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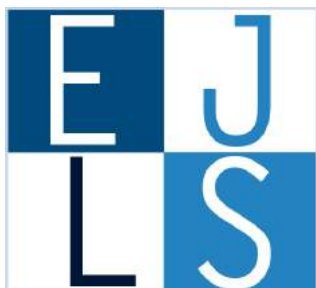
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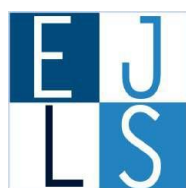
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Vol. 4 No. 2 (Winter 2011)

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EDITORIAL

Benedict S. Wray^{*}

CITIZENSHIP & MIGRATION: THE PROBLEM OF WHO SHOULD REGULATE

It is difficult to imagine a more important or pressing question for academia right now than migration and its corollary, citizenship. The scale of the current crisis has engendered protectionism of all types across the world, but not least in the ramping up of immigration controls on a large scale, particularly in western democracies fearful of the floodgates of economic migration. Meanwhile the imminent threat of migration linked to climate change is one that must be met head-on if we are not to witness a host of humanitarian disasters in the decades to come.

But what of the underlying questions behind migration and citizenship? Is the approach of the European Union, one which serves as a model for other economic integration zones, the right one? More importantly, can regionalism really deal with the transnational nature of modern migratory flows or do we need a more cosmopolitan, more global approach? With the introduction of quotas for non-EU work visas in the United Kingdom, economic migration has become all but impossible from outside of Europe, with the exception of a few specialist jobs. One may question whether that is a desirable result, particularly at a time when skilled labour is necessary to help re-start growth in a troubled economy. On the other hand, it is doubtful whether a global approach is materially or politically feasible, let alone whether it is desirable. Indeed, authors such as Wenar have suggested in the development context that we need far more empirical research into the consequences of global initiatives as often well-intentions attempts to aid those in other countries can go awry. Might the same risk be present in the migration context?

The other alternative would appear, on the face of it, to be a return to nationalism, and grounding the idea of citizenship in the nation-state which in turn necessitates national control of migration in order to maintain coherence in the concept of national citizenship. Yet, I would argue, such an isolationist solution carries with it its own particular risks, which could in fact lead to a decrease in national sovereignty and national

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power. The degree of dependence that big business has upon national support is a debated question, but it is clear that following the growing pace of globalization in recent decades, we are no longer in the world imagined by the ICJ in the *Barcelona Traction* case, a world in which each state has perfect control over companies incorporated under its laws. Rather, we have arrived at a situation where transnational corporations may bargain on an equal footing – or even in some cases from a position of power – *vis-à-vis* individual states. The justification presented by the British Prime Minister, David Cameron, for his recent veto of EU treaty modification to cope with the Euro crisis, namely that increased regulation in the City of London could scare away banks from emerging markets such as Brazil, India and China, provides an illustration of the extent to which states may fear the departure of significant transnational business interests. It is precisely this easy mobility of capital that erodes national power, yet if protectionist immigration and citizenship policies are adopted, they may only serve to increase the relative imbalance between labour and capital, leaving the benefits of immigration and citizenship subject to the whims of business interests and the implied threat of divestment.

I do not pretend to have answers to any of these concerns, but it is interesting to note that EU immigration policy is often justified on economic grounds. Our first article, by Anna Kocharov, offers an interesting analysis of current EU immigration law in light of its supposed economic aims. Second, Ferri and Marquis provide a suggestion for (re)framing the ‘social market economy’ as introduced by the Lisbon Treaty, through an examination of state aid incentives to encourage the employment of people with disabilities, ultimately arguing that the latter provides an interesting expression in positive law of the marriage between social policy and market economics. For them, the concept of a social market economy ‘has significant potential as an interpretive guideline for the EU as it carries out its activities’. Third, Panos Stasinopoulos analyses the evolution of the concept of citizenship in the case-law of the Court of Justice and examines in particular the relationship between economic activity, or citizens *qua* workers, and citizenship *per se*, concluding that the Lisbon treaty is the launching pad for a ‘more inclusive’ conception of citizenship, something already to be seen in the early post-Lisbon jurisprudence of the Court.

Still in the vein of regional approaches to immigration and citizenship policy, M. Belén Olmos Giupponi offers a comparative look at changes in immigration laws in Argentina and the MERCOSUR. One particularly interesting feature of her article, apart from its examination of the impact of regional integration in the MERCOSUR on migration flows, is the

discussion of the interplay between citizenship and migration, something clearly relevant beyond the South American context.

The last article in our symposium, by Juan M. Amaya-Castro, takes a very different approach to the other four, focusing on the notion of ‘illegality regimes’ and their potentially corrosive effects on citizenship. There are obvious parallels here to current research into states of emergency and temporary zones of illegality brought into being to cope with such situations, as well as to the Sousa Santos idea of ‘interlegality’.

ALSO IN THIS ISSUE

Beyond the migration and citizenship context, we have several articles on general topics in this issue. In EU law, Pedro Cara de Sousa argues that the CJEU does not take sufficient cognizance of institutional ability and legitimacy in making its decisions, something it must take account of urgently if it is to find a legitimate way of balancing the competing normative aims of the economic freedoms, on the one hand, and fundamental rights on the other. Loïc Azoulay takes a different tack, examining the familiar use of the ‘retained powers’ adage in the reasoning of the Court. In a call to other scholars, he argues that great scrutiny of the invocation of this formula by the court – supposedly to safeguard the interests of Member states while enabling the protection of interests protected by EU law – is essential to prevent arbitrariness and to meet criticisms of the EU’s ‘creeping competence’.

Meanwhile in legal theory Guerra-Pujol makes the case, going back to Wendell-Holmes, for a predictive approach to law, and uses a formal Bayesian model of litigation dubbed ‘the litigation game’ to argue that positive litigation outcomes are, in fact, a reliable indicator of a defendant’s guilt. Finally, Jean-Sylvestre Bergé takes a look at global legal pluralism and the role of hierarchy, both in different legal orders and in legal reasoning.

Benedict S. Wray
December 2011

REGULATION THAT DEFIES GRAVITY: POLICY, ECONOMICS AND LAW OF LEGAL IMMIGRATION IN EUROPE

Anna Kocharov*

This article offers an assessment of EU directives in the field of legal immigration in the light of the Union's own claims of economic rationale behind its immigration policy. While stopping short of economic analysis of law, the work pinpoints the areas of EU immigration law of relevance to economists in future immigration research in the European context, and to policy makers when enacting immigration laws. It is argued that, contrary to the political discourse, EU immigration law is inconsistent with the objectives of EU immigration policy and fails to take into account economic rationales for migration.

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* Department of Law, European University Institute. I am indebted to Elspeth Guild, James Hollifield, Bernard Ryan, Rainer Bauböck, Jean-Pierre Cassarino, Alessandra Venturini, Achilles Skordas and Marise Cremona for their comments on the previous drafts. Any omissions remain my own.

I. INTRODUCTION

EU policy-makers and European governments increasingly favor immigration policy linked to the demand for labor. The proponents of this approach argue that Europe should welcome immigrants who bring with them skills required in our economies, while their opponents claim that this approach dehumanizes migrants ignoring their non-economic needs. This article analyzes the legal substance behind these claims and discusses whether the two seemingly opposing camps can at all be disconnected the way they are portrayed in European politics. To do this, the official objectives of common immigration policy (CIP) of the EU will be matched against the actual effect of the legislation adopted to achieve them, while introducing some basic notions from the economics of migration as benchmark for the policy-law comparison. This will take out the politics from immigration policy and offer a systematic look at how the law is used to achieve CIP goals. Does the substance of law correspond to its declared objectives?

Five caveats apply. First, the analysis is limited common immigration policy as opposed to immigration rooted in international human rights law (refugees and asylum seekers): the rationales and objectives valid for one group of immigrants are not easily transferable to the other, while the body of law applicable to the two types of migrants significantly differs. Second, the analysis is limited to EU Directives on legal as opposed to illegal migration: this is for the sake of space and because legal migration is the most controversial branch of immigration law politically, making the distinction between politics and policy not readily apparent; the match between the policy objectives and the law is less obvious in the Directives on legal immigration, many provisions of which remain optional and open-worded. Third, the analysis is limited to the EU law and policy as opposed to the national (implementing) measures. Fourth, while immigration policy is an inherently interdisciplinary field, the analysis presented here omits other factors that may influence immigration flows, such as the general economic situation, the presence of immigrant networks, cultural and historic ties, etc. In the discussion of the economics of migration, for each of the selected factors, the analysis will assume that the other factors remain equal. Fifth, EU policy objectives are taken at their face value, presuming their legitimacy and appropriateness, while questioning instead the feasibility of their accomplishment through the enacted laws. The terms “immigrant”, “migrant”, and “third-country national” are used interchangeably throughout to refer to persons not in the possession of nationality of any EU or EFTA state, who come to the EU as a primary migrant, as opposed to the second and third generations of third-country nationals and family members of the primary migrant or “sponsor”.

The paper proceeds in two parts. *Part I* unpacks the objectives of common immigration policy contained in EU policy documents and legal texts, and discusses how these objectives may be attained. *Part II* analyzes EU immigration law in light of EU policy objectives, using economics of immigration as a tool to evaluate the match between the policy and the law. Results are then summarized and discussed.

II. OBJECTIVES OF COMMON IMMIGRATION POLICY

1. *Sources of Objectives and Their Relevance*

The Amsterdam Treaty reform of 1999 introduced a power for the EU – then the European Community – to regulate immigration. This new power, however, was not accompanied by any objectives in the text of the Treaty itself, prompting commentators to describe the area of freedom, security and justice (AFSJ), which incorporates the CIP, as “singularly less specific”¹ than other Community policies. The only thing one could infer from the text of the Treaty itself was that EU immigration policy was somehow tied to the establishment of the internal market and the Schengen space.² Objectives of the CIP were *de facto* – and, with the Lisbon Treaty, are *de jure*³ – formulated by the European Council and are found, first, in the Council Conclusions, second, in the policy documents of the Commission, and, third, in the explanatory memoranda to legislative proposals and preambles to the Directives on legal immigration. This fluid system of objective-setting adds flexibility to EU immigration policy while simultaneously rendering it more vulnerable to momentary political concerns of national governments. It has been noted that without concrete objectives listed alongside the competence provisions in the Treaty, the prominence of objectives is diluted, encouraging pragmatic over visionary approach to EU immigration law;⁴ proposals on immigration law easily turn into a battle over national sovereignty where each Member State

¹ E. Guild and H. Staples, ‘Labor Migration in the European Union’ in P. DeBruycker (ed) *The Emergence of a European Immigration Policy* (Bruylant 2003) 214.

² The name itself of the original Title IV EC supports this conclusion: “Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons”. The new Title V TFEU, successor to Title IV EC, is called “Area of Freedom, Security and Justice”. Its first article, Article 67 TFEU, proclaims that the Union as a whole – as opposed to only the Schengen area in the previous Treaty version – shall constitute AFSJ; however, the second point of this article links EU immigration policy to the absence of internal border controls – and thus back to the Schengen space.

³ Art. 68 TFEU.

⁴ G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (2006) 197–262.

seeks to export its model to the EU.⁵ EU and national immigration policies should take into account other Union policies in order not to jeopardize the latter.⁶ Consistency, however, is a small consolation for anyone looking for the purpose of Union's immigration law.

With the re-shuffling of the Union's purposes in the Lisbon Treaty and the increasing prominence of the AFSJ, the broad objectives of the CIP are now stated in Article 79 TFEU. This Treaty article restates the three main policy strands formulated over the preceding decade by the European Council. The Union's immigration policy should thus ensure "efficient management of migration flows", "fair treatment" of legally resident third-country nationals, and the prevention of illegal immigration.

2. *Objective 1: State Management of Immigration*

Two questions call for answer before proceeding to the substance of EU's "managed immigration policy".

The first is whether and to what extent a state can manage its immigration flow. Management of immigration flow by the state implies two basic functions: (1) capacity of the state to de-select immigrants from entry and residence in its territory and (2) capacity of the state to attract and retain immigrants. The capacity of Member States to restrict immigration is inherently incomplete, not least due to the existing legal framework in international law.⁷ On the other hand, the EU has enacted directives on illegal immigration and return,⁸ necessary for implementing the Schengen

⁵ S. Boelaert-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] C.M.L.Rev. 42; Peers, 'Implementing Equality? The Directive on long-term resident third-country nationals' [2004] EL Rev. 29; Louise Halleskov, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' [2005] EJML 7.

⁶ Joined Cases 281, 283, 284, 285 and 287/85 *Germany and others v. Commission* [1987] ECR 03203. This principle has been adopted in the Lisbon Treaty: for instance, new Article 21(3) TEU on the external action states that "The Union shall ensure consistency between the different areas of its external action and between these and its other policies".

⁷ Most notably, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (4.11.1950) as amended; European Convention on the Legal Status of Migrant Workers (1977); Geneva Convention relating to the status of refugees (1951); ILO C143 Migrant Workers (Supplementary Provisions) Convention (1975); C97 Migration for Employment Convention (Revised) (1949); Cases *Gaygusuz v Austria* (ECHR, 16 September 1996) and *Jabari v Turkey* (ECHR, 11 July 2000).

⁸ Regulation 562/2006 Schengen Borders Code, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-

space and abolition of internal borders.⁹ The competence to restrict is therefore not only regulated but presents fewer open questions as regards the content of policy: foreign nationals may not enter the territory of the state unless specifically authorized either by the state itself, by international or Union law. And here comes in the policy component. If the policy is, as it is in Europe, to encourage immigration by some foreign nationals only, then we need to examine closely the capacity of Member States to attract these people. This capacity is much less restricted by supranational law and is determined instead by a number of factors, including but not limited to the admission policy, legal protection of the rights of migrants, and (economic) situation in the host state. The rest of this article will analyze how EU immigration law affects the capacity of Member States to attract and retain “wanted” immigrants.

The second question of “managed immigration policy” concerns the instruments that a state can use to manage immigration efficiently. Labor immigration quotas have been criticized for inability of the public administrator to identify the fluctuating needs of the business community¹⁰ and for the rigid nature of the system that cannot timely react to changes in the demand for workers.¹¹ While state-managed schemes will likely deplete the resources of any public administration, by changing its legislation a state can influence individual decisions of migrants and thus affect the volume and composition of immigration flow.¹² The skills of immigrants, in particular, “can be directly influenced by immigration policy”.¹³ Governments may provide “incentives for foreign skills to flow in or remain in the country, for instance by easing immigration and work permits restrictions, providing tax incentives, and promoting the country as an attractive working and living environment.”¹⁴

country nationals, Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

⁹ In particular, abolition of internal borders does not present any problem of legal immigration because all third-country nationals are required to report their presence on arrival to another Member State, failing which they become illegal, Articles 11 and 21 Schengen Borders Code.

¹⁰ A. Constant and K.F. Zimmermann, ‘Immigrant Performance and Selective Immigration Policy: a European Perspective’ [2005] 195 *National Institute Economic Review* 105.

¹¹ G. Orcalli, ‘Constitutional choice and European immigration policy’ [2007] 18 *Constit Polit Econ* 9.

¹² M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 *1 IMR* 253.

¹³ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 *3 Oxford Review of Economic Policy* 406.

¹⁴ S. Mahroum, ‘Europe and the Immigration of Highly Skilled Labour’ [2001] 39 *5 International Migration* 29.

Points systems increase the share of skilled immigrants in the overall immigration flow;¹⁵ however, their success depends on the favorable disposition of other factors, such as employment opportunities in the destination country and the wage differential with the country of origin. The weakness of the points systems has been their inability to guarantee jobs, leading to significant brain waste. This has been the case in Canada¹⁶, the UK¹⁷, and New Zealand¹⁸, suggesting that employers should be closely involved in the admission of economic migrants.¹⁹ Yet, uncontrolled employer-driven systems may “discourage employers from raising wages and/or adopting alternative production technologies, thus exacerbating shortages and entrenching certain low-cost production systems in the long run.”²⁰ Thus, no single stakeholder, not even the state, is placed in the position to manage immigration in isolation from others. State management of immigration requires a system that is flexible enough to timely react to the changing circumstances and to accommodate participation by non-state actors.

3. *Objective 2: Competing for the Highly-Skilled*

Over the past half-a-century, Western Europe witnessed remarkable turnarounds in its immigration policies. Low-skilled labor immigration in the 1960s was followed by a closure to economic immigrants after the oil crisis of 1973, this principle reiterated by the Council as recently as 1994.²¹

¹⁵ R. Iredale, ‘The Internationalization of Professionals and the Assessment of Skills: Australia, Canada, and the US’ [2002] 16 Georgetown Immigration L.J. 797; J. Walsh, ‘Navigating Globalization; Highly-Skilled Labor Migration and State Management: The Cases of Canada and Australia’ [2006] Paper presented at the annual meeting of the American Sociological Association, www.allacademic.com (25.02.2010); A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ 151-152 citing OECD, ‘International Mobility of the Highly Skilled’ 88 [2001] 29.

¹⁶ R. Iredale, ‘The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility’ [1999] 37 1 International Migration 98.

¹⁷ C. Dustmann, ‘Immigrants and the Labour Market’ [2008] 16 4 European Review 508.

¹⁸ M. Benson-Rea and S. Rawlinson, ‘Highly Skilled and Business Migrants: Information Processes and Settlement Outcomes’ [2003] 41 2 International Migration.

¹⁹ J. Doornik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thranhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] Transatlantic Academy Report, www.transatlanticacademy.org.

²⁰ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 421.

²¹ Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment and Council Resolution of 30 November 1994 relating to the limitations on the admission of

However, only a few years later, the Lisbon Strategy goals necessitated the admission of economic migrants in order to secure the international competitiveness of Europe.²² The Hague European Council Conclusions explicitly mentioned establishment of admission procedures capable of responding promptly to the fluctuating demand for migrant workers. The objective of a more “selective” and better “managed” immigration policy is reiterated in the European Pact on Immigration and Asylum²³ and found support of many governments at the national level.²⁴ The Stockholm Program calls for a flexible admission system that is responsive to the priorities, needs, numbers and volumes determined by each Member State and that enables migrants to take full advantage of their skills and competence. Such immigration policy should benefit “all stakeholders”.²⁵

It would, however, be erroneous to assume that Europe re-opened its doors to economic immigrants. Proposal of the Commission on the admission of third-country nationals for employment met little enthusiasm in the Council and was subsequently withdrawn.²⁶ Member States found it difficult to agree on a common admission policy, as the demand for workers and skills vary from one Member State to the other²⁷ while “economic impact of immigration critically depends on the skills of residents and the characteristics of the host economy”.²⁸ Instead, the Union should “assist Member States in meeting the existing and future labour needs” by establishing EU “admission procedures capable of responding promptly to fluctuating demands for migrant labor in the labor market”²⁹ which would “improve labour market efficiency” and “prevent skill shortages”.³⁰ EU law, being a rather slow instrument that requires

third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons, OJ C 27 [1996] 0003 – 0009.

