839.

CJEU, Ruiz Zambrano v Office national de l'emploi (ONEm), C-34/09, judgment of 8 March 2011, ECR 2011 I-01177.

CJUE, Bibi Mohammad Imran v Minister van Buitenlandse Zaken, C-155/11 PPU, order of the Court of 10 June 2011.

CJEU, Murat Dereci et al. v Bundesministerium für Inneres, C-256/11, judgment of 15 November 2011, ECR 2011 I-11315.

Opinion of the Advocate General Mengozzi delivered on 30 April 2014, C-138/13, Naime Dogan v Bundesrepublik Deutschland.

Opinion of the Advocate General Kokott delivered on 19 March 2015, C-153/14, Minister van Buitenlandse Zaken v K and A.

CJEU, P and S v. Commissie Sociale Zekerheid Breda, College van Burgemeester en Wethouders van de gemeente Amstelveen, C-579/13, judgment of 4 June 2015, not yet published.

CJEU, Minister van Buitenlandse Zaken v. K, A, C-153/14, judgment of 9 July 2015, not yet published.

ECtHR Gül v. Switzerland, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174.

ECtHR Ahmut v. the Netherlands, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030.

ECtHR, Sen v.the Netherlands, no. 31465/96, 21 December 2001.

CONCLUSION: THE RELATION OF CONCEPTUAL AND PRACTICAL BARRIERS TO EU CITIZENSHIP

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The contributions to this volume address a huge variety of topics that are important for understanding and evaluating the present as well as possible future of EU citizenship. They lucidly reflect the variety of disciplines cooperating in the bEUcitizen-project and their different points of view on EU citizenship. More generally, with each chapter standing on its own, the present volume also gives a glimpse on the richness of the diversity entailed in the project of European integration. Much like the EU, however, from a WP2-perspective it is key to identify the potential of unity in diversity across the various contributions. What lessons do they teach us regarding the core topics of the bEUcitizen-project? Integrating and evaluating their insights and conclusions requires taking a step back, shifting from the micro-perspective on the concrete topics they address to the macro-perspective that focuses on the questions outlined in the introduction to this volume. How do the contributions inform our view on the two kinds of *conceptual* and *practical* barriers towards EU citizenship?

Across all four streams one can identify three 'meta-topics' to which each contribution can be subsumed. Firstly, some papers address down-to-earth ***practical*** problems for EU citizens in making use of the rights granted or implied by EU citizenship. Hyltén-Cavallius' illuminating account of how Scandinavian registration procedures cause problems of discrimination on grounds of nationality is a case in point and also Banon's description of practical obstacles to the citizens' effective use of the European Citizens' Initiative. At first glance one may see them as straightforward accounts on everyday practical barriers towards EU citizenship calling for policy-changes. However, things become more complicated when we add the perspective of a second kind of contributions to this volume that focus on the ***conceptual*** dimension of EU citizenship. Here, the more empirically oriented contributions find that a consistent and unambiguous understanding of current EU citizenship is lacking. Both the papers of Mancano and Phoa identify contradictory tendencies in how the meaning of EU citizenship is interpreted by one of the key EU actors, namely, the European Court of Justice. Phoa notes that while in the Grzelcyk-case the ECJ stresses Union citizenship as a fundamental status of having equal rights, in the similar Dano-case it frames Union citizenship in terms of a 'market citizenship' and implies EU citizenship rights as something 'that you have to earn…by being a 'good', productive citizen.' From a WP2-perspective, these ambivalences are of utmost importance. They point to an intricate relation between the conceptual and practical dimension in the analysis of barriers towards EU citizenship that easily slips attention. What one identifies as a practical barrier towards EU citizenship and how one evaluates them depends on how one understands the concept and meaning of EU citizenship. In our case, for example, Hyltén-Cavallius evaluates the Scandinavian registration practice as a serious practical barrier. This, however, presupposes assuming EU citizenship as a fundamental status. Conceived in terms of market-citizenship, one may come to a different conclusion. The same goes for Banon's conclusions regarding the obstacles in using the Citizens' Initiative. Seeing these obstacles as a practical barrier, as Banon does, implies assuming EU citizenship in terms of a fully-fledged political citizenship in a democratic polity. Doubtlessly, there are good reasons to do so. The crucial point, however, is that, as we learn from Phoa and Mancano, at a very basic level the meaning and future trajectory of EU citizenship is still politically undecided. It is this vacuum at the conceptual level that the more normatively oriented contributions from Richter and Zdravkovic aim to fill. They suggest realigning our deeply entrenched modern understanding of citizenship as a bounded concept based on nationality, boundaries and exclusion, towards an unbounded view of citizenship as a fundamental status granting equal rights for everyone– including rights to political participation for every person irrespective of her or his identity. While it is debatable if and how such an unbounded, non-exclusive concept of citizenship translates into an institutional order, the conceptual vacuum around EU citizenship raises another issue crucial to WP2. It pertains to the analysis of the ***effects*** of EU citizenship practice both on national citizenship and the EU itself. This is the third 'meta-topic' addressed, for example, by the contributions of De Pietri/Rodríguez-Magdaleno,