²² The Hague Programme (13.12.2004) Council 16054 [2004] 10.

²³ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008].

²⁴ For instance, for Finland see ‘Regeringens invandrapolitiska program’ (19.10.2006) Statsrådets principbeslut.

²⁵ Draft Council Conclusions on ‘Labour Migration and its Development Potential in the Age of Mobility’ 19 November 2009, Council document 15823 [2009] 2.

²⁶ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001) 386 final, withdrawn COM(2005) 462 final OJ C 64. For a discussion of Member State objections to the 2001 Proposal see B. Ryan, ‘The EU and Labor Migration: Regulating Admission or Treatment?’ in A. Baldaccini, E. Guild and H. Toner, *Whose Freedom, Security and Justice?* (Hart Publishing 2007) 500.

²⁷ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 4-5.

²⁸ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 407.

²⁹ Hague Programme (13.12.2004) Council 16054 [2004] 10.

³⁰ Blue Card Directive; Council Conclusions (14.12.2007) Council 16616/1 [2007] 5.

time to pass and amend, should therefore leave certain provisions open-ended in order to secure rapid adjustments on national level.

Recognition of diverging labor needs found expression in the “division of labor” between the national and European levels, whereby the admission of economic immigrants, at least on the face of it, remains within the powers of each Member State,³¹ while the admission of other immigrants and the rights of migrants once admitted are regulated increasingly in EU law. There seems to be a presumption that selection of third-country workers is separate and dissimilar from the regulation of their rights once admitted. This distinction between admission and rights has been criticized as misguided: “legal rules cannot be classified as concerning either selection or regulation because every rule concerns both.”³² Thus, although Member States preserve their powers not to admit economic migrants, their capacity to attract third-country workers is inevitably tied to the European level.

While Member States emphasize the divergence of their labor market needs, studies suggest that the OECD countries increasingly compete to attract international migrant workers with the same set of skills.³³ Convergence in the demand for skills triggers what has been termed a “global race for talent”³⁴ – competition between destination countries to attract international migrants with high human capital attributes. While there is no common accord as to what amounts to “high” professional skills³⁵, it is more accurate to call these migrants “wanted” in order to reflect the mismatch between their supply and demand. The scarcity in the

³¹ Article 79(5) TEU – under this article, however, Member States are only guaranteed power to regulate admission of work seekers from outside the Union; secondary EU immigration law, e.g. Recital 8 Blue Card Directive and Article 14(3) LONG-TERM RESIDENCE Directive, recognizes national powers to restrict admission of all economic migrants. Stockholm Programme (02.12.2009) Council 17024 [2009] 63; European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 5.

³² A.C. Cox, ‘Immigration Law’s Organizing Principles’ [2008] 157 2 Univ. of Pennsylvania L. Rev.

³³ D. Guellec and M. Cervantes, ‘International Mobility of Highly Skilled Workers: From Statistical Analysis to Policy Formulation, in International Mobility of the Highly Skilled’ [2001] OECD; A. Wyckoff and M. Schaaper, ‘The Changing Dynamics of the Global Market for the Highly-Skilled’ [2005] OECD www.si.umich.edu/AdvancingKnowledge/drafts/Wyckoff-Version%20Feb%2028%20-%20Global_HRST_7-Jan_Draft.doc (25.02.2010).

³⁴ A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

³⁵ The issue has been disputed both in Council and European Parliament during the adoption of Blue Card Directive, see Working Party on Migration and Expulsion (4.4.2008) 8249 [2008] 13; summary of the meeting of the LIBE Committee of the European Parliament (5.5.2008) 9259 [2008] 4.

supply of “wanted” immigrants relative to the overall immigration flow³⁶ coupled with the shortage of workers in high-skill occupations in the OECD countries³⁷ create an excess demand, which builds up competitive pressure on the destination countries and changes the rationale behind immigration law.³⁸ It is not about restricting immigration of the highly-skilled, but about attracting this type of migrant.

Global competition for the highly skilled is vividly reflected in EU immigration policy. The Lisbon Strategy set a “new strategic goal” for the EU: “to become the most competitive and dynamic knowledge-based economy in the world”.³⁹ This marked an official entry of the EU into the competition for the best and the brightest. The Hague Program recognized the importance of legal immigration “in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy”.⁴⁰ The *European Pact on Immigration and Asylum* fine tuned this objective: it is necessary to “increase the attractiveness of the European Union for highly qualified workers”.⁴¹ The EU acknowledged that it must take into account “the fact that the main world regions are already competing to attract migrants to meet the needs of their economies.”⁴² Member States thus aspire to compete with the traditional immigration countries for migrant workers with high human capital attributes.⁴³ Competition with the United States as regards both attraction and retention of skilled workers⁴⁴ plays a prominent role in the formation of

³⁶ T. Liebig, ‘Migration Theory from a Supply-Side Perspective’ [2003] 92 Discussion Paper, Research Institute for Labour Economics and Labour Law, www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF (25.02.2010)

³⁷ M. Doudeijns and J.-C. Dumont, ‘Immigration and Labor Shortages: Evaluation of Needs and Limits of the Selection Policies in the Recruitment of Foreign Labor’ [2003] OECD.

³⁸ M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 IMR; A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

³⁹ Presidency Conclusions of the Lisbon European Council, 23-24 March 2000.

⁴⁰ The Hague Programme (13.12.2004) Council 16054 [2004] 10.

⁴¹ European Pact on Immigration and Asylum (24.12.2008) Council 13189 [2008] 5.

⁴² Green Paper on an EU Approach to Managing Economic Migration [2005] COM(2004) 811 final 4.

⁴³ Policy Plan on Legal Migration [2005] COM(2005) 669 final.

⁴⁴ W. Geis, S. Uebelmesser, M. Werdling, ‘Why go to France or Germany, if you could as well go to the UK or the US? Selective Features of Immigration to four major OECD Countries’ [2008] 2427 CESIFO Working Paper. Skilled immigrants from third countries coming to the United States for work often transit through another European country, see A. Takenaka, ‘Secondary Migration: Who Remigrates and Why These Migrants Matter, Migration Policy Institute’ 26.04.2007,

EU immigration policy.⁴⁵ The necessity to attract skilled third-country workers has been reflected in the proposals for EU immigration directives⁴⁶ and in the text of the directives themselves.⁴⁷

More subtle objectives, however, can be more revealing about the nature of the EU's stance in competition for the highly-skilled. One such objective is "to establish a level playing field within the EU".⁴⁸ Beyond elimination of competition between Union citizens and third-country workers resulting from unequal rights, the "level playing field" concerns *elimination of competition between Member States*⁴⁹, which might result from national immigration schemes favoring "wanted" workers.⁵⁰ An example of this reasoning is found in the Commission's proposal for the Blue Card Directive, which states that in a situation where each Member State has different national entry and residence conditions for highly-qualified workers, national systems are bound to be in competition, which weakens the attractiveness of the EU as a whole and distorts third-country workers' migration choices; this, according to the Commission, triggers the need for

www.migrationinformation.org/Feature/print.cfm?ID=597. See also D. J. DeVoretz and J. Ma, 'Triangular Human Capital Flows between Sending, Entrepot and the Rest of the World Regions' [2002] www.iza.org (20.10.2008). IT specialists who entered Germany under its "green card" scheme stayed only long enough to cultivate a job offer in the United States, see D. G. Papademetriou and K. O'Neil, 'Efficient Practices for the Selection of Economic Migrants' [2004] Migration Research Group for the European Commission. Third-country students studying in the EU tend to stay more on a temporary basis than those studying in the United States, see 'International Mobility of the Highly Skilled' OECD Policy Brief, July 2002 <http://www.oecd.org/dataoecd/9/20/1950028.pdf> (20.10.2008).

⁴⁵ In connection with the Blue Card Proposal, Commissioner Frattini alleged that while the US attracts 55% of all skilled migrants worldwide, the EU attracts only one eleventh that number, see European Commission SPEECH/07/526, Lisbon, 13.09.2007.

⁴⁶ E.g. Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 23 October 2007, COM(2007) 637 final 2.

⁴⁷ Recital 6 Student Directive, Recital 17 Research Directive, Recital 7 BC Directive.

⁴⁸ Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final.

⁴⁹ Commission *Communication on immigration, integration and employment*, COM (2003) 336 final 16.

⁵⁰ E.g. the UK points system, German green card, preferential treatment accorded to highly skilled immigrants in Sweden and the Netherlands. A. Shachar, 'The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes' 187; R. Cholewinski, 'The Legal Status of Migrations Admitted for Employment' [2004] 44; S. Mahroum, 'Europe and the Immigration of Highly Skilled Labour' [2001] 39 5 International Migration.

a common EU admission system.⁵¹ The UK House of Commons pointed out a tension between this objective, the objective of matching immigration flow to the labor market needs of individual Member States, and the objective of protecting rights of third-country nationals.⁵² While enhanced incentives by one destination may “undermine the effectiveness of the managed-migration policies” of another destination,⁵³ competing destinations are forced to match each other’s immigration rules, leading to convergence of their immigration policies in the long run,⁵⁴ making EU regulation unnecessary. When competition between Member States is artificially reduced, the total competitive pressure on individual Member States falls, leading to a longer period of adjustment of national immigration policy to global competitive realities.⁵⁵ The situation would be different only if elimination of competition between Member States would be accompanied by unification of Europe into a single destination for “wanted” international migrants.

4. *Objective 3: Temporary Labor Immigration*

Another subtle objective of EU immigration policy is its temporary nature. Temporary labor immigration is a pragmatic approach, which should increase the responsiveness of skill composition of immigration flow to ever shorter cycles of the demand for skills,⁵⁶ offer an alternative to illegal

⁵¹ Proposal for Blue Card Directive, COM(2007) 637 final 7. The objective of elimination of competition between Member States is contrary, in its conception, to the logic of the internal market and could be challenged on economics grounds. As global race for talent leads to “non-cooperative action taken by fiercely competitive jurisdictions”, the countries seek to emulate and exceed their rivals’ immigration offer, leading to “a significant policy convergence among rival economies”. Thus, competition will actually result in convergence rather than differentiation, which would annihilate the need for EU-level regulation. See A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ [2006] 18 NY Univ. L. Rev. 156-157.

⁵² UK House of Commons, European Scrutiny Committee hearing 13.10.2010, record available at www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-iii/428iii12.htm (last accessed 07.09.2011).

⁵³ A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ [2006] 18 NY Univ. L. Rev. 166.

⁵⁴ N. T. Duncan, ‘International Labor Competition: Explaining the Timing of Immigration Policy Convergence’ Paper presented at the MPSA Annual National Conference (Apr 03, 2008) www.allacademic.com/meta/p268242_index.html (23.02.2010).

⁵⁵ This has been argued even in international setting, see C. Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times* [2004] 67 4 Modern L.Rev. 603-604.

⁵⁶ C. Dustmann, ‘Immigrants and the Labour Market’ [2008] 16 4 European Review 505.

immigration,⁵⁷ reduce the integration and other costs resulting from settlement migrants. The link is based on two premises. First, it is submitted that giving illegal immigrants an option to come and work in the EU legally, albeit on a temporary basis, would remove the necessity of illegal migration. Second, the possibility of multiple entries to the EU and of return home without losing the rights acquired from work and residence in Europe would reduce the incentives for staying in the EU, both legally and illegally. These two components are expressed in two corresponding instruments: (1) mobility partnerships between the interested Member States and third countries and (2) circular migration approach to EU immigration law.

Mobility partnership is an instrument of external policy, whereby interested Member States offer concessions to one or more third countries for short-term admission of third-country workers flanked by an agreement on readmission and a monitoring mechanism to ensure the temporary character of migration.⁵⁸ Return to the country of origin is the default, while the duration of residence at destination is typically less than a year. Competence of the EU in mobility partnerships is limited to coordination and facilitation, with no legislative powers. Due to the lack of EU regulatory powers in this field, mobility partnerships will not be discussed here further.

Circular migration can be characterized as an approach to EU immigration law, which avoids penalizing third-country nationals for absences due to return to their countries of origin in order to study and work there. Specific clauses to this effect are inserted into LTR and Blue Card Directives.⁵⁹ These clauses are often said to promote development of the countries of origin, which is a rather feeble claim considering that “countries of origin” include such developed nations as the USA and Japan. On the other hand, no provision is made to facilitate absences due to employment in developing countries other than the country of origin of the migrant. A more accurate vision appears to be that of the Commission,

⁵⁷ Article 79 TFEU; on the link between temporary legal immigration and the fight against illegal immigration see e.g. Council Conclusions (21/22.06.2007) Council 11177/1 [2007] 4 17; ‘A Common Immigration Policy for Europe: Principles, actions and tools’ COM(2008) 359 final 7.

⁵⁸ Mobility partnerships have been concluded with Moldova and Cap Verde. For an overview see R. Parkes, ‘EU Mobility Partnerships: A Model of Policy Coordination?’ [2009] 11 E. J. of Migration and L. 327-345.

⁵⁹ LONG-TERM RESIDENCE Directive contains an optional derogation for absence rules, to be implemented at the discretion of Member States; this derogation was conceived to accommodate mobility between the EU and country of origin, see Proposal for Long-Term Residence Directive COM(2001) 127 final 17. Article 16(5) Blue Card Directive specifically provides for such derogation.

which sees circular migration as a legislative framework that aims to promote temporary immigration over permanent settlement.⁶⁰ It is thus an approach valid for all types of legal immigration.

2.5 Objective 4: Fair Treatment

Initially, the fair treatment objective was conceived from the benefit-conferring and individual-empowering angle to secure non-discrimination in economic, social and cultural life, access to employment and, as a collateral policy, measures against racism and xenophobia.⁶¹ While temporary character of immigration aims to avoid the costs associated with settlement, fair treatment of immigrants inevitably implies incurring these costs. This conflict finds expression in the integration – fair treatment nexus,⁶² whereby granting non-discrimination rights is implicitly tied to the “reasonable prospects of permanent residence”⁶³ and the condition of having integrated into the host state.⁶⁴ The nexus between integration and fair treatment leaves a logical gap for third-country workers, who *ab initio* are perceived as temporary migrants. Unwillingness to secure rights even for “wanted” immigrant workers is traceable in the adoption of Blue Card Directive.⁶⁵

The idea that economic migrants are somehow less in need of being integrated in the host Member State because they will one day leave is not new. This has been the case in Germany and other European countries in the second half of the past century and lead to disastrous consequences that spread across generations. The current situation in the EU is different: it is no longer the low-skilled who are supposed to circulate between Europe and third-countries, but highly-skilled workers who can, it is submitted, choose where to migrate. In the context of this selective policy goal, openness of the receiving labor market and fight against discrimination are the determining factors for success of selective

⁶⁰ M. Cremona, ‘Circular Migration: a legal perspective’ 30 CARIM Analytic and Synthetic Notes (2008) 1, citing the Commission’s ‘Communication on circular migration and mobility partnerships’ COM(2007) 248 final.

⁶¹ Tampere European Council Presidency Conclusions (15 - 16.10.1999) SN 200/99.

⁶² European Pact on Immigration and Asylum, Recital 12 LONG-TERM RESIDENCE Directive.

⁶³ Wording borrowed from FR Directive but the idea is linked to the substance of LONG-TERM RESIDENCE Directive: see the section on substance of non-discrimination rights.

⁶⁴ Articles 5(2) and 15(3) Long-Term Residence Directive, Articles 4(1) last indent and 7(2) Family Reunification Directive.

⁶⁵ S. Peers, ‘Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’ [2009] 11 E. J. of Migration and L. 387-426.

immigration policy.⁶⁶ Xenophobia and discrimination create a “disadvantaged reception context” that dissuades potential migrants⁶⁷ and acts as a push factor forcing immigrants to leave Europe.⁶⁸ Importance of the level of rights of migrants increases together with their skill:⁶⁹ discrimination, both in employment and other spheres, is progressively a larger deterrent for highly-skilled than for low-skilled workers.⁷⁰ As person’s income rises above the minimum level, her relative status becomes more important, as the determinant of human happiness, than even the absolute value of income.⁷¹ This suggests that the degree of deterrence remains unaltered with the change in the value of the loss caused by discrimination; rather, the occurrence of discrimination as such plays a key role. Where rights of immigrants are restricted, an economic case can be made for selectivity in the restriction of rights, with lower restriction levels associated with “wanted” immigrants.⁷²

III. SUBSTANCE OF EU IMMIGRATION LAW

The previous section has outlined the policy choice of EU immigration law: legal immigration should match the demand for workers in national labor markets with preference to the highly-skilled who should come to Europe temporarily and be guaranteed rights on a level that is considered “fair” both to them and to EU-national workers. This section focuses on how EU immigration law achieves these policy objectives. Four directives will be examined: Directive 2005/72/EC on the admission of researchers (Research Directive), Directive 2009/50/EC on the admission of highly qualified workers (Blue Card Directive), Directive 2003/86/EC on family reunification of third-country nationals (Family Reunification Directive)

⁶⁶ J. Doomernik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] Transatlantic Academy Report 14-15, www.transatlanticacademy.org.

⁶⁷ R. Iredale, ‘The Migration of Professionals: Theories and Typologies’ [2001] 39 5 International Migration 19.

⁶⁸ MIREM data on return of Maghrebi immigrants from the EU and J.-P. Cassarino (ed.) ‘Return Migrants to the Maghreb: Reintegration and Development Challenges’ [2008] RSCAS/EUI <http://www.mirem.eu/>.

⁶⁹ J. Doomernik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thränhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] Transatlantic Academy Report, www.transatlanticacademy.org.

⁷⁰ T. Liebig, ‘Migration Theory from a Supply-Side Perspective’ [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law, <http://www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF> (20.10.2008).

⁷¹ Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 49.

⁷² M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic 414.

and Directive 2003/109/EC on the status of long-term residents (Long-Term Residence Directive). These directives regulate immigration to the EU for work, tackle specifically highly-skilled immigrants and produce cumulative effects that are bound to influence the attainment of the CIP objectives.

1. *State Management of Migration*

Economic models of immigration are based on the assumption that people migrate in order to maximize the utility and return on their human capital.⁷³ According to the *human capital theory*, immigration is a form of investment whereby workers seek to maximize their lifetime earnings.⁷⁴ For immigration to take place, the value of the opportunity available abroad must exceed the value of the opportunity available at home plus the costs of moving.⁷⁵ The costs of immigration include, but are not limited to, the foregone earnings, the direct costs of migration, the burden of bureaucratic procedures, as well as the non-monetary costs of adjustment to a new environment. Immigration law can raise or lower these costs by regulating the conditions for lawful residence and admission. The value of the opportunity depends on the wage level and employment options in the destination country, the length of stay, and the predictability of the outcomes of migration. Immigration law can affect these factors by regulating access to work, security of residence, the duration of stay, and the legal protection of the rights of migrants. An increase in immigration costs or decrease in the expected earnings at the destination reduce the overall volume of immigration without altering the skill composition of immigration flow.⁷⁶ However, when immigration costs or immigration earnings vary across workers who differ in their skills, the composition of

⁷³ Not necessarily only in monetary terms but also in terms of the overall satisfaction, happiness and standard of living: people optimize for the “best life” they can get, where the “best” is defined by the individual in comparative terms, depending on her group of reference; what is “best” will vary throughout the individual’s lifetime but the optimizing behavior is presumed to persist. In addition to pull factors in the destination country, it is important to acknowledge the role of the push factors in the countries of origin e.g. the desire to diversify risks resulting from instability in the country of origin, when the family sends some of its members to work abroad.

⁷⁴ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 314 - 351.

⁷⁵ This theory has been developed by Sjaastad. For an overview see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) Ch. 2.

⁷⁶ G. J. Borjas, *Labor Economics* (2005) 338; D. Chiquiar and G. H. Hanson, ‘International Migration, Self-Selection, and the Distribution of Wages: Evidence from Mexico and the United States’ [2002] 59 Working Paper The Center for Comparative Immigration Studies, University of California, San Diego www.ccis-ucsd.org/publications/wrkg59.pdf.

immigration flow might change.⁷⁷ Increased immigration costs or lower rate of returns for one group of workers may lead to their negative self-selection and a drop of the share of these immigrants relative to the other immigrant groups. The opposite would occur should a particular group of workers receive a preferential treatment that lowers their costs or increases earnings. The pattern of destination choices made by individual immigrants based on the cost-benefit analysis is called the *self-selection* of immigrants.

Because the costs and benefits of immigration include but are not limited to the factors controlled by immigration law,⁷⁸ immigrant self-selection happens even in the absence of pro-active immigration policy. The closure of Europe to economic immigrants between the oil crisis and the Amsterdam Treaty, characterized by restrictions on economic immigration, resulted not in the absence of immigrant selectivity but in the reinforcement of self-selection patterns that favored first of all low-skilled settlers.⁷⁹ Restrictive immigration policy adds to the overall costs of

⁷⁷ D. Chiquiar and G. H. Hanson, 'International Migration, Self-Selection, and the Distribution of Wages: Evidence from Mexico and the United States' [2002] 59 Working Paper The Center for Comparative Immigration Studies, UC San Diego www.ccis-ucsd.org/publications/wrkg59.pdf; J. Grogger and G. H. Hanson, 'Income Maximization and the Sorting of Emigrants across Destinations' (2007) www.princeton.edu/~ies/Spring07/HansonPaper.pdf 2.

⁷⁸ For instance, networks reduce immigration costs through active assistance to the newly arrived, provision of information, and facilitating adjustment; network effects become stronger over time and may be self-enforcing, see W. Geis, S. Uebelmesser and M. Werding, 'Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries' [2008] 2427 CESIFO Working Paper www.cesifo-group.org/wp.

⁷⁹ I. Kogan, *Working through Barriers. Host Country Institutions and Immigrant Labor Market Performance in Europe* (Springer 2007). Ireland and the UK are an exception to this trend, see A. Turmann, 'A New European Agenda for Labor Mobility' [2004] CEPS, Brussels. Non-economic migrants have been accused of being "less active in the labour market and exhibit lower earnings" than immigrants admitted for work, see A. Constant and K.F. Zimmermann, 'Immigrant Performance and Selective Immigration Policy: a European Perspective' [2005] 195 National Institute Economic Review 94-96; B. R. Chiswick, 'Are Immigrants Favorably Self-Selected?' Available at www.rau.ro/intranet/Aer/1999/8902/89020181.pdf 181. Studies based on US data suggest that family-based immigration may weaken the selective immigration policies aimed at achieving a bias towards the highly-skilled, see W. Geis, S. Uebelmesser and M. Werding, 'Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries' [2008] 2427 CESIFO Working Paper www.cesifo-group.org/wp; B. R. Chiswick, 'Are Immigrants Favorably Self-Selected?' Available at www.rau.ro/intranet/Aer/1999/8902/89020181.pdf 183; A.C. Cox, 'Immigration Law's Organizing Principles' [2008] 157 2 University of Pennsylvania Law Review 383. Other studies suggest that self-selectivity of family migrants depends also on factors

immigration, reducing the rates of return on immigration and thus reducing attractiveness of the destination country.⁸⁰ Non-economic immigration channels coupled with the limited employment opportunities in Europe led to a strong path dependency⁸¹ and de-selection of economic migrants in favor of humanitarian and family reunification channels.⁸² The challenge of the European immigration policy today is to turn the tide by opening the channels, lowering the costs and increasing the benefits for “wanted” third-country workers.

2. *Selection, Differentiation or Discrimination?*

EU law prohibits discrimination on the grounds of nationality as regards nationals of the Member States.⁸³ This, however, is not the case for third-country nationals. First, third-country nationals may be treated differently as between themselves depending on their nationality. A number of external agreements of the EU with third countries secure for nationals of these countries equal treatment rights in various areas, e.g. conditions of employment including remuneration and dismissal,⁸⁴ social security,⁸⁵ and the right to continue employment and residence in the host Member State.⁸⁶ Second, there is no general prohibition of discrimination of third-

beyond immigration rules, see J. Doornik, R. Koslowski, J. Laurence, R. Maxwell, I. Michalowski, D. Thranhardt, ‘No Shortcuts: Selective Migration and Integration’ [2009] www.transatlanticacademy.org (01.02.2010).

⁸⁰ The so-called Clark, Hatton and Williamson model, see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 48.

⁸¹ One of the factors contributing to path dependency is the availability of immigrant networks, which tend to reinforce existing skill composition of immigration flow, see R. Iredale, ‘The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility’ [1999] 37 *International Migration* 94. Other authors mention regional disparities in prosperity among the drivers of migration: K. F Zimmermann, ‘European Labor Mobility: Challenges and Potentials’ [2005] 4 *De Economist* 153.

⁸² G. Orcalli, ‘Constitutional choice and European immigration policy’ [2007] 18 *Constit Polit Econ* 15. Those who could enter under the no-immigrant-worker policies were humanitarian immigrants and family members of the low-skilled workers already settled in Europe.

⁸³ Article 18 TFEU.

⁸⁴ Partnership and Cooperation Agreements : 1999 Armenia Article 20; 1999 Azerbaijan Article 20; 1999 Georgia Article 20; 1999 Kazakhstan Article 19; 1999 Kyrgyz Republic Article 19; 1998 Moldova Article 23; 1996 Russia Article 23(1); 1998 Ukraine Article 24; 1999 Uzbekistan Article 19; 2005 Stabilization and Association Agreement with Croatia Article 45; 2004 Agreement with Yugoslav Republic of Macedonia Article 44.

⁸⁵ Euro-Mediterranean Agreements: 2005 Algeria Article 67; 2000 Morocco Article 64; 1998 Tunisia Article 64.

⁸⁶ EEC-Turkey Association Agreement (1963) Additional Protocol Article 37, Decisions 1/80 and 3/80 of EEC-Turkey Association Council.

country nationals vis-à-vis nationals of Member States. General non-discrimination law adopted by the EU is applicable to third-country nationals but discrimination on the grounds of nationality remains excluded from its scope.⁸⁷ Quite on the contrary, equal treatment with nationals of the host Member State is granted to third-country nationals in deviation from the general unequal treatment presumption. Differential treatment of foreign nationals serves as a tool in external relations of the Union and its Member States by allowing them to offer privileged treatment in exchange for other concessions.⁸⁸

In the CIP, differential treatment of migrants is the key to influencing the skill composition of immigration flow. At the first glance, the structure of EU immigration law is coherent with the overall policy objective of attracting skilled migrants in that there are two types of directives: vertical directives on admission, which differentiate between the different professional groups of migrants (Students, Research and Blue Card Directives, 2004/114/EC, 2005/72/EC and 2009/50/EC accordingly), and horizontal directives on the rights of migrants, applicable across the different groups (Family Reunification and Long-Term Residence Directives, 2003/86/EC and 2003/109/EC accordingly).⁸⁹ Both types of instrument regulate the rights of third-country workers and thus produce cumulative effects that vary from one group to another.

The problem, however, arises with the definition of these migrant groups. In other words, do the groups that form the basis for differentiation reflect the professional skills of migrants? The answer to this question is “not necessarily”. This is so because rights in EU immigration law attach to immigration status (the label on the residence permit, e.g. “Blue Card holder” or “researcher”), which is the function of the motives for first admission into the Union (in order to study, join family members, undertake research, seasonal or highly-qualified employment, etc), while

⁸⁷ E.g. Article 3(2) Race Directive 2004/43/EC and Article 3(2) Framework Directive 2000/78/EC. For further analysis see A. Wiesbrock, *Legal Migration to the European Union. Ten Years after Tampere* (Wolf Publishers 2009).

⁸⁸ For example, offering visa facilitations in return for readmission obligations for third states, e.g. Council Decision 2007/340/EC of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on the facilitation of issuance of short-stay visas and Council Decision 2007/341/EC of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission, both agreements concluded together and entering into force simultaneously.

⁸⁹ Students Directive 2004/114/EC is left out from the analysis as it is not directly concerned with economic migration and does not give a right to remain and work upon the completion of studies. Proposal on a single work and residence permit (COM(2007) 638 final) is currently pending Council negotiations.

subsequent switching between the statuses is not always possible.⁹⁰ Differentiation in the admission directives is not linked to the skills of workers *per se*: a highly-skilled third-country national who is a family member of Union citizen, for example, will likely opt for admission as a family member rather than the complex admission and certification procedure under the Blue Card Directive.⁹¹ If not all highly-skilled immigrants are admitted under the Blue Card Directive,⁹² not all the highly-skilled will benefit from the facilitations contained therein. This is in sharp contrast with the approach adopted in EU free movement law, where the rights of “wanted” migrants (in this case EU national workers) arise as a direct consequence of their economic activity and independently of the initial reason for their migration.⁹³ Impossibility of switching based on actual employment and impossibility to accumulate rights under the different immigration statuses for which the same individual could be eligible, add rigidity to the system and nullify facilitations aimed at the highly-skilled. In order to promote skilled migration and discourage brain waste, switching and upgrading of status should be allowed for lawfully resident third-country workers who engage in skilled work independently of their initial motives for entry into the Union. Tying the rights of migrant workers to their *actual* employment (rather than to their immigration status in law) would give a clear incentive to engage in skilled work.

The rights directives, on the other hand, apply across the different migrant groups, allowing third-country workers to upgrade their rights subsequently to the first entry into the Union, tying this upgrade directly to the stability of residence in the host Member State. To understand the influence of these directives on the composition of immigration flow, we need to answer whether the “wanted” groups of third-country nationals benefit from these directives more (or at least no less) than third-country

⁹⁰ A requirement to apply for status prior to admission and from outside the territory of the Member State is contained in Article 3(1) of Research Directive, Blue Card Directive and Students Directives. However, Member States may allow applications for EU Blue Card once already in the country, Article 10 Blue Card Directive.

⁹¹ No accumulation of rights under the different immigration status to which the same individual may be entitled is possible under EU immigration law, see for instance Article 3(2)(e) Blue Card Directive. A family member of Union citizen will thus have to choose whether to benefit from EU free movement law but remain dependent on his/her spouse as the source of rights or undergo much more cumbersome admission procedures in order to gain independent rights.

⁹² Blue Card Directive also allows parallel national schemes, Article 3(4).

⁹³ E.g. Cases C-415/93 *Bosman* [1995] ECR I-04921, C-292/89 *Antonissen* [1991] ECR I-00745, 53/81 *Levin* [1982] ECR 01035, 48/75 *Royer* [1976] ECR 497; 157/79 *Pieck* ECR [1980] 02171; 118/75 *Watson and Belmam* [1976] ECR 118; C-363/89 *Roux* [1991] ECR I-273; C-459/99 *MRAX* [2002] ECR I-6591.

nationals generally. This question is addressed below.

3. *Decreasing Costs: Admission Procedures*

EU immigration policy links admission of third-country workers to the availability of open vacancies in specified employment sectors,⁹⁴ with a protective preference secured for EU labor force.⁹⁵ Research and Blue Card Directives are coherent with this approach: both include a mechanism of employer authorizations and quotas that allows each Member State to refuse admission of economic immigrants; this is a *de facto* opt-out available to the Member States from application of the Directives.⁹⁶ Those Member States that set their admission quotas and employer authorizations above zero, may subject admission of third-country workers into their territories and labor markets to the so-called “labor market test”,⁹⁷ which for the holders of EU Blue Card may be made anew on each renewal.⁹⁸ To allow adjustments to the divergent and constantly changing needs of the national labor markets, many provisions relating to the acquisition and retention of residence rights remain undefined on Union level, causing variations from one Member State to the other, in particular financial requirements and salary thresholds,⁹⁹ conditions for the loss of status,¹⁰⁰ and access to the labor market.¹⁰¹ EU

⁹⁴ Policy Plan on Legal Migration COM(2005) 669.

⁹⁵ Articles 11(3)(a) and 14(3) Long-Term Residence Directive, 8(2) BC Directive.

⁹⁶ A direct opt-out from EU immigration law is exercised by the UK, Ireland and Denmark.

⁹⁷ Article 8(2) Blue Card Directive, Article 14(2) Family Reunification Directive, Article 14(3) Long-Term Residence Directive as regards admission of long-term residents for employment from one Member State to another; Research Directive does not regulate access to the labor market outside the pre-approved research project with pre-approved employer.

⁹⁸ Articles 8(2) and 12(2) BC Directive.

⁹⁹ Articles 4(2)a and 7(3-6) Blue Card Directive, Article 6(2)b Research Directive, Articles 5(1)a, 7(1) and 15(2)a Long-Term Residence Directive, Article 7(1)c Family Reunification Directive.

¹⁰⁰ Due, inter alia, to non-compliance with the financial and other variable conditions on the renewal of permit. In some cases, divergences arise also due to variations in national implementation: for instance, although Article 9 Long-Term Residence Directive contains mandatory conditions for the loss of status, Finnish law implementing of this directive allows for longer periods of absence without the loss of status, §58 Utlänningslag 30.4.2004/301.

¹⁰¹ Research Directive does not specify whether researchers may engage in economic activities other than research and teaching, while its Article 4(2) allows Member States adopt more favorable provisions, presumable including on access to work. Article 12 Blue Card Directive on access to economic activities leaves scope for significant variations between Member States. According to Article 14 Family Reunification Directive, access to employment for family members follows the

and national residence permits may lead parallel co-existence and Member States may issue either to economic migrants.¹⁰² While the intention is clearly to ensure a match between immigrant workers and the local demand for labor, avoiding rigidity that could result from fixing the rules at the Union level, for highly-skilled third-country workers such variations between Member States create uncertainty, making immigration to the EU less attractive.

According to the human capital theory, the choice of whether and where to move depends on the ability of the migrant to predict the value of immigration option, in other words the total earnings from immigration, which is a function of the duration of stay, the rights of migrants, and the wage differential compared to the alternative destinations (including staying at home). Scarcity of any of these factors, e.g. wage differential that in Europe is lower than in the US,¹⁰³ can be compensated by the other factors, such as the duration of stay, stronger protection of the rights of migrants, and overall clarity of immigration rules. Inability to forecast future earnings at destination creates a potential cost for migrants and could act as a deterrent, lowering the total volume of immigration, postponing migration¹⁰⁴, or causing re-migration.¹⁰⁵ High degree of uncertainty over immigration rules (admission, residence length, rights and treatment) in the host state increases migration costs and renders the destination less attractive. In order to enhance selectivity, clarity and predictability of immigration rules should be progressively increased and harmonized for immigrants with the desired skills. A European policy to attract highly-skilled workers requires more boldness if it is to affect the actual composition of immigration flow to any perceptible degree.

national deviations for the main migrant and allows additional national variations under Article 14(2).

¹⁰² Article 13 Long-Term Residence Directive.

¹⁰³ One of the non-immigration-law factors that contribute to the self-selection of immigrants with lower human capital in Europe than e.g. in the United States is lower income dispersion and more progressive social policies in the EU. J. Grogger and G. H. Hanson, 'Income Maximization and the Sorting of Emigrants Across Destinations' [2007] www.princeton.edu/~ies/Spring07/HansonPaper.pdf; G. J. Borjas, 'The Economics of Immigration' [1994] XXXII Journal of Economic Literature ; Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009).

¹⁰⁴ Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 50.

¹⁰⁵ MIREM data on return of Maghrebi immigrants from the EU and J.-P. Cassarino (ed) 'Return Migrants to the Maghreb: Reintegration and Development Challenges' [2008] RSCAS/EUI <http://www.mirem.eu/>.

4. *Increasing Benefits: Length of Stay and Security of Residence*

If immigration is an investment into the individual's future, the value of immigration option is directly proportional to the length of residence at the destination, i.e. the period during which the return on investment is reaped. Recent experiences in Europe show that temporary migration schemes are not sufficiently attractive for highly-skilled immigrants.¹⁰⁶ The pay-off period on immigration is reduced for temporary migrants, while home-specific human capital valuable in the case of return is depreciated during the stay abroad.¹⁰⁷ Temporary character of migration may even lead to a negative self-selection and a drop in the level of skills because temporary immigrants have fewer incentives to invest in the destination-specific human capital.¹⁰⁸

Research and Blue Card Directives offer only temporary stay; there is no underlying presumption or expectation that the workers will settle, nor is there a right to permanent settlement from the day of entry or anytime soon after. In order to secure residence and employment rights, third-country nationals must apply for the long-term residence permit after having resided continuously in the EU for at least five years.¹⁰⁹ The likelihood of being able to apply for this permit depends on whether the immigrant succeeds in preserving continuous legal residence over a five-year period. The combination of restrictions on employment and geographic mobility with tying residence rights to constant availability of employment make it more difficult for Blue Card holders and researchers to fulfill the residence requirement as compared to other third-country nationals.¹¹⁰ This makes those who come to the EU for skilled employment

¹⁰⁶ This was the conclusion of numerous commentators of the original German "green card" scheme for IT immigrants. See for instance M. Doudeijns and J.-C. Dumont, 'Immigration and Labor Shortages: Evaluation of Needs and Limits of the Selection Policies in the Recruitment of Foreign Labor' [2003] OECD.

¹⁰⁷ T. Liebig, 'Migration Theory from a Supply-Side Perspective' [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF.

¹⁰⁸ B. R. Chiswick, 'Are Immigrants Favorably Selected? An Economic Analysis' in C. D. Brettell and J. F. Hollifield (eds) *Migration Theory: Talking Across the Disciplines* (Routledge 2000) 60-61.

¹⁰⁹ The general rule is five years of residence in the same Member State. Blue Card holders may accumulate residence periods in different Member States but must reside continuously in the same Member State for at least two years immediately prior to the application for the long-term resident status (Article 16 Blue Card Directive). Family members of Blue Card holders may still be required to accumulate five years of residence within only one Member State (Article 15(7) Blue Card Directive).