Schenk and Kroeze. These contributions do not only trace various effects of EU citizenship in illuminating ways, but also evaluate them. While each analysis is perfectly sound in itself, their evaluation of EU citizenship's effects gets more ambivalent if one takes a step back and applies the conceptual perspective. De Pietri and Rodríguez-Magdaleno, for example, insightfully show how EU citizenship practice blurs the distinction between the categories of an EU citizen, on the one hand, and a long-term resident third-country national, on the other, by granting EU citizenship rights (including political rights) to EU citizens and third-country nationals alike. The consequence is, they argue, that EU citizenship fails to generate a unique EU identity and undermines its original purpose to strengthen EU's legitimacy. Obviously, however, this conclusion depends on a particular view of what EU citizenship is supposed to be. If one applies a different understanding and views EU citizenship in terms of an unbounded citizenship, as Richter and Zdravkovic do, then the very same tendency to blur the lines between EU citizens and third-country nationals turns out to strengthen EU's legitimacy. Similarly, whether the conditionality of the political rights granted by EU citizenship is detrimental to EU's legitimacy, as Kroeze argues, depends on the kind of citizenship one holds EU citizenship to be. If one sees the EU as mainly an economic order and EU citizenship as market-citizenship, one may conclude the opposite.

To sum up, the crucial lesson from the contributions to the Open Conference 'Being a Citizen in Europe,' and to the bEUcitizen-project more generally, is that a profound understanding of barriers towards EU citizenship presupposes conceptual clarity about the meaning of EU citizenship. Without a shared understanding of the meaning of a (future) EU citizenship, the task of identifying practical barriers towards EU citizenship and evaluating the latter's effects remains ambivalent. Such a shared understanding is still missing – what shall EU citizenship be or become: a fully-fledged democratic citizenship or a market-citizenship, bundling certain rights implied by the internal market freedoms? This undecided question is at the core of the debate on EU citizenship. What kind of citizenship EU citizenship is or shall become is dependent on the kind of political entity the EU is or shall become. In this sense, the long suppressed question about EU's *finalité* brings itself to the fore in the debate about EU citizenship. The issue is not that we need a deep consensus about what should be the ideal 'end state' of the EU. Such a consensus does hardly exist in national democracies. It is even more hopeless to expect it for the EU. But this, on the other hand, does not mean that the question about EU's *finalité* should be avoided and kept from the public – as it largely has been ever since the Maastricht Treaty in 1992.

In order to (re-)turn the short-sighted muddling through driven by national interests, to which the European integration has degenerated in the course of the financial crisis, into a common project, an open debate about why this project is still worth pursuing is required. Contrary to a widespread view, shutting down the talk about EU's *finalité* is not helping to keep European integration going. To the contrary, given the current state of EU affairs, avoiding thoughts about EU's finalité means fixing the EU's *finalité*: it fosters the image of the EU as an order that has failed to live up to its own expectations and to develop into a prospering transnational political and democratic order. What is needed instead – to prevent citizens from turning their backs on the EU – is public contestation of our understanding of the EU and why we still need it. A political debate about what the EU should be, how we want to live together and what values shall guide us. In the words of the philosopher Jacques Derrida: European Democracy 'à venir' requires an ongoing public debate about what European integration is all about and where it should lead us to - even and especially if there is no consensus about it.