¹¹⁰ Articles 7(2), 13(1) and 16 Blue Card Directive and Article 4(1) Long-Term Residence Directive; Article 8 Research Directive specifies that residence permits

comparatively worse off than other migrants, because the general rule of the Long-Term Residence Directive only requires employment at the time of the application for status and not throughout the five preceding years.¹¹¹ Researchers are in an even worse situation because they (1) cannot accumulate periods of residence in different Member States and (2) could fall outside the scope of the Long-Term Residence Directive altogether pursuant to Article 3(2)e.¹¹²

EU long-term residence rules may be counterproductive for achieving EU policy goals. On the one hand, their very existence undermines the temporary character of labor immigration, one of the objectives of EU immigration policy; on the other hand, long-term residence rules fail to lower the costs of migration by securing a longer period of returns on migration for “wanted” migrants. Despite the weak attempts to facilitate acquisition of the long-term resident status for Blue Card holders, the combination of various rules clearly favors non-economic migrants. While highly-skilled workers are more internationally mobile than their low-skilled counterparts,¹¹³ for many highly-skilled immigrants, especially those from poorer and less stable countries, stability and participation in the host society may be an additional non-monetary benefit of migration, which is already offered by the traditional destination countries. Europe may lose attractiveness if it fails to match the “talent for citizenship

should be valid for at least one year, but typically both research and Blue Card permits are valid for less than five years, and should thus be renewed at least once before the worker qualifies for acquisition of long-term residence permit; the conditions for admission should be fulfilled on each renewal of permit, Article 9(1)b Blue Card Directive and Article 8 Research Directive.

¹¹¹ Article 5(1)a Long-Term Residence Directive refers to “stable and regular resources” at the time of application for the permit: thus both at the time of application and prior to that the resources may come from sources other than work, decoupling legality and continuity of residence from the situation in the employment market. This, however, is not so for researchers and Blue Card holders, whose permits are linked directly to their employment.

¹¹² Member States diverge on this point, see Report from the European Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (28.9.2011) COM(2011) 585 final.

¹¹³ A. Takenaka, ‘Secondary Migration: Who Re-Migrates and Why These Migrants Matter’ [2007] Migration Policy Institute www.migrationinformation.org/Feature/print.cfm?ID=597; G. J. Borjas, ‘Labor Economics’ [2005] 317-319; A. Solimano, ‘The International Mobility of Talent and its Impact on Global Development’ 08 UN University Discussion Paper [2006]. Positive correlation between education and mobility was also noted in the European context, see A. Turmann, ‘A New European Agenda for Labor Mobility’ [2004] CEPS Brussels.

exchange” offered elsewhere.¹¹⁴ Treating “wanted” migrants as “visitors” makes them “less likely to come in the first place”.¹¹⁵

5. *Increasing Benefits: Labor Market Size*

Other things being equal, more populous destination countries are more attractive for migrants, especially the highly-skilled, because they maximize career choices¹¹⁶ and offer wider consumption options.¹¹⁷ The size of potential labor market matters more for the highly-skilled:¹¹⁸ as workers become more specialized, a limited local labor market is less likely to offer sufficient breadth for lifetime career development.¹¹⁹ For the highly-skilled, “countries with very specific skills requirements are less attractive than those with a more ample demand for skills, as future employment perspectives will be more limited in the former.”¹²⁰

EU law limits employment opportunities of migrants both geographically and by type of economic activity. Only long-term residents (independently of their profession) have a general right to work in the host Member State. Access to the labor market for Blue Card holders and researchers is limited to a specific job with a specific employer; switching jobs *must* be authorized each time, while switching to a branch that does not meet the criteria established in the Directives will lead to a loss of residence

¹¹⁴ M. Ruhs and P. Martin, ‘Numbers vs. Rights: Trade-Offs and Guest Worker Programs’ [2008] 42 1 IMR; A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] [2006] 18 NY Univ. L. Rev.

¹¹⁵ J. Wickham, ‘A Skilled Migration Policy for Europe? in European Governance of Migration’ [2008] www.migration-boell.de (18.01.2010).

¹¹⁶ A. Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimens’ [2006] 18 NY Univ. L. Rev. This is consistent with the gravity model of immigration developed by Zipf (1946), see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 30. See also R. Iredale, ‘The Need to Import Skilled Personnel: Factors Favouring and Hindering its International Mobility’ [1999] 37 1 International Migration 90.

¹¹⁷ Migration is responsive to availability of amenities and overall quality of life, see Ö. B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 34-36.

¹¹⁸ T. Bauer and A. Kunze, ‘The Demand for High-Skilled Workers and Immigration Policy’ (Feb. 2004) 4274 Centre for Economic Policy Research Discussion Paper.

¹¹⁹ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 318. In some highly-skilled careers, there is even an expectation of geographic mobility without which career progression is stalled, see S. Morano-Foadi, ‘Scientific Mobility, Career Progression, and Excellence in the European Research Area’ [2005] 43 5 International Migration 144.

¹²⁰ T. Liebig, ‘Migration Theory from a Supply-Side Perspective’ [2003] 92 Discussion Paper Research Institute for Labour Economics and Labour Law www.faa.unisg.ch/publikationen/diskussionspapiere/dp92.PDF.

permit.¹²¹ The right to change jobs for Blue Card holders is circumvented further by tying their residence rights to the continuity of employment.¹²² This reduces attractiveness of the EU as a destination for the “wanted” immigrants because workers with high professional qualifications are more likely to change jobs and occupations.¹²³ Difficulty in switching between various economic activities was one of the reasons for failure of the German “green card” scheme.¹²⁴ “Restricting migrants’ employment to specific employers [...] is likely to have adverse consequences for the employment prospects of resident workers and for the efficiency of the labour market[; i]t can encourage employers to prefer migrants over resident workers who have free choice of employment”,¹²⁵ creating social dumping and undermining the 2020 Strategy goals.¹²⁶

Geographically, residence and employment permits established in EU law and marked “EU” permits are limited to the issuing Member State and do not grant a right to work and reside outside its borders.¹²⁷ Residence and economic activities in another Member State must be authorized anew on each relocation. Although the Directives contain provisions regulating mobility between Member States, the effect of these provisions on mobility is restrictive.¹²⁸ Even long-term resident status, which is supposed to secure residence rights and facilitate mobility, is easily lost as a direct consequence of mobility both within the EU and between the EU and

¹²¹ Residence of researchers is tied to a hosting agreement with a particular employer for a particular project, Articles 7(1)(b) and 10(1) Research Directive; Articles 9(1) and 12(2) Blue Card Directive.

¹²² Blue Card permit may be withdrawn if unemployment lasts longer than three consecutive months or if it occurs more than once during the validity of Blue Card, see Article 13 Blue Card Directive. The European Convention on the Legal Status of Migrant Workers obliges France, Italy, Portugal, Spain, Sweden and the Netherlands to allow at least five months’ unemployment prior to withdrawal of residence permit.

¹²³ D.G. Papademetriou and K. O’Neil, ‘Selecting Economic Migrants’ in D.G. Papademetriou, ‘Europe and Its Immigrants in the 21st Century’ [2006] Migration Policy Institute 236.

¹²⁴ H. Werner, ‘The Current “Green Card” Initiative for Foreign IT Specialists in Germany, in International mobility of the Highly Skilled’ [2001] OECD.

¹²⁵ M. Ruhs, ‘Economic Research and Labour Immigration Policy’ [2008] 24 3 Oxford Review of Economic Policy 413.

¹²⁶ One of them being employment: Communication from the Commission, *Europe 2020 A strategy for smart, sustainable and inclusive growth* (3.3.2010) COM(2010) 2020, p. 8.

¹²⁷ For all groups of migrants, the second Member State must grant a permit to reside in order to move within the Union: Article 19 Long-Term Residence Directive, Article 18 Blue Card Directive, Article 13 Research Directive.

¹²⁸ A. Kocharov, ‘What Intra-Community Mobility for Third-Country Workers?’ [2008] 6 E.L.Rev. 913 – 926, S. Iglesias Sanches, ‘Free Movement of Third-Country Nationals in the European Union?’ [2009] 15 6 E.L.J. 791–805.

non-EU countries.¹²⁹ Blue Card Directive explicitly prohibits mobility in the EU during the first 18 months of residence in *each* Member State; thereafter conditions for admission to another Member State equal the conditions for first admission into the Union.¹³⁰ If anything, these provisions increase certainty: there is no EU-wide labor market.¹³¹ Surprisingly, the workers who are supposedly the most “wanted” and whose availability should reduce skill shortages in the EU, are being penalized by an outright ban on their geographic mobility. This is in line with the concealed goal of reducing competition for highly-skilled immigrants between Member States. Having established a “level playing field” between themselves, Member States remain disadvantaged in the international arena: a highly-skilled third-country worker might have only one plausible employer in the host Member State due to the structure of its labor market; in a situation where a change of employer takes place, either because of a career move or because the job is no longer available, a rule facilitating admission and preserving residence status in another Member State could induce the migrant to stay in the EU. Without such rule, onward migration from the EU becomes more likely. This is especially so for Blue Card holders, who might see their residence right withdrawn after three months of unemployment in their Member State of residence.¹³²

The mismatch between the connotation of permits as “EU” permits and their substance, limited to the issuing Member State, creates a deceptive impression of the EU as a single immigrant destination, especially as regards the “Blue Card” permit, which was explicitly designed to send a “clear signal” that “highly skilled people from all over the world are

¹²⁹ Twelve months of absence from the territory of the Community or six years of absence from the issuing Member State trigger a loss of status. Longer absences are permitted for Blue Card holders; however, Member States may limit this extension to cases where the absence is due to the exercise of economic activities or study in the country of origin (Article 16(4) and (5) Blue Card Directive). The status is confined to the issuing Member State and its acquisition *ex novo* in other Member States is subject to the same conditions as in the first Member State. A loss of long-term resident status in one Member State may lead to withdrawal of or refusal to renew a residence permit in another Member State (to which the person has relocated pursuant to Chapter III Long-Term Residence Directive) and initiation of removal procedures to a non-EU country even where other conditions for residence continue to be met (Article 22(1)b Long-Term Residence Directive). Member States, however, must allow facilitated re-acquisition of status to compensate for this drawback, though not necessarily re-admit.

¹³⁰ Article 18 Blue Card Directive.

¹³¹ A. Skordas, ‘Immigration and the Market: the Long-Term Residence Directive’ [2006] 13 Columbia J. of E.L. 201.

¹³² Article 13 Blue Card Directive.

welcome in the European Union”.¹³³ Obviously, creating an “EU” permit with a name reminiscent of the US Green Card is likely to “have an effect on the expectations that migrants have regarding their life” in Europe,¹³⁴ in particular as regards both stability and geographical breadth of residence and employment rights. This disinformation may lead to suboptimal immigration choices resulting from the underestimation of costs and risks, and the overestimation of benefits of the “destination Europe”. Having realized their mistake, migrants will be more likely to re-migrate to destinations outside Europe.¹³⁵ Immigrants will waste their time and resources, the benefit of having attracted them will be short-lived, while the reputation of Europe as destination will be undermined. The Blue Card deception could also run counter to Article 3 of the ILO Convention 97 on Migration for Employment, which obliges its signatories – inter alia Belgium, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, UK – to “take all appropriate steps against misleading propaganda” relating to immigration.

It is regrettable that the Union fails to cash in on one of its greatest potentials. An EU-wide labor market is one of the main benefits that EU law could offer to its prospective immigrants.¹³⁶ Occupational and geographic mobility of resident third-country workers could be a “primary mechanism” for improving labor market efficiency¹³⁷ and enhance the “effective attainment of an internal market”.¹³⁸ When it comes to the exercise of economic activities, the EU seems incapable to translate its own policy goals into a binding law that would achieve them.

6. *Decreasing Costs: Family Reunification*

Inability to live with one’s own family is one of the most immediate non-monetary costs of migration. Following the differentiation principle, EU

¹³³ J. M. Barroso, SPEECH/07/650, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/650> (18.01.2010).

¹³⁴ W. Geis, S. Uebelmesser and M. Werding, ‘Why Go to France or Germany, if You Could Go As Well to the UK or the US? Selective Features of Immigration in Four Major OECD Countries’ [2008] 2427 CESIFO Working Paper 9 www.cesifo-group.org/wp; S. Peers, ‘Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’ [2009] 11 E.J. of Migration and L. 410.

¹³⁵ Ö.B. Bodvarsson and H. Van den Berg, *The Economics of Immigration* (Springer 2009) 264.

¹³⁶ Y. Schibel, ‘Mobility Rights in Europe’ in R. del Caz, M. Rodríguez and M. Saravia (eds) ‘Report of Valladolid. The Right to Mobility’ [2005] www.migpolgroup.com/documents/3183.html; S. Mahroum, ‘Europe and the Immigration of Highly Skilled Labour’ [2001] 39 5 International Migration.

¹³⁷ Recital 15 Blue Card Directive.

¹³⁸ Recital 18 Long-Term Residence Directive.

immigration law facilitates family reunion for “wanted” third-country nationals. Blue Card holders enjoy exemptions from some of the onerous conditions of the Family Reunification Directive: the requirements of the “reasonable prospects” of permanent residence, the minimal residence period, facilitation of integration requirements where they are applied, halved period for evaluation of applications, and immediate access to the labor market for family members.¹³⁹ Family unity of researchers should be “facilitated and supported”¹⁴⁰ though each Member State “decides to grant a residence permit to the family members of a researcher”¹⁴¹ without a binding EU standard.¹⁴²

Exercise of mobility between Member States is much more problematic for family unity of third-country workers. Although the Blue Card Directive offers Blue Card holders a possibility to accumulate periods of residence in different Member States for the purposes of acquisition of long-term residence permit (five years of continuous residence), there is no provision for a similar facilitation for their accompanying family members. Intra-EU mobility for family members of researchers is even more problematic because the Research Directive leaves the admission of family members to the discretion of Member States; thus, family members may face with different rules on their admission each time their researcher spouse moves between Member States. Not only does this create uncertainty about migration outcomes, but it may discourage the primary migrant from effectuating the move altogether. As an increasing number of spouses are themselves career professionals and participate in immigration choices, their position becomes equally important to that of the principle migrant.¹⁴³

7. *Increasing Benefits: Labor Market Access for Family Members*

Despite facilitated rules for family reunification outlined above, family members of researchers and Blue Card holders may find it more difficult, as compared to other immigrants, to access the labor market. This is so because Member States may restrict access to economic activities for

¹³⁹ Article 15 Blue Card Directive.

¹⁴⁰ Recital 18 Family Reunification Directive.

¹⁴¹ Article 9(1) Research Directive. Family reunification of researchers upon their mobility between Member States is governed by national law, see Recital 19 Family Reunification Directive.

¹⁴² It is recommended that Member States offer “favorable and attractive conditions and procedures” for family reunification of researchers. Point 3 Council Recommendation 2005/762/EC.

¹⁴³ D. Guellec and M. Cervantes, ‘International Mobility of Highly Skilled Workers: From Statistical Analysis to Policy Formulation, in International Mobility of the Highly Skilled’ [2001] OECD.

family members of any immigrant group “in the same way as the sponsor”.¹⁴⁴ Where the sponsor’s work permit is limited to one employer or branch, or sets an overall cap on the number of hours she may work, this may apply equally to all her family members. Not all family members of the highly-skilled migrants will necessarily qualify for employment under the Blue Card scheme or under the Research Directive; even those who do possess the necessary qualifications may be unable to find employment in the same branch due to the labor market structure of the host Member State. Children of Blue Card holders may be excluded from the labor market altogether for lack of requisite qualifications. Yet, the degree to which family members can compensate for the opportunity costs incurred by quitting a job at an alternative destination in order to follow the principle migrant has a major impact on destination choice.¹⁴⁵ This is why countries competing for the “wanted” immigrants increasingly allow spouses of the highly-skilled immediate access to their labor market.¹⁴⁶ In EU free movement of workers, liberal family reunification rules are a condition *sine qua non* for ensuring mobility of EU nationals.¹⁴⁷ Fortunately, the rules on access to work for family members of third-country workers are only minimum standards, not followed by all Member States.¹⁴⁸ It is nevertheless surprising that EU immigration law sets such low a standard that the objectives of EU immigration policy come in peril and must be rescued by non-application of what EU law allows.

8. *Decreasing Costs: Rights Protection*

It has long been recognized in EU free movement law that the protection of the rights of migrant workers plays a key role in their ability and willingness to migrate. The ECJ has developed the doctrines of direct effect, *effet utile*, and state responsibility in order to ensure the protection of the individual’s rights in EU law.¹⁴⁹ Third-country nationals benefit from these principles when they derive rights from Union-citizen family members¹⁵⁰ or EU service providers.¹⁵¹ These doctrines have equally been

¹⁴⁴ Article 14(1)b Family Reunification Directive.

¹⁴⁵ G. J. Borjas, *Labor Economics* (McGraw-Hill 2005) 321-327.

¹⁴⁶ This has been the case, for instance, in Australia and Germany, see A. Shachar, ‘The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes’ 185, 190.

¹⁴⁷ E.g. cases C-370/90 *Singh* (1992) ECR I-04265, C-60/00 *Carpenter* (2002) ECR I-06279, C-127/08 *Metock* (2008) ECR I-06241.

¹⁴⁸ K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers, T. Strik, ‘The Family Reunification Directive in EU Member States the First Year of Implementation’ [2007] Centre for Migration Law Nijmegen.

¹⁴⁹ Case 6/64 *Costa v ENEL*, Case 26/62 *Van Gend en Loos*, Case C-6&9/90 *Frankovich*.

¹⁵⁰ Case C-127/08 *Metock* (2008) ECR I-06241; Case C-34/09 *Zambrano*; Article 24(1) Directive 2004/38/EC.

¹⁵¹ Case C-43/93 *Van der Elst* (1994) ECR I-03803.

extended to the provisions of mixed external agreements with third-countries where these provisions regulate the rights of migrant workers.¹⁵² While a detailed discussion of all these instruments would go beyond the scope of this work,¹⁵³ it is important to note here that third-country nationals do benefit from rights that are directly applicable and enforceable both against their host Member State and against employers.

EU immigration law is different. First, the rights of third-country nationals are not set in the Treaty text itself but in the secondary legislation, which takes form of directives. This strips the rights from horizontal direct effect, making them directly enforceable in national courts only against the state but not against private parties (most importantly, not against employers).¹⁵⁴ Many provisions of EU directives on legal migration are difficult to enforce even against the state because their objectives are far from clear, their provisions are often optional and open-ended, leaving only *effet utile* as a last resort.

Second, equality with host state nationals is an exception in EU immigration law, and is often limited to narrow fields. Presumption of inequality is particularly strong as regards access to economic activities (secured on quasi-equal footing with nationals only for long-term residents) and rights related to services financed from the public coffer. The latter include access to education, housing, and tax benefits, which are protected at a minimum-standard level.¹⁵⁵ Equal treatment is more widespread as regards employment-related rights, such as working conditions,

¹⁵² Cases 12/86 *Demirel* (1987) ECR 03719, C-18/90 *Kziber* (1991) ECR I-00199, C-235/99 *Kondova* (2001) ECR I-06427, C-265/03 *Simutenkov* (2005) ECR I-02579.

¹⁵³ See *ex multis*, A. Evans, 'Third-Country Nationals and the Treaty on European Union' [1994] EJIL 5; K. Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' [1998] CMLR 35; J. Niessen, 'Overlapping Interests and Conflicting Agendas: The Knocking into Shape of EU Immigration Policies' [2001] EJML 3; J. Apap, 'Shaping Europe's Migration Policy New Regimes for the Employment of Third Country Nationals: a Comparison of Strategies in Germany, Sweden, the Netherlands and the UK' [2002] EJML 4; A. Baldaccini and H. Toner, 'From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law' in A. Baldaccini, E. Guild, H. Toner (eds) *Whose Freedom, Security and Justice?* (Hart Publishing 2007); E. Ozlem Atikcan, 'Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union' [2006] Sussex European Institute working paper, www.sei.ac.uk (05.02.2010)

¹⁵⁴ For more on (the absence of) horizontal direct effect of directives see, T. Tridimas, 'Horizontal Direct Effect of Directives: a Missed Opportunity?' [1994] 19(6) ELRev 621-636, P. Crig, 'Directives: Direct Effect, Indirect Effect, and the Construction of National Legislation' [1997] 22 6 ELRev 519-538, M. Lenz, 'Horizontal What? Back to Basics' [2000] 25 5 ELRev 509-522.

¹⁵⁵ Articles 12(c) Research Directive, 14 Blue Card Directive, 11 Long-Term Residence Directive.

recognition of professional qualifications and freedom of association, where equality without reservations is secured in the Charter of Fundamental Rights¹⁵⁶ and reiterated in all immigration Directives as well as in some external agreements of the EU.¹⁵⁷ Possibly, having the same rights secured in immigration directives and in the Charter also give these rights a direct horizontal effect, making them enforceable against employers without the need for national implementing measures.

EU law differentiates the rights accorded to different immigrant groups, but the criterion employed for raising the level of rights is not the skill or economic activity of migrants. Priority instead is placed on securing rights for those already settled, while rights of newcomers persistently remain sidelined. This is in line with the CIP objective of “fair” treatment,¹⁵⁸ while at the same times undermining the objective of managing the composition of immigration flows. Equal treatment rights are widest for long-term residents, enhanced for Blue Card holders, and significantly reduced for researchers. The final policy choice is relegated to the national level, as each Member State may enhance differentiation by raising the level of rights for any immigrant group and facilitating naturalization (and thus the access to full rights of Union citizenship). Considering the low minimal level of rights ensured in EU law, the contribution of EU immigration law to positive self-selection of migrants is negligible.

IV. SUMMARY AND DISCUSSION

The table below summarizes the results of the combined effect of the four Directives in terms of the costs and benefits imposed on researchers and Blue Card holders. For each of the areas regulated by EU immigration law, the middle column reflects the cost or benefit effect that should result to the highly-skilled in order to enhance their self-selection, as suggested by economics of migration; the last column reflects the corresponding

¹⁵⁶ Articles 27-31 EU Fundamental Rights Charter.

¹⁵⁷ Articles 12 Research Directive, 14 Blue Card Directive, and 11 Long-Term Residence Directive. Equal treatment with host Member State nationals as regards working conditions is also granted in the external agreements of the EU – op.cit 84-86.

¹⁵⁸ Policy Plan on Legal Migration (2005) COM 669 final; S. Castles, ‘Back to the Future? Can Europe Meet its Labor Needs through Temporary Migration?’ [2006] 1 Int. Migration Institute Working Paper 27. Single Permit Proposal, currently negotiated in the Council, has been qualitatively transformed from a horizontal instrument that protects rights of all third-country nationals who are allowed to work in the EU, into yet another vertical directive that regulates rights only of those who are admitted under a certain type of residence permit: compare the scope of the original proposal COM (2007) 638 final, Articles 2(b) and 3(1)b, to the amended version, interinstitutional file 2007/0229 (CNS) (30.06.2009), Articles 2 and 3.

situation under EU immigration law. Each factor is taken in isolation, other factors deemed equal. The inconsistencies between what is required to achieve the objectives of the CIP and the actual effects of EU Directives are highlighted in Bold.

	Economics of migration	EU immigration law
<i>Admission criteria</i>	COST Admission linked to employment	COST Admission linked to employment
Admission procedure	BENEFIT Migration costs due to bureaucracy are high for all migrants but low for “wanted” migrants	COST Migration costs due to bureaucracy and complexity are uniformly high for all migrants
Labor market size	BENEFIT Enhanced geographic mobility for employment	COST Restricted geographic mobility for employment
Employment mobility	BENEFIT Right to change jobs / branch / employers	COST Right to change jobs / branch / employer restricted
<i>Family reunification</i>	BENEFIT Facilitation of family reunification rules	BENEFIT Facilitation of family reunification rules
Rights of family members	BENEFIT Broad and immediate employment rights for admitted family members	COST Access to employment for family members may be significantly limited
<i>Length of stay</i>	COST Temporary stay linked to employment	COST Temporary stay linked to employment
Security of residence rights	BENEFIT Clear possibility of permanent stay for “wanted” migrants	COST More difficult to attain permanent stay for “wanted” migrants

Non-discrimination	BENEFIT Strong non-discrimination, equal treatment and anti-racism policy	COST Equal treatment with nationals is only secured in selected fields as a derogation from the unequal treatment standard
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The table is revealing. In six cases out of nine, EU immigration law establishes rules contrary to the objectives of EU immigration policy, imposing a cost on migrants instead of conferring benefits. While economics of immigration suggest that only two of the nine factors should be restrictive in order to implement selective immigration policy biased towards the highly-skilled, the only liberalization granted to “wanted” immigrants in EU law is facilitation of family reunification for Blue Card holders. The other eight factors – and for researchers all nine – amount to an overall restriction, which will reduce the net benefits of migrating to the EU. This is a surprising result if we believe in the scarcity of “wanted” workers both in the EU and globally. Under a shortage of highly-skilled workers, provisions of immigration law that decrease net benefits to this group of migrants can be expected to cause a fall in their overall number and a loss for the destination economy and its business. Economic considerations and interests of national economies are what Member State governments and EU institutions argue to justify the adoption of EU immigration law. Yet, the substance of the adopted law jeopardizes the achievement of these goals.

Evaluation of EU law on legal economic immigration depends largely on our benchmark. The Directives enhance legal venues for economic migration in comparison to the previous European rules. Western Europe evolved from a low-skilled labor immigration policy in the 1960s to a zero labor immigration policy in the 1990s, and a temporary admission policy for the highly-skilled workers presently. These are radical changes over a very short time span. Both the magnitude of change and the brief period available for its implementation present a considerable challenge that might be insurmountable simply because of the natural length of human life cycle. Measuring the directives by reference to the rights of nationals of the Member States also presents a coherent picture, considering the restrictions on free movement of workers from new Member States and the fact that naturalization policies remain within the sole competence of each European nation. Yet, these comparisons do not reflect the reality that in competing for the “wanted” immigrants, the EU and its constituent countries do not challenge themselves or their own citizens but the traditional countries of immigration.

The goals of EU policy on legal immigration reveal a thoroughly confused vision of European policy-maker. Presuming that the objectives as set are legitimate and desirable, they are incoherent between themselves. Thus, the objective of eliminating competition between Member States for highly-skilled third-country workers, in situation where no unified EU immigration space is created, is counterproductive to the objective of attracting these workers to Europe; the objective of temporary labor immigration runs counter to the objective of "fair treatment" of third-country nationals, when one of the criteria set for such treatment is availability of stable residence rights; EU development objectives might also come in conflict with the objective of attracting the highly-skilled, which may contribute to brain drain in the countries of origin despite the framework of circular migration. Such examples abound. Inconsistencies in the conception of EU policy on legal economic immigration certainly are unhelpful at the implementation stage. Claims of the Council and the Commission that Europe as a whole needs third-country workers with high professional skills are difficult to reconcile with the other claims of these same actors to the effect that labor needs vary across Member States. Controversial political nature of immigration complicates the adoption of EU immigration law, resulting in multiple optional clauses, which *de facto* delegate the finality of the CIP to national level. The underlying assumption seems to be that immigrant admission and selection rules are somehow different from the rules regulating the rights of immigrants once admitted. Yet, economics of immigration predict that both immigrant-selection and rights-regulating provisions affect the volume and the composition of immigration flow. The artificial division of labor between the Union and national levels splits the capacity to select, complicating the achievement of EU policy goals more.

The picture is equally contradictory in substance of the adopted rules. The overall approach of EU immigration law follows economics of immigration: the law differentiates between the different groups of immigrants by varying both the admission criteria and the rights once admitted. However, these groups are not defined by their professional skills. This mismatch between the objectives of EU immigration policy and the structure of law undermine the attainment of EU policy goals. When it comes to the substantive rights accorded to "wanted" third-country workers, EU law imposes an overall cost on these migrants, rendering immigrating to Europe less attractive for them than for third-country nationals generally. It is not possible to attract the people without giving them benefits; offering benefits without discriminating between people by skill will not increase the share of the skills we desire. If economic considerations are the force of gravity that pull together policy and the law, then EU immigration law is drifting in outer space.

INROADS TO SOCIAL INCLUSION IN EUROPE'S SOCIAL MARKET ECONOMY: THE CASE OF STATE AID SUPPORTING EMPLOYMENT OF WORKERS WITH DISABILITIES

Delia Ferri and Mel Marquis *

Since the 1990s if not earlier, the asymmetry in the European Community/European Union between market-making free trade rules and distributive mechanisms sometimes known as 'the social' has been perceived by many as at least a potential factor contributing to a legitimacy crisis in European integration. There are no easy solutions to this state of affairs, but the European Union can take small steps toward an enhanced equilibrium. A small but potentially important step was taken in the Lisbon version of the Treaty on European Union, when the notion of a 'social market economy' was explicitly embraced. But what do these alluring words mean? They are left formally undefined and they have been freed, we submit, from their historical and conceptual moorings. It is up to European practice and scholarship to determine whether and how the idea will take on a life of its own in its new context. In this paper we consider a narrow but not insignificant policy field that suggests itself as a possible example of Europe's social market economy principle in action, namely, the use of state aid rules to encourage Member States to support the hiring and accommodation of persons with disabilities. In exploring the legal norms and policy in this area, we put forward some tentative suggestions about how the idea of a social market economy for Europe might be framed as the EU passes through the next phase of the integration project.

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I. INTRODUCTION

A fundamental part of the original and enduring mission of European Union is to focus on preventing obstacles to competition and to ensure the smooth functioning of the internal market. As a consequence of decades of negative integration and certain positive initiatives such as the Treaty-based monetary union (beleaguered of late, to be sure), European economic integration has progressively reduced the relative capacity of the Member States to influence the course of their own economy and to reach self-defined policy goals, even if the constraints placed on purely autonomous state action are seen as part of the price for a generally positive process of system-building, institutional coordination, mutual support and so on.

With reduced policy space at the national level, which may be exacerbated in times of painful economic adjustment, we suggest that it is increasingly incumbent on the EU to pursue its various objectives and tasks in a manner that is consistent with, and supports the aims of, adequate social protection and correction of market failures. The imperatives of a ‘highly competitive social market economy’, now explicitly incorporated in the Treaty on European Union,¹ require the EU to play a more active role in pursuing goals of social equity in tandem with its other tasks. The fact that

¹ Article 3(3) of the Treaty on European Union. These five pregnant words are immediately followed by a reference to the goals of full employment and social progress. The wording of Article 3(3) suggests that a highly competitive social market economy is one of the elements – together with economic growth, price stability and environmental protection – which constitute the basis for Europe’s sustainable development. Within that context of sustainable development, the syntax of Article 3(3) indicates that full employment and social progress are to function as guideposts for the interpretation of the social market economy concept. Other guideposts undoubtedly include Article 119 of the Treaty on the Functioning of the European Union (TFEU), which requires the Member States and the Union to respect the principle of an open market economy with free competition; and Protocol 27 on the Internal Market and Competition, which confirms that the Union’s internal market necessarily includes a system of undistorted competition. On the vitality of Protocol 27 and the continuity between the Protocol and its predecessor, Article 3(1)(g), see Case C-52/09 *Konkurrenzverket v Telia Sonera Sverige* (ECJ, 17 February 2011), paras 20–22. The latter judgment seems to lay to rest somewhat alarmist notions that the formal ‘demotion’ of the once-sacrosanct Article 3(1)(g) may have signalled a fundamental decision to shift from a competitive order toward a more ambiguous regime embracing, for example, industrial policy and the establishment of ‘European champions’ as being among the Union’s central occupations. For discussion, see, eg, Josef Drexler, ‘Competition Law as Part of the European Constitution’, in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing and Verlag CH Beck 2009) 661–69.

the meaning of the words ‘social market economy’ is contested,² sometimes misunderstood,³ and laden with specific historical associations⁴ does not mean that its development at a new, supranational level is either foreclosed or predestined.

In what appears to be a lapse of drafting, the Lisbon Treaty only introduced a single reference to the idea of a social market economy. Nevertheless, this reference should be seen in light of a general trend toward a more serious commitment on the part of the EU to becoming more socially oriented. Some might find it hard to believe that such a

² See, eg, Constanze Semmelmann, ‘The European Union’s economic constitution under the Lisbon Treaty: soul-searching among lawyers shifts the focus to procedure’ (2010) 35 *European Law Review* 516, 521-22, with references; Constanze Semmelmann, *Social Policy Goals in the Interpretation of Article 81 EC* (Nomos Verlagsgesellschaft 2008) 148-53.

³ As Christian Joerges and Florian Rödl have explained, the conceptual content of the social market economy, which is to a large extent a product of German neoliberal philosophy (with an emphasis on the idea that social protection measures had to be *marktkonform* and thus consistent with the competitive order), albeit an emphatically humanistic brand of neoliberalism, was generally lost on those at the European Convention of 2002-2003 who secured its inclusion in the Constitutional Treaty. Joerges and Rödl, “Social Market Economy” as Europe’s Social Model?, in Lars Magnusson and Bo Stråth (eds), *A European Social Citizenship? Pre-conditions for Future Policies in Historical Light* (Peter Lang 2005) 125. At the level of the EU, the term was reduced essentially to a slogan that not many could disagree with. In a way, this might recall how, in the history of German party politics the term had cross-partisan appeal despite its close association with Ludwig Erhard and the CDU. See Jan Zutavern, ‘Just Liberalization? Ideas, Justification and Rhetorical Choice in 30 Years of German Employment Policy Making’ (Ph.D thesis, European University Institute 2011) 165.

⁴ It is not our intention to discuss this history in great detail, or to trace the genealogy of the concept of the social market economy or analogous concepts such as ‘social capitalism’. For further discussion, see, eg, Mel Marquis, ‘The Collocation of “Social” and “Market” in the Economy and Europe’s Elusive Social Identity in the Stardust of the Economic Constitution’, in Andrea Caligiuri, Giuseppe Cataldi and Nicola Napolitano (eds), *La tutela dei diritti umani in Europa: Tra sovranità statale e ordinamenti sovranazionali* (CEDAM 2010) 419. See also Christian Watrin, ‘The Principles of the Social Market Economy: Its Origins and Early History’ (1979) 135 *Zeitschrift für die gesamte Staatswissenschaft* 405. For a sharp critique of how the social market economy concept has in fact been (mis)implemented in Germany, with results contrary to what some of its progenitors might have hoped, see Ulrich Witt, ‘Germany’s “Social Market Economy”. Between Social Ethos and Rent Seeking’ (2002) 6 *The Independent Review* 365. For an extended analysis of Germany’s experience with the social market economy, see Umut Devrim Özbideciler, ‘Social Market Economy: An Inquiry into the Theoretical Bases of [the] German Model of Capitalism’ (Masters thesis, Graduate School of Social Sciences, Middle East Technical University 2003), available at <<http://etd.lib.metu.edu.tr/upload/1041896/index.pdf>> accessed 15 September 2011.

trend has taken hold at EU level, such as those feeling the squeeze of austerity programmes in Member States with unsustainable public debt. But while slow reaction and ambivalence often dilute the effectiveness of its initiatives, the EU is responding, in some measure and with all its idiosyncrasies, to the sovereign debt crisis. In particular, it has set up temporary support mechanisms for the Member States, to be replaced by a permanent 'European Stability Mechanism' (ESM) in 2013, that is, if an amendment to Article 136 TFEU is approved. Second, the EU, and more specifically, the Commission, has taken significant steps to ratify, as it were, aid measures adopted by Member States to address the crisis afflicting the real economy.⁵ The number of cases where aid was legally granted grew from 202 in 2003 to 636 in 2007 and to 964 in 2009.⁶ Moreover, in the throes of the crisis the Member States provided substantial support for the financial sector, with 300 billion euros in capital injections and almost 3 trillion euros' worth of guarantees.⁷ If we look at the so-called 'Europe 2020' areas⁸ (ie, research and development and innovation, environmental protection, regional development, broadband, SMEs, employment and training), we observe that, between 2004 and 2010, the Commission approved several aid measures (eg, with respect to R&D&I measures, 413 measures were approved as compatible, an additional 12 measures were declared not to contain state aid and only one measure was subject to a negative decision with recovery).⁹ We do not intend to discuss here the handling of the crisis, or the controversies surrounding it. But we note the heightened activity in the field of State aid as a contextual feature and propose to examine a more specific policy development that we hope can shed some light on what the notion of a social market economy might mean for the European Union.

In this article we suggest that the development of EU rules on state aid

⁵ For discussion of the effects of the financial crisis on the application of competition rules, see, eg, Jürgen Keßler, (2010) 'Rethinking Competition: State Aids and Competition Rules in the Age of the Financial Crisis', in Harold James, Hans-Wolfgang Micklitz and Heike Schweitzer (eds), *The Impact of the Financial Crisis on the European Economic Constitution*, EUI Working Paper Law 2010/05 <<http://cadmus.eui.eu/handle/1814/14055>> accessed 15 September 2011.

⁶ See also the pending cases charted at <http://ec.europa.eu/competition/elojade/isef/dsp_reg_main_3.cfm#pending> accessed 15 September 2011.

⁷ See Christoph Bertsch, Claudio Calcagno and Mark Le Quement, 'State aid and tacit collusion', EUI Working Paper ECO 2009/36 <<http://cadmus.eui.eu/browse?value=CALCAGNO%2C+Claudio&type=author>>; also available at <http://www.christophbertsch.com/wp-content/uploads/2011/01/STATE_AID_AND_COLLUSION_30092010.pdf> accessed 10 September 2011.

⁸ COM(2010) 2020 final.

⁹ COM(2011) 356 final.

targeted to promote the active inclusion in the labour market of persons with disabilities, ie, one of the most vulnerable groups in society, provides some basis for assessing the EU's early steps toward establishing a European social market economy. Our investigation also provides us with an initial glimpse of how the latter concept might come to be understood. Of course, we recognise that the 'social market economy' may be interpreted in ways quite different from the suggestions we make here. It might even lie dormant well into the future. But we think it better to grapple with the idea than to let it be, since it seems to reflect an affirmative choice with regard to the EU's aspirations and constitutional identity.

The remainder of this discussion is divided into six sections. Section 2 reviews the meaning and the main features of the traditional concept of the social market economy, and then considers how the social market economy has emerged in the EU legal context. Section 3 provides a general overview on the Treaty rules on state aid and how they relate to the social market economy, taking into account that, in the last couple of decades, they have assumed increasing importance and impact on national economic policies. We then analyse the EU's General Block Exemption Regulation (GBER), as well as other guidance documents and Commission decisions in the field of state aid policy, insofar as they aim at an enhanced recognition of the rights of persons with disabilities (Section 4). In light of this analysis, Section 5 discusses the use of State aid to protect and promote the rights of persons with disabilities as a 'test-bed' for Europe's social market economy. Section 6 concludes.

II. 'A HIGHLY COMPETITIVE SOCIAL MARKET ECONOMY, AIMING AT FULL EMPLOYMENT AND SOCIAL PROGRESS'

We will contend, in this article, that encouraging Member States, via the state aid rules, to create conditions favourable to the employment of persons with disabilities is a means to promote a *social market economy*. But this begs the question of how the latter term should be understood. We begin with the proposition that the social market economy is a problematic notion, and unless it is handled with care it is liable to invite confusion. For example, for the uninitiated the term may evoke the 'socialist market economy', a completely different creature found in, among other things, the Chinese constitution.¹⁰ But the social market

¹⁰ Following reforms dating back to 1978 under Deng Xiaoping, Article 15 of the Constitution (as amended in 1993) declares that the State practices a 'socialist market economy'. China's brand of (problematic) state capitalism need not be elaborated on here; suffice it to note that the socialist market economy in China leaves ample room for intervention in markets, and it is still characterised by weak independence of

economy should be seen as a concept with rich potential, a concept unburdened by its own historical and cultural legacy, and ripe for substantive development. It is likely to mean different things to different people based on, for example, whether stress is laid upon the word ‘social’ or, by contrast, on the words ‘market economy’. Hermeneutic cleavages may be an intrinsic risk of institutionalising these seductive, expansive words. And indeed, the various meanings of the ‘social market economy’, even within the German tradition, where the popular notion of the concept took on associations independently of and divergent from the original intellectual design, have complexified the term, making it ripe for misinterpretation. We do not propose a lengthy investigation into the fascinating intellectual, historical and cultural legacy of the social market economy. Much of the terrain has already been explored retrospectively in various academic treatments.¹¹ We condense the basics into the following summary.

The starting point for the social market economy is the conscious choice in favour of a system based on voluntary market transactions, in which competition, price signals and private law mechanisms such as contract and tort law are fundamental. This system – with constitutional safeguards against the excesses of power in both private and public form – is the competitive order famously advocated, with varying points of emphasis, by German intellectuals such as Walter Eucken, Franz Böhm and Wilhelm Röpke. But markets are invariably imperfect and incapable, in and of themselves, of meeting all the requirements of a socially just society that attaches value to the fulfilment of basic human needs.¹² The market was regarded as a necessary foundation for the (German) post-War society, but it had to be supplemented by adequate social policies. This realisation prompted Alfred Müller-Armack, a figure well-known from the folklore of European integration and of EU competition law, to observe in 1956 that ‘in a system of free competition it is possible for the social duties of

market regulators and a host of other structural difficulties left behind by Maoist reforms.

¹¹ For details and further references, see Semmelmann (n 2) and Marquis (n 4).

¹² The idea of social justice has of course been the object of deep-cutting critiques, based notably on the danger of ‘social justice’ being used as a means to consolidate the incumbency of privileged classes. On the other hand, we do not think that it follows from such critiques that an open market economy has no need for humane supplementary devices that include (involuntary) redistribution of wealth. On this latter point we think there is at least a patch of common ground between our point of view and that of the critics of social justice (or at least some influential ones), who seem to accept the state’s role in providing for certain minimal social welfare needs.

modern society to be carried out better than in the past'.¹³ According to Müller-Armack, '[t]he concept of a social market economy may therefore be defined as a regulative policy which aims to combine, on the basis of a competitive economy, free initiative and *social progress*'.¹⁴ However, what is not always obvious is that in advancing the notion that the 'market' and the 'social' can work side by side in harmony, where conflicts arose there was to be a hierarchy: in principle, measures of social protection were not permitted to violate the principle of well-functioning markets. Such measures were thus subject to a test of 'market conformity'. It is this hierarchy that is not easily visible from the term 'social market economy' taken in isolation and out of context.¹⁵

The nuances of the social market economy, as originally understood, were made still more obscure by the use of the term, in Germany, as a malleable political slogan. The popular version of the social market economy combines 'ideas from liberal thought, social welfarism, and corporatism', and allowed a wide berth for 'bilateral labor-market cartels'.¹⁶ With the concept of the social market economy absorbing such extraneous impurities, and with the general erosion of the distinction between that concept and the proverbial 'welfare state', many of those more in tune with the origins of the social market economy regard its implementation in Germany as a history of profound disappointment.¹⁷

But we now leave history to one side and propose to offer our tentative suggestions as to how a *European* conception of a social market economy, decoupled as far as possible from its specific cultural-national tradition, might develop and be interpreted and applied. We do not presume to

¹³ Müller-Armack, 'The Meaning of the Social Market Economy', in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan 1989) 83.

¹⁴ *ibid* (emphasis added).

¹⁵ cf Joerges and Rodl (n 3).

¹⁶ Witt (n 4), at 366 and 374 respectively.

¹⁷ The failures of the social market economy as implemented in Germany are described concisely by Witt (n 4). According to his account, the social market economy was essentially hijacked by rent-seeking German trade unions, who failed to take full account of the consequences of their wage demands on the national labour market, which grew increasingly rigid. The systemic moral hazard induced by a generous taxpayer-funded social safety net exacerbated these externalities, which in combination created a vicious circle since the side payments necessary to cover the needs of the excluded were largely funded by ever-increasing wage demands which in turn reinforced the rigidities in the German labour market. The high and persistent rate of unemployment, as Witt points out at page 373, was certainly not what the original promoters of the social market economy (Eucken, Müller-Armack, Erhard, etc.) had aimed for.

present a complete framework; indeed, such an endeavour would comport poorly with our sense that the idea of a social market economy for Europe requires time – for reflection, for further concrete action and for dialectic evolution – before its essence and boundaries can be fully understood. Here we merely suggest some building blocks that might be used for further construction and refinement.

We would start by recalling that the EU still has limited competences with regard to the establishment of a socially progressive and socially inclusive supranational polity. Yet it does not follow that the EU is powerless to pursue and achieve social aims; furthermore, the Union should not be seen artificially as a detached entity but as a key partner in a complex collaborative enterprise (not a frictionless one, surely) in which national and supranational competences and initiatives interact and can potentially reinforce each other. In addition, for all its fits and starts the ECJ has made progress in striking a better balance between free trade and national (social) rights,¹⁸ and the Court has at times shown itself willing to give precedence to such rights, particularly where the values protected are shared by a large number of Member States.¹⁹ Nevertheless, given the EU's well known limitations in relation to taxation and spending powers, the Union simply cannot be expected to be the focal point of a grand wealth redistribution system, regardless of whether or not such a system is to be

¹⁸ We do not suggest that there has been a sudden transformation of the EU's objectives and competences. Rather, we see recent developments as a continuation of and confirmation of an emerging social dimension to European integration. Much has been made of, among other things, the *Laval* judgment of the Court of Justice (Case C-341/05 *Laval un Partneri* [2007] ECR I-11767), which has been decried by some prominent observers as a reassertion of the primacy of a European integration project biased in favour of negative integration and against social protection. We think that erroneous conclusions may be drawn from that jurisprudence if it is read in isolation, and unless it is seen in the light of other notable efforts by the ECJ to integrate the EU's concerns for social protection into its economic policies. Illustrative in this regard, and to name but one example, would be the *Albany* judgment (Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751), where the Court disapplied the Treaty competition rules in circumstances where a collective bargaining agreement was concluded for the purpose of improving employment conditions.

¹⁹ We won't venture here to critically discuss the ECJ's case law on employment and social provisions, or to examine the principle of solidarity in the Court's judgments. Suffice it to note that, in many cases, the Court has simply interpreted the relevant EC/EU provisions in a way that permits the realisation of the social objective in question. See, eg, Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635. For discussion of many of the pertinent issues, see, among others, Miguel Maduro, *We the Court: The European Court of Justice and European Economic Constitution* (Hart Publishing 1998) (emphasising the 'majoritarian' principles that tend to guide the thinking of the Court's judges in their application of free movement rules).

desired. Despite the progressive recognition of social rights,²⁰ and despite achieving at least some degree of success with the open method of coordination and with soft governance in the field of social policies,²¹ the EU still lacks the capacity to deliver a wide range of social protection measures according to a criterion of distributive justice, and this constraint presents a fundamental challenge to idealistic notions of the social market economy.²² Thus, if Europe is to be a ‘more social Europe’, it will have to be so first within the confines of its powers and prerogatives, acting incrementally and depending on and expecting Member States to participate within their own spheres of (constrained) action and capacity. The notion of a European social market economy must likewise be modulated so as to fit the ambitions, capacities and constraints of supranational action.

Bearing in mind the limitations just described and the need for realistic expectations, we would further emphasise the need for an ahistorical and *forward-looking* approach as Europe’s social market economy incrementally materialises, and as it is dialectically conceptualised by observers. In that regard, we would put forward three general remarks before we proceed, in the following sections, to consider how the state aid rules have been used to support employment of persons with disabilities.

First, the term ‘social market economy’ in the Treaty on European Union introduces, we think, more than a rhetorical flourish with which to embellish political speeches. The authors of the Treaty have in fact constitutionalised the concept of a social market economy in Article 3 TEU. The latter Article should be also be considered in conjunction with the horizontal clause contained in Article 9 TFEU, which provides that: ‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of

²⁰ See, among others, Pasquale Costanzo, ‘Il sistema di protezione dei diritti sociali nell’ambito dell’Unione europea’, in Fernando Facury Scaff, Miguel Revenga and Roberto Romboli (eds), *Problemi e prospettive in tema di tutela costituzionale dei diritti sociali* (Giuffrè 2009) 103; Stefano Giubboni, *Diritti sociali e mercato* (Il mulino 2003); Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart Publishing 2003).

²¹ See Milena Büchs, *New governance in European social policy: the open method of coordination* (Palgrave Macmillan 2007).

²² On the limited competences of the Union in this context, see, eg, Loïc Azoulay, ‘The Court of Justice and the social market economy’ (2008) 45 *Common Market Law Review* 1335, 1337.

human health.’²³ These concerns, embedded within the TFEU, may constitute useful indicators of what the *social* component of a ‘social market economy’ might mean. It may also be significant that, after Lisbon, for most Member States and absent an ‘opt-out’, fundamental social rights are now firmly protected by the European Charter of Fundamental Rights, which has been elevated to primary law and given binding force. Conceptually at least, as EU law now stands, the ‘market economy’ and the ‘social’ are on what appears to be equal footing; and this *footing* is at the highest rank of law, even if by nature the social market economy is not fit to be endowed with direct effect under principles of EU law. Since both aspects of the concept have been given constitutional rank, it may be concluded that in situations where a conflict between ‘market’ and ‘social’ arises, neither can be permitted to extinguish the other. Instead, an effort must be made to apply a kind of practical concordance to these elements in order to give them a coherent co-existence. The notion of practical concordance in turn implies that the co-interpretation of ‘social’ and ‘market’ should be regarded as a dynamic undertaking, or as an ongoing dialogue.

But in other situations, and this is the second point, it should not be assumed that some hermetic shield separates the ‘social’ and the ‘market economy’. Scholars have long understood that the market is a socially constructed and inherently social institution; and while different models emerge to describe and influence the modes in which things of ‘value’ are exchanged – from command economy, to mixed economy, to the dreaded *laissez-faire* and all shades in between – those modes of exchange are fundamentally social, even if normatively they may or may not be attractive. A market is an institution in which participants express desires and in which those desires are fulfilled totally, partially or not at all. Moreover, to the extent that the modes of exchange accord with one’s conception of an edifying ‘good life’, they may also be said to have an ethical character. The market economy has thus been said to be not just a social institution but an ethical one, even if this perspective has obviously also been contested.

Third, not only is the social market economy, as it appears in the TEU, liable to be distinct from the concepts associated with the same term in the specific historical frame of the German experience, the authors of the Treaty also qualified the term and referred not just to a social market economy but to a *highly competitive* one. What conclusions could be drawn

²³ For discussion, see, eg, Giuseppe Bronzini, ‘Il modello sociale europeo nel Trattato di Lisbona’, in Franco Bassanini and Giulia Tiberi, *Le nuove istituzioni europee. Commentario al nuovo Trattato europeo* (il Mulino 2008) 109.

from this? It seems clear enough that among at least some of the drafters there must have been some lingering anxiety in importing the term ‘social market economy’ into the Treaty, and a feeling that it would be prudent to subject that notion to an implicit proviso: the adoption of the social market economy as a defining model is *not* to be construed in a manner contrary to the objective of a competitive economy. This already provides another prism through which to consider the meaning of Article 3(3) TEU, and it underlines once again that the social market economy concept that has been entrusted to the EU need not and should not be tied to past custom and usage. The words ‘highly competitive’ seem to reflect a recognition that a well-functioning economy producing value in a rivalrous system of international economic activity is desirable, and that robust economic performance should be preserved notwithstanding the express commitment to a market economy that responds to ‘social’ needs. It is axiomatic, given the context, development and imperatives of European integration, that such economic performance is to be pursued in an economy organised as a competitive order – this is made clear, as if it were necessary, by Article 119 TFEU and by Protocol 27 on the Internal Market and Competition, not to mention by the more detailed internal market and competition rules themselves. On the other hand, it is equally clear from the words that immediately follow ‘social market economy’ that the concept is one that aims at ‘full employment and social progress’. Taking ‘full employment’ as perhaps a telling sign of dissatisfaction with Germany’s own failure to implement a successful version of a social market economy, the structure of the overall expression – ‘highly competitive social market economy, aiming at full employment and social progress’ – appears to have teleological and dynamic content, and appears (to us) as pleading at least implicitly for an autonomous character in EU law. Finally, we recall that this highly competitive social market economy is portrayed as one of the essential bases for Europe’s sustainable development, the latter concept evoking the multiplicity of Europe’s constitutional objectives and, again, the dynamic process of construction that is to be guided by those objectives.

III. STATE AID CONTROL AND ITS ROLE IN EUROPE’S SOCIAL MARKET ECONOMY

According to Article 107(1) TFEU, any aid granted by a Member State or through state resources, in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is in principle, in so far as the aid affects trade

between Member States, incompatible with the internal market.²⁴ The consistent case law of the Court of Justice unequivocally holds that the aim of a certain measure, even if it is a social aim, is irrelevant when it comes to classifying it as state aid.²⁵ In other words, the social character of the measure is not sufficient to exclude it outright from the scope of Article 107. Hence, the ‘third sector’ does not enjoy any special dispensation based on organisational structure or charitable purpose. In the *Maribel bis/ter* case,²⁶ the ECJ ruled that state aid covers measures which, in various forms, mitigate the charges normally included in the budget of an undertaking and which, although they are not subsidies in the strict sense, are similar in character and have the same effect.

State aid is prohibited unless it has been notified to and approved by the Commission, in compliance with Article 108 TFEU. A measure must be considered compatible with the internal market if it: (i) has a social character and is granted to individual consumers, provided that such aid is granted without discrimination as regards the origin of the products; or (ii) makes good the damage caused by natural disasters or exceptional occurrences.²⁷ These categories, which are listed in Article 107(2), are automatically exempted from the prohibition of Article 107(1) TFEU; they are sometimes called *de jure* derogations. By contrast, and of greater practical importance, Article 107(3) TFEU provides that some other forms

²⁴ The Treaty does not contain any definition of State aid, and it is obvious that not every form of State intervention in the market can be regarded as State aid. However, the ECJ has developed a very broad notion of State aid, and it has clarified that aid is to be defined in relation to its effects, even if the measure must satisfy all the requirements of Article 107(1) TFEU: economic advantage, selectivity, State imputability, transfer of resources, distortion of competition, and effect on trade between Member States. See, among others, Richard Plender, ‘Definition of Aid’, in Andrea Biondi, Piet Eeckhout and Joe Flynn (eds), *The Law of State Aid in the European Union* (OUP 2004) 3; Jens-Daniel Braun and Jürgen Kühling, ‘Article 87 EC and the Community Courts: from Devolution to Evolution’ (2008) 29 *Common Market Law Review* 465; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP 2009) 149ff.

²⁵ Andrea Biondi and Luca Rubini, ‘Aims, Effects and Justifications: EC State Aid Law and Its Impact on National Social Policies’, in Eleanor Spaventa and Michael Dougan (eds), *Social welfare and EU law* (Hart Publishing 2005) 79.

²⁶ Case C-75/97 *Belgium v Commission (Maribel bis/ter scheme)* [1999] ECR I-3671.

²⁷ Article 107(2) TFEU also mentions ‘aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division’. This exemption is of limited practical relevance, and indeed it sows the seeds of its own destruction, providing that ‘[f]ive years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point’.

of aid *may* be considered to be compatible with the internal market.²⁸ In this regard, the Commission has significant discretion to carry out an assessment of economic, technical and policy considerations, and where appropriate, the Commission has room for manoeuvre to take into account the necessity of the aid as a means of achieving not only goals of a predominantly economic character, but also relevant social objectives.

Article 109 TFEU is the legal base for the adoption of secondary legislation in the field of state aid. By complementing the fundamental substantive rules with legislative acts that provide for certain exemptions and *de minimis* thresholds,²⁹ a rather elaborate system of rules has been established. Council Regulation 994/98³⁰ has given the Commission the power to adopt individual regulations in which it declares certain types of aid to be lawful (ie, 'compatible' with the Internal Market), and to exempt them from the obligation of prior notification.³¹ From 2001 to 2006, the Commission exercised this power by adopting a series of regulations,³² and

²⁸ Aid to promote the economic development of areas where the standard of living is abnormally low or where there is underemployment; aid to promote the execution of a project of common European interest; aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; and aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

²⁹ Consistent with the generally flexible posture toward state aid, the Commission has taken the view that *de minimis* aid does not have a significant effect on competition or trade between Member States, that they fall outside the scope of Article 107(1) TFEU, and that they do not require notification. Originally, *de minimis* aid was addressed in a soft law instrument (see [1996] OJ C68/9), but now such aid is covered by Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of [Articles 107 and 108 TFEU] to *de minimis* aid [2006] OJ L379/5.

³⁰ [1998] OJ L142/1.

³¹ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now Articles 87 and 88 TFEU respectively] of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1. The Commission can also adopt guidelines in this respect. In Case C-110/03, *Belgium v Commission*, the ECJ stated that the wording of Article 1 of Regulation 994/98 did not limit the Commission to laying down only compatibility criteria that conformed to past practice; the Commission thus has discretion to allow for some evolution of its policy, and may lay down new criteria, including criteria of a stricter character. On the move from the prior notification rule to the block exemption model, and on the economic consequences of this model, see Frederic Lossa, Estelle Malavolti-Grimal, Thibaud Verge and Fabian Berges-Sennou, 'European competition policy modernization: From notifications to legal exception' (2008) 52 *European Economic Review* 77.

³² Commission Regulations (EC) 68/2001 ([2001] OJ L10/20), 70/2001 ([2001] OJ L10/33), 2204/2001 ([2002] OJ L337/3) and 1628/2006 ([2006] OJ L32/29).

in 2008 the Commission adopted the General Block Exemption Regulation (GBER),³³ which replaced previous acts and harmonised all horizontal aspects applying to specific types of aid.³⁴ The GBER has also widened the array of exemptions, covering several categories of aid in areas which are particularly relevant for the Europe 2020 Strategy:³⁵ regional aid, investment related to small and medium sized enterprises (SMEs) and employment aid, aid for the creation of enterprises by female entrepreneurs, aid for environmental protection, aid for consultancy in support of SMEs and SME participation in trade fairs; aid in the form of risk capital; aid for research, development and innovation; training aid; and, most importantly for present purposes, aid for the employment of disadvantaged or disabled workers (Article 1(1) GBER).³⁶ Aid not covered

³³ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty - General Block Exemption Regulation [2008] OJ L214/3.

³⁴ In light of the need to revise State aid policy relatively frequently, the Commission also limited the GBER's period of application: the Regulation will expire on 31 December 2013 (Article 45 (2)).

³⁵ COM(2010) 2020 final. The new Europe 2020 Strategy puts a clear emphasis on social objectives: the EU should become 'a smart, sustainable and inclusive economy'. There has been an apparent and progressive shift from the 2000 'Lisbon Strategy' to the new 'Europe 2020'. In 2000, the European Council stated that Europe should commit itself to becoming the world's most competitive and dynamic economic area by 2010. To create the knowledge economy, the Lisbon Strategy provided for the enhancement of the working and living conditions of the European population. However, this social element is considered only a means to an end. In the Strategy it is asserted that a flexible social protection system not only does not impede growth but facilitates it. According to the new Strategy, 'Europe needs to make full use of its labour potential to face the challenges of an ageing population and rising global competition'. The 'social element' has been made more visible and more insistent. It seems clear that this shift of emphasis poses growing challenges for Europe's traditionally dominant ethos of market-building and free trade, movement and investment.

³⁶ The GBER does not apply to aid to export activities, aid contingent on the use of domestic products, aid in the fisheries, aquaculture, agricultural or coal sectors, regional aid for steel, shipbuilding, or synthetic fibres (Article 1(2)(3)). Nor does the GBER apply to *ad hoc* aid to large enterprises or undertakings in difficulty. Measures which are listed in the GBER and which comply with the conditions and criteria set forth therein benefit from an exemption from the notification requirement. Member States are free to implement them without a Commission assessment. However, the GBER exempts only aid which has an 'incentive effect' as provided in Article 8. According to Article 8, aid is deemed to have an incentive effect if the beneficiary submitted an application for the aid to the Member State concerned before work on the project or activity started. However, in the case of aid granted to large enterprises, the granting authority is required to verify the incentive effect by ascertaining that, as a result of the aid, there has been: a material increase in the size or the scope of the project/activity; a material increase in the total amount spent by the beneficiary on the project/activity; or a material increase in the speed of the

by the GBER remains subject to the notification requirement. The GBER is thus closely linked to many objectives of common interest, and can also be considered as a means to promote equal opportunities and social inclusion for certain vulnerable groups, eg, persons with disabilities and disadvantaged workers (including people belonging to minorities). The GBER thus encourages Member States to focus their resources on aid that will directly promote targeted job creation and a more inclusive social environment while seeking to boost the EU's competitiveness.

In addition, in April 2009, a new *Simplification Package* for State aid with a *Best Practice Code* and a *Simplified Procedure Notice* was adopted.³⁷ Both aim at improving the effectiveness, transparency and predictability of State aid procedures at each step of an investigation, and at encouraging better co-operation between the Commission and the Member States.

Beyond the regulatory framework we have roughly described, the distinctiveness of EU state aid law and policy is tied to the functions they perform. State aid is certainly one of the most politicized EU fields, and it is a field in which the Commission, in the exercise of its supervisory powers and wide discretion, may take account of social considerations and find ways to reconcile efficiency-oriented goals with other objectives such as solidarity, all within the context of its broader mandate, that of pursuing the common European interest.

The main objective of state aid rules, as confirmed by many decisions taken by the European Commission and by soft law documents, is to contribute to the maintenance of undistorted competition in the EU system. EU law aims to ensure a level playing field for companies doing business in Europe, and to prevent Member States from engaging in subsidy races, which are unsustainable and detrimental to the EU as a whole, not to mention costly to taxpayers. An important policy goal, notwithstanding the spike of aid seen during the economic crisis, has been to reduce the general of state aid and to shift the emphasis from

completion of the project must be verified. As regards aid compensating for the additional costs of employing disabled workers, referred to in Article 42, the incentive effect is established if the conditions of Article 42(3) are fulfilled. In particular, an incentive effect is assumed if the aid leads to a net increase in the number of disadvantaged/disabled workers employed. For details on the application of the principle of an incentive effect, see Lowri Evans and Harold Nyssens, 'Economics in state aid: soon as routine as dentistry?', <http://ec.europa.eu/competition/speeches/text/sp2007_14_en.pdf> accessed 15 September 2011, at 4-5.

³⁷ Commission Notice on a Simplified procedure for the treatment of certain types of State aid [2009] OJ C136/3; Commission Notice on a Best Practices Code on the conduct of State aid control proceedings [2009] OJ C136/13.

supporting individual sectors or companies towards horizontal objectives of common interest ('less and better targeted state aid').³⁸ At the same time, the Commission has sought, through state aid policy, to balance the potential inefficiencies caused by state intervention (inefficient allocation of resources, moral hazard, etc.³⁹) against the potential gains, whether they be related to the correction of market failures or to the promotion of enhanced social equity. In pursuit of a coherent balance, the application of the state aid rules has become more complex through an evolution which has related, at least indirectly, to significant reforms in other areas of competition policy within the framework of Articles 107-109 TFEU.⁴⁰

It is evident that, in recent years, the Commission has recognised the need of Member States to grant much greater volumes of state aid as a means of softening the effects of the financial crisis.⁴¹ Based on the principle of 'less and better targeted State aid',⁴² the central objective of the Commission is still to encourage Member States to reduce their overall aid levels, while permitting and encouraging grants of aid that address concerns social and political objectives that are not always served by market mechanisms.

IV. AID SUPPORTING EMPLOYMENT OF PERSONS WITH DISABILITIES

With the adoption of the GBER and related guidelines, the Commission has moved beyond a general commitment for 'social objectives' by devoting specific attention to persons with disabilities. In this section we consider some of the detailed rules governing state aid granted for the purpose of promoting the inclusion of such persons in the work force, which in our view is a necessary (not to say sufficient) condition of meaningful participation in society. If this enhanced level of social participation is to

³⁸ In 2005, the Commission identified the aim of less and better targeted state aid as one of the pillar of a comprehensive reform package. See State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM(2005) 107 final (State Aid Action Plan).

³⁹ For discussion of the potentially undesirable economic impact of state aid, see, among others, David Spector, 'State Aids: Economic Analysis and Practice in the EU', in Xavier Vives (ed), *Competition Policy in the EU: Fifty Years On from the Treaty of Rome* (OUP 2009) 176.

⁴⁰ For details, see Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EC State Aids* (3rd edn, Sweet and Maxwell 2006); Connor Quigley, *European State Aid Law and Policy* (2nd edn, Hart Publishing 2009); Alison Oldale and Henri Piffaut, 'Introduction to State aid law and policies', in Kelyn Bacon (ed), *European Community Law of State Aid* (OUP 2009) 3; Ornella Porchia, 'Aiuti di Stato', in *Digesto delle discipline pubblicistiche*, vol. 'Aggiornamento' (*ad vocem*, Utet 2010) 1.

⁴¹ See, eg, COM(2011) 356 final.

⁴² See the State Aid Action Plan (n 38).

be achieved, it is essential to encourage national measures which address unemployment, especially structural unemployment, and which ameliorate social exclusion, which is both degrading to individuals and costly to society.⁴³

We first consider the GBER and, in particular, Articles 41 and 42, which set forth the basic rules on aid granted for the employment of disabled workers⁴⁴ in the form of wage subsidies, and on aid that helps to offset the additional cost of employing disabled people.⁴⁵ The relevant policy objective in facilitating the grant of aid in this context is to boost the demand of employers for this category of workers (Recital 64 GBER). Some boldness can be detected here in that, by way of exception to its general scope, the GBER allows employment aid (including aid for disabled and disadvantaged workers) even in the fisheries and aquaculture sectors, and for the primary production of agricultural products (cf Articles

⁴³ On the (contested) notion of social exclusion, see, eg, Amartya Sen (2000), 'Social Exclusion: Concept, Application and Scrutiny', Social Development Paper No. 1, Asian Development Bank <http://www.adb.org/documents/books/social_exclusion/social_exclusion.pdf>

accessed 15 September 2011. For a legal perspective, see, among others, Lara Trucco, 'La nozione di "esclusione sociale" fra ordinamento interno e ordinamenti nazionali', in Pasquale Costanzo and Silvana Mordegia (eds), *Diritti sociali e servizio sociale dalla dimensione nazionale a quella comunitaria* (Giuffrè 2005) 122.

⁴⁴ A 'disabled worker' is anyone who is recognised as disabled under national law or who has a recognised limitation resulting from physical, mental or psychological impairment (Article 2(20)). The definition of disabled workers does not cover *aged* workers. In Decision No. 210/2009 ([2009] OJ C162/7), where the Commission examined a Spanish scheme for the reduction of social security contributions for aged workers in the furniture sector ('Article 41 of the GBER is also not applicable to the present scheme, because the aged workers targeted by the measure do not qualify as "disabled workers" in the sense of the definition provided by Article 2.20 of the GBER.' – para 15 of the public version). The conditions to be satisfied in the case of aid for employment of disabled workers in the form of wage subsidies are set out in the Regulation; they substantially modified the conditions provided for in Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment [2002] OJ L337/3.

⁴⁵ Section 9 GBER is dedicated to disadvantaged and disabled workers. Article 40 sets forth rules on aid granted for the employment of disadvantaged workers in the form of wage subsidies. A 'disadvantaged worker' is anyone who: has not been regularly employed in past six months; does not have an upper secondary educational or vocational qualification; is over the age of 50; lives as a single adult with one or more dependents; works in a sector/profession that has a strong gender imbalance, and belongs to the underrepresented group; or is a member of an ethnic minority and needs to develop their linguistic knowledge/vocational training/ professional experience. A 'severely disadvantaged worker' is anyone who has been unemployed for at least 24 months. See Domenico Garofalo, 'La nozione di svantaggio occupazionale' [2009] *Diritti lavori mercati* 569.

1(3)(a) and 1(3)(b)).

The GBER sets a notification threshold of 10 million euros per undertaking per year for the employment of disabled workers and to compensate for any additional expenses of employing persons with disabilities (Article 6). The notification threshold has thus been doubled compared to the 2002 Regulation.⁴⁶ The decision to raise the threshold is a subjective and fully ‘political’ choice in the sense that the threshold does not derive from any empirical analysis. It does not reflect an amount calibrated to address specific market failures, and furthermore the degree of competitive distortion caused by grants of less than 10 million euros remains unknown and, indeed, undeterminable.⁴⁷ In short, the notification threshold reflects a subjective ranking of the perceived gravity or importance of the corresponding policy objective.

Coming back to the substantive provisions, the first category provided for is aid granted for the employment of disabled people in the form of wage subsidies. Pursuant to Article 41(2), aid intensity must not exceed 75% of the eligible costs. The Commission has thus decided to implement a significant increase of the aid intensity: from the 60% ratio that applied under the previous rules to the current figure of 75%. Eligible costs are the wage costs over any given period during which the disabled worker is employed. If the period of employment is shorter than 12 months, the aid is reduced *pro rata* (Article 41(5)). The GBER has thus removed the minimum requirement of a 12-month contract, which discouraged hiring choices. The employment must represent a net increase in the number of jobs or, if that number declines, the posts must have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct, and not as a result of redundancy.⁴⁸ Furthermore, employment must be maintained for at least the minimum period consistent with national legislation or collective agreement.

The second category – aid for compensating the additional costs of employing workers with disabilities – is set forth in Article 42. The aid intensity must not exceed 100% of the eligible costs (Article 42(2)).

⁴⁶ For the purpose of calculating aid intensity, the aid and the costs are expressed before taxes. Notification thresholds and ceilings apply to aid from all sources (Article 7(1)).

⁴⁷ See Christian Buelens, Gaëlle Garnier and Roderick Meiklejohn (2007) ‘The Economic Analysis of State Aid: Some Open Questions’ <http://ec.europa.eu/economy_finance/publications/publication9549_en.pdf> accessed 15 September 2011.

⁴⁸ See Article 41(4) GBER.

Eligible costs are additional costs directly linked to the employment of a disabled worker: they include the costs of adapting premises, of employing staff solely to assist the disabled worker(s), and of adapting or acquiring equipment for disabled worker(s); if the beneficiary provides ‘sheltered’ employment,⁴⁹ eligible costs also include the costs of constructing, installing or expanding the establishment and any administration and transport costs resulting directly from the employment of disabled workers (Article 42(3)).

According to the GBER, accumulation of different categories of aid measures is possible as long as the measures concern different identifiable eligible costs. With respect to the same eligible costs, accumulation is not allowed for partly or fully overlapping costs if it would result in an amount exceeding the highest allowable aid intensity. However, aid in favour of disabled workers may be combined with aid exempted under the Regulation in relation to the same eligible costs above the highest applicable threshold (ie, 10 million euros). Such accumulation must not result in an aid intensity exceeding 100% of the eligible costs over any period for which the workers concerned are employed (Article 7(4)).

In addition, the GBER recognises that the promotion of training of disabled workers constitutes a central objective of the economic and social policies of the EU and of its Member States. The GBER generally covers public support for training, ie support which favours one or more firms or sectors of industry by effectively reducing the relative costs they would otherwise have to bear if they want their employees to acquire new skills. It applies to training aid irrespective of whether the training is provided by companies themselves or by public or private training centres. The GBER fixes the notification threshold at 2 million euros for training aid projects. Article 38 distinguishes between specific training and general training. The first involves tuition directly and principally applicable to the employee’s present or future position in the undertaking. The latter concerns tuition for training which is not only or principally related to the employee’s present or future position in the undertaking but which provides skills largely transferable to other undertakings or fields of work. The distinction between specific and general training is unlikely to be clear-cut in all cases, and some line-drawing may be expected, but the line will have significant consequences: where aid is granted for training, its intensity must not exceed 25% of eligible costs for specific training and 60% of eligible costs

⁴⁹ Sheltered employment programs assist individuals who are regarded as unable to work in a competitive employment setting. The work activity may be carried out, for example, in special work areas or at home. Such programs have not been free of controversy, since there is at least some risk that they may perpetuate the social divisions they are designed to overcome.

for general training. Eligible costs include trainers' personnel costs; trainers' and trainees' travel expenses including accommodation; other current expenses (materials, supplies, etc.); depreciation of tools and equipment, to the extent that they are used exclusively for the training scheme in question; the cost of guidance and counselling services with regard to the training project; and trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) up to the amount of the total of the above eligible costs. The aid intensity may be increased, potentially by 10 percentage points if the training is given to disabled or disadvantaged workers, subject to a maximum combined aid intensity if cumulated with other 'bonuses' available for SMEs (10%) and small enterprises (20%).

The GBER is remarkable in that it expressly recognises a more 'flexible' approach to state aid targeted to a particularly vulnerable group that experiences significant, and often severe, social exclusion. The GBER itself cannot produce an immediate effect on the employment level of persons with disabilities but it facilitates state measures, and in doing so both accommodates the Member States and puts an implicit onus on them to take advantage of the possibilities available to them.

To what extent are they doing so? The number of block exempted state aid measures for employment and training introduced by Member States, during the period 2004-2010, was 1,005. Of this total, 147 correspond to measures put in place under the block exemption regulation on employment,⁵⁰ 420 correspond to measures established under the block exemption regulation on training,⁵¹ and 438 of the aid measures were granted under the GBER.⁵² Within the latter category, 66 measures were adopted for the employment of disabled workers in the form of wage subsidies (Article 41) and 50 measures granted compensation for the additional costs of employing disabled workers (Article 42). We may take these numbers as an encouraging sign insofar as they suggest that the opportunity to grant exempted aid is not simply languishing in disuse. More recently, in the year 2011, new measures were adopted by the

⁵⁰ Commission Regulation No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment [2002] OJ L337/3 (in force prior to the introduction of the GBER).

⁵¹ Commission Regulation No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid [2001] OJ L10/20 (in force prior to the introduction of the GBER).

⁵² See COM(2011) 356 final.

Member States, including, for example, aid packages in Sicily⁵³ and Calabria,⁵⁴ in Valencia,⁵⁵ and in Yorkshire.⁵⁶

Outside the scope of the GBER, individual aid measures involving large aid amounts are not prohibited by the Commission; rather, they are subject to the standard obligation of prior notification. In 2009, the Commission set out the criteria used to assess the compatibility of notified aid measures for disadvantaged and disabled workers (ie, of individual aid targeted to combat unemployment of persons with disabilities, granted either *ad hoc* or as a part of a scheme where the grant exceeds 10 million euros).⁵⁷ This Communication on the ‘Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification’, as noted by others,⁵⁸ reflects the ‘refined economic approach’ introduced by the Commission’s State Aid Action Plan in 2005. The core instrument of this refined economic approach is the ‘balancing test’. The Commission looks at the purpose of state aid and, on the other side, Member States must demonstrate that the aid will address the equity objective in question. In its analysis, the Commission considers the number and the categories of workers concerned by the measure, the employment rates of the categories of workers concerned by the measure and the unemployment rates for the categories of workers concerned on the national and/or regional level. The Commission evaluates whether the aid measure is an appropriate and proportionate policy instrument, and finally balances the negative effects, considering whether the aid may result in a change in behaviour of the beneficiary.⁵⁹ In other words, the Commission employs two related principles: the compensatory justification principle and the principle of proportionality. It considers whether the aid measure can be justified on the basis that it pursues important aims which correspond with the common interest and whether, without the aid,

⁵³ *Aiuti all'occupazione per l'assunzione a tempo indeterminato di lavoratori svantaggiati, molto svantaggiati e disabili*. ex Titolo VI L.r. 9/2009 e CAPO II L.r. 11/2010 ex Reg. UE 800/2008, 2011/X [2011] OJ C/118.

⁵⁴ XI3/2010 [2010] OJ C/15.

⁵⁵ See SA.32893 *Fomento del empleo protegido para personas con discapacidad en centros especiales de empleo y enclaves laborales para 2011*, 2011/X [2011] OJ C/171.

⁵⁶ See SA.33140 *Changeworks - wage subsidy scheme*, 2011/X [2011] OJ C/224.

⁵⁷ [2009] OJ C188/6 (Communication).

⁵⁸ See Justyna Majcher-Williams and Juergen Foecking, ‘State aid for disabled and disadvantaged workers: compatibility criteria for big cases’ [2010/1] Competition Policy Newsletter 20-22.

⁵⁹ The aid characteristics which may affect the likelihood and the size of the distortion are: selectivity and asymmetry; size of aid; repetition and duration of aid; and the effect of the aid on a firm’s costs. The Commission in its assessment considers the structure of the market, and the characteristics of the sector and of the national labour market.

market forces would be unable to achieve such aims. In addition, the Commission examines whether the measure is necessary and is the least distortive method of pursuing the relevant objective of common interest.

The Commission has ample room for manoeuvre, and the ‘criteria set out in this guidance will not be applied mechanically’.⁶⁰ The evaluation of the extent to which the positive effects of the aid outweigh its negative effects is done on a case-by-case basis.

The experience with the Communication is still limited, and with limited data it is too early to assess the impact of this instrument. Nevertheless, the adoption of the Communication is another positive step in this policy area insofar as it contributes to predictability with regard to the Commission’s methodology. Enhanced predictability should lead, in principle and *ceteris paribus*, to greater levels of investment.

V. A TEST-BED FOR EUROPE’S SOCIAL MARKET ECONOMY

The rules contained in the GBER and the guidelines contained in the 2009 Communication described above expressly recognise that people with disabilities are a particularly vulnerable group, and that they still experience social exclusion and acute difficulties in seeking to enter the labour market. These represent a renewed commitment by the Commission to the promotion of equality and full employment through EU state aid policy. The enhanced threshold of 10 million euros per undertaking per year for the employment of disabled workers (see previous section) is a positive sign indicating that the welfare of persons with disability is becoming a matter of greater priority.

In portraying the rules on state aid in support of employment of persons with disabilities as a ‘test-bed’ for a new concept of a social market economy, we should be careful not to be swept away, or overstate the point. We acknowledge, for example, that the provisions of the GBER contribute to the fulfilment of the international obligations assumed by the EU⁶¹ under the UN Convention on the rights of persons with

⁶⁰ Point 4 of the Communication.

⁶¹ The European Community, as it was then called, having signed the UN Convention on the Rights of Persons with Disabilities, acceded to the Convention with Council Decision 2010/48/EC, formally adopted on 26 November 2009 under the EC Treaty. The ratification process was formally concluded in December 2010, when the EU deposited the instrument of formal confirmation, in accordance with Articles 41 and 43 of the UN Convention. On the ratification of the UN CRPD by the EC/EU, see Delia Ferri, ‘The Conclusion of the UN Convention on the Rights of Persons with

disabilities (the ‘UN CRPD’, or the ‘Convention’),⁶² and this development is worth highlighting for a moment here. Indeed, the signature and conclusion of the UN CRPD has had important legal effects, as the Convention commits the EU to higher standards of non-discrimination, accessibility and inclusion, and sets forth, as a general principle, ‘equality of opportunity’. The GBER can also be considered as an instrument that promotes equal opportunities and the removal of barriers that impede full participation in society, as envisaged in the UN CRPD. In particular, Articles 41 and 42 of the GBER seem to contribute to the fulfilment of the international obligations laid down in Articles 4 and 27 UN CRPD.⁶³ They may also be regarded as a means of complying with Article 19 UN CRPD, which imposes a general obligation on the Parties to recognise the ‘equal right of all persons with disabilities to live in the community, with choices equal to others’, and to ‘take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community’.⁶⁴ The 2009 Communication, which explains how the Commission assesses aid for disabled workers where the aid must be notified, can also be regarded as a means of compliance, notwithstanding its soft law character.

Furthermore, developments in the field of state aid are linked to the evolution of the EU’s general disability policy.⁶⁵ Disability issues are of

Disabilities by the EC/EU: A Constitutional Perspective’, in Lisa Waddington and Gerard Quinn (eds), *European Yearbook of Disability Law*, vol 2 (Intersentia 2010) 47.

⁶² The UN CRPD (together with its Optional Protocol) was adopted by consensus by the UN General Assembly on 13 December 2006. It was opened for signature on 30 March 2007 and entered into force on 3 May 2008, as did its Optional Protocol. See, among others, Sergio Marchisio, Rachele Cera and Valentina Della Fina, *La Convenzione delle Nazioni Unite sui diritti delle persone con disabilità. Commentario* (Aracne 2010).

⁶³ Article 4 UN CRPD refers broadly to a variety of measures intended to combat discrimination against and to promote the rights of persons with disabilities. Article 27(1) UN CRPD provides, *inter alia*, that ‘States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to [...] (h) [p]romote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.’

⁶⁴ However, there seem to be two significant weaknesses in the GBER. First of all, the definition of ‘disabled workers’ (Article 2(20)) appears to refer to the out-of-date medical model: emphasis is placed on the limitation which results from the impairment. Secondly, the GBER does not mention aid for research in the field of accessibility and universal design.

⁶⁵ In the last decade, the EC/EU has developed a significant disability policy. The EC’s activities regarding disability were relaunched in 1996, with the *European Community Disability Strategy*. This was a typical soft law instrument. From a strictly

growing importance in the EU's sphere of activities, and this trend has been reinforced by the adoption, last November 2010, of the new EU disability Strategy for 2010-2020.⁶⁶ The GBER is thus not an isolated instrument but rather supplements broader efforts by the EU to mainstream disability rights issues across the entire range of EU policies. Such efforts – which are also called for in the UN CRPD – were previously

legal point of view, the EC competence to take action to address disability discrimination was found primarily in Article 13 EC, which was added in 1997 by the Treaty of Amsterdam (ie, after the *Strategy* of 1996). The Charter of Fundamental Rights represented a new step towards more comprehensive action. Article 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited. Article 21 is supplemented by Article 26, according to which 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. At present, the principal EC/EU antidiscrimination legislation in the field of disability is Directive 2000/78 establishing a General Framework for Equal Treatment in Employment and Occupation, which is based on Article 13 EC ([2000] OJ L303/16). This is not a disability-specific legal instrument. The Directive aims at facilitating the integration of persons with disabilities, not simply by the prohibition of direct and indirect discrimination against them but also by imposing a duty of *reasonable accommodation*. Other pieces of EC/EU legislation also address disability, albeit indirectly. In addition to the inclusion of provisions in general directives such as these, the Council of Ministers has adopted a variety of non-binding instruments addressing the need to mainstream disability issues in particular fields. These non-binding instruments, which take the form of Resolutions and Communications, call on the Member States, the Commission and occasionally the Social Partners and civil society to take action to improve the lives of persons with disabilities in various ways. Such initiatives have addressed fields as diverse as employment and social integration, culture and education (non-extensively), the knowledge-based society and a barrier-free society. The *EU Disability Action Plan 2003-2010* (COM(2003) 650) carried forward the 1996 *Strategy* and continued in the direction already traced by the preceding initiatives. On 15 November 2010, a new Disability Strategy was adopted (see COM(2010) 636 final). The Disability Strategy 2010-2020 outlines how the EU and national governments can empower people with disabilities so they can better enjoy their rights.

⁶⁶ COM(2010) 636 final. This new EU Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection. The Strategy focuses on eliminating barriers across eight main areas: accessibility, participation, equality, employment, education and training, social protection, health, and external action. For each area, key actions are identified and a timeline is provided. These areas were selected on the basis of the overall objectives of the EU Disability strategy, the UN CRPD (discussed above), related policy documents of the EU institutions and of the Council of Europe, the results of the EU Disability Action Plan 2003-2010, and a consultation of the Member States, stakeholders and the general public.

reflected in the *EU Disability Action Plan 2003-2010*, and today they are highlighted in the Strategy adopted in 2010.

But the foregoing points do not diminish the contribution of the GBER and the 2009 Communication, particularly given the rather more specific and operative character of these instruments. The contribution of those instruments to enhanced inclusiveness provides a useful lens through which to consider Europe's social market economy. On the one hand, like the EU's broader policy efforts, the GBER and the Communication recognise, explicitly and implicitly, that persons with disabilities face social exclusion and impoverished access to goods, services, rights and political voice. But they also link this concern (one of a fundamentally social nature) to the more historically familiar dimensions of growth, jobs and improved welfare that have driven European economic integration ever since the days of Monnet, Beyen and Spaak.

VI. CONCLUDING REMARKS

The original European Economic Community, closely associated with some of the venerable names mentioned above, was primarily concerned with trade liberalisation (ie, the removal of obstacles to flows of goods, persons, services and capital), efficient resource allocation and global competition, particularly given the onslaught of large American companies. In 1972, that is to say, once the EEC's customs union was up and running, the Heads of State and Government of the Community countries, meeting in Paris, affirmed the 'social dimension' of the construction of Europe. Two years later, this was given a more tangible form in the Community's first *Social Action Programme*. This brought together social policy objectives across a wide range of areas, and provided for specific actions to be taken at Community and national levels to secure improved living and working conditions across the Community. Following on from this Action Programme, and from later programmes specifically aimed at developing strategies in the equality and health and safety fields, a body of EEC-level social legislation gradually developed throughout the 1970s and 1980s. Treaty amendments significantly expanded the Community's competence in the social sphere to include, initially, a broader range of employment matters.

The evolution continues. Under the Lisbon Treaty, while the EU's competences in the social field are still limited, and while European social legislation reflects these limits, a new comprehensive social agenda has been launched. But more significantly, social aims have also been reflected to some extent, as we have seen, within the field of competition policy,

broadly understood.⁶⁷ Our suggestion is that the rules on state aid supporting the employment of persons with disabilities may reflect a somewhat more robust version of social Europe, and a new way to reconcile the principle of an open market economy with certain forms of solidarity.

The fact that the social market economy concept now appears in the TEU as a basis for Europe's sustainable development is no guarantee that the concept will play a significant role in defining Europe's identity or shaping the interpretation and application of European law. Nevertheless, the social market economy has significant potential as an interpretive guideline for the EU as it carries out its activities within the limits of its competences.

In this paper we have pointed to the congruence between the ideal of a social market economy, in which social protection and social inclusion are assigned roles of equal dignity with market values, on the one hand, and the use of the EU's powers in the field of state aid as a means to support the employment of persons with disabilities, on the other. In this respect, the aims of full employment and social progress are advanced – in a collaborative effort between the EU and its Member States – through measures addressing market failure and social exclusion. These may be seen as small but significant steps in a 'formative' period whereby a more social Europe asserts itself and whereby the EU gains, perhaps, greater legitimacy in the eyes of its citizens.

⁶⁷ For purposes of this article we have obviously left aside other matters of competition law, including, for example, an intriguing and long-running debate with regard to the breadth of Article 101(3) TFEU and of the expression 'technical or economic progress'. We merely note that attempts to determine the scope of Article 101(3) must take account of a number of significant institutional factors and of the evolved structure of European antitrust enforcement in modern times.

**EU CITIZENSHIP AS A BATTLE OF THE CONCEPTS:
TRAVAILLEUR V CITOYEN**
Panos Stasinopoulos*

Ever since Citizenship was introduced at EU level, the concept's perception has varied from a mere declaratory status to a more substantial, fundamental status attached to Europeans. Regardless of whether one views Citizenship as the latter or the former of the above construes, this concept is undoubtedly intriguing and is still the subject of discussions and studies. This paper wishes to contribute to the debate regarding the concept of Union Citizenship and its future and relevance in today's EU. The scope of the notion has been enriched considerably since its conception, as a result of the work of the Court of Justice although the Treaty provisions have not reflected this and they remain largely unchanged since 1993. Owing to said case-law, different constructions of Citizenship have been proposed in the academic literature; this paper focuses on the nature of the relationship between Union Citizenship and the pursuit of an economic activity and the relative independence the former enjoys owing to the recent CJEU case-law. This independence will be assessed in three parts, covering this content of Citizenship which supports the latter's independence, its arguably receding association with the common market and its aims, and the support which the Lisbon Treaty's new stance on social values could potentially offer.

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I. INTRODUCTION

The concept of Union citizenship, which was introduced with considerable political turmoil by the Maastricht Treaty, is older than its founding treaty suggests; rather, an *incipient*¹ form of European citizenship has existed ever since the (then) Community was founded.² Of course, the economic rights that are now associated with Citizenship were at that time attached to workers only and it took the European Union (henceforth “EU” or “the Union”) many decades to realise that a political union was also needed to complement its already existing economic counterpart. With the progress of the Union and the efforts of the Court of Justice of the EU (henceforth “the Court”), the free movement provisions became more substantive and these efforts were amalgamated in the introduction of a more inclusive, but far from perfect, Union Citizenship.

However, not all rights are unchallenged; thus, workers’ rights, no matter how fundamental, are still subject to judicial review, which has to incorporate not only the wording, but also the aim of the legislation, along with the constitutional reality which stipulates the balance between social and economic values by which each era of EU integration should abide. The results of this review are most evident in the four cases associated with the Posted Workers’ Directive, although the most recent case-law has demonstrated a subtle yet important departure from the principles it created. Owing to this change of course, the previous Court’s efforts, and the new constitutional *status quo*, the rights of free movement, residence, and establishment have created a substantive nucleus of rights, which, combined with the Union citizenship, offer a significant advantage to European citizens.

This paper aims to compare the following two notions: the notion of the Union citizen who has the right to move and reside within the territory of the Union and enjoys a variety of rights which are detached from the need to fulfil an economic activity (*citoyen*), and the notion of citizen/worker who decides to pursue an economic activity in another Member State (*travailleur*). The notion of citizenship was introduced in order to ‘be the

¹ The term was used as early as 1968 by the then Vice-President of the European Commission, who stated that free movement was ‘more important and more exacting than the free movement of a factor of production’. His speech was published in the EC-Bulletin of November 1968.

² See, indicatively, an article published in the mid-1970’s which already referred to citizens, a concept that, at the time, was 20 years away: A Lhoest ‘Le Citoyen à la une de l’Europe’ [1975] RMC 431. Even earlier than that, in 1951, the first President of the European Commission, W. Hallstein, said that free movement in the ESCS was reminiscent of a European citizenship.

fundamental status of nationals of the Member States'³ and 'a positive contribution to the legitimacy of the European Union which an active and participatory concept of social citizenship may make'⁴ and for these reasons it encompassed various rights but fewer, if any, obligations; the notion of worker, on the other hand, is older and comprises a wider variety of rights. In recent years, however, the Court has acknowledged the independent nature of citizenship rights.

This paper shall examine the manner in which citizenship rights operate in the current legal and constitutional configuration of the Union with the ultimate goal of providing an appropriate answer to the question regarding the true extent of citizenship's independence from the pursuit of economic activity. In order to do so, the paper will first explore the independent nature of the Union citizenship by referring to the political rights attached to it while attempting an assessment of their value, extent, and shortcomings. Part II shall assess the citizenship's connection to the internal market through the more recent case-law which suggests a departure from the market-based construction of citizenship and, in some cases, even from a long-established rule according to which EU rights are triggered by intra-border move. Initially, the second part shall focus on the case-law which revisits the rules on purely internal situations, while the rest of the second part will examine recent ground-breaking cases such as *Ruiz Zambrano* and *McCarthy* which seem to be establishing new guidelines on how to address issues of citizenship where the traditional rules of intra-border move may not apply as unambiguously as in the past, owing to potentially complicated lives of Europe's residents. Lastly, part III will focus on the potential contribution of the Lisbon Treaty to the constitutional re-shaping of the Citizenship provisions. Effectively, the two parts which follow will present two strands of Citizenship, as identified in the title, and the third part shall suggest a way of bridging the gap between them.

II. RIGHTS WITHOUT A MARKET

One of the most intriguing aspects of the Union Citizenship is the inclusion of political rights,⁵ namely the passive and active electoral rights

³ C-184/99 *Grzelczyk v Centre public d'aide sociale* [2001] ECR I-6193.

⁴ Jo Shaw, 'Citizenship in the Union: Towards Post-National Membership' in *Collected Courses of the European Academy VI-I* (Kluwer 1998).

⁵ It is noteworthy that there is no reference to duties in the treaties. Although the *status civitatis* is normally associated with both rights and duties, the EU legislation governing citizenship mirrors the *sui generis* status of the Human Rights law that bypasses the states and gives rights to the individual without following the traditional state/citizen relationship, which is, by nature, reciprocal. The same principle was

that EU citizens enjoy.⁶ The importance of these rights lies in their unique character in international law. Although in bilateral agreements signed by their respective parties a degree of reciprocity is not uncommon, the granting of political rights to nationals of another state, and voting rights no less, is not so common, and, thus, it should not be underestimated. However, the truth is that the participation in elections and exercise of the rights inherent in EU Citizenship have been low; moreover, the number of people exercising 'alien suffrage' has been lower than the number of people voting in their own countries.⁷

It seems, therefore, that the political rights have not had a considerable impact and this is reflected in the relevant case-law, which remains limited. In *Spain v UK*,⁸ the Court allowed the UK to extend voting rights to

used for the Charter of Fundamental Rights of the European Union, which is silent on duties. It is hard to imagine EU citizens having the same duties as in their states of origin; moreover, given the current integration in the EU, it is reasonable that the Union cannot impose any duties upon its citizens as it lacks the main characteristics of a state under international law. It could be argued, however, that all EU citizens have the duty to respect the laws and cultures of the states in which they reside when they exercise their right to free movement, but complying with the law is a general duty and not one that can be codified by the institutions of the EU.

⁶ For a detailed study of the political rights see Shaw, *The Transformation of Citizenship in the European Union* (CUP 2007). The reader is reminded that the electoral rights are as follows: EU citizens have the right to stand and vote in municipal and European elections in a Member State other than their own. See Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals OJ L 329; also, the Resolution of the implementation of the Directive OJ C44/159. See also Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals OJ L 92. See also Directive 2002/722 on the Act concerning the election of the members of the EP. The right was problematic in that it was introduced as it was against certain constitutional provisions at national level OJ L 220/18; therefore, derogations were permissible, as per Commission's Reports COM(2003)31 and COM(2005)382. EU citizens have also the right to protection by diplomatic authorities of any EU Member State in countries where their state of origin is not represented. This right provides for the equal treatment of non-nationals and it operates on a reciprocal basis and does not require any actions on behalf of the Union in the field of its international relations. Additionally, EU citizens have the right to appeal to the EP and the Ombudsman. The latter applies also to non-EU citizens, residents of EU Member States. The former was part of the EP's Rules of Procedure since 1981 but after 1993 the right to appeal was established by primary legislation.

⁷ See COM/2002/260.

⁸ C-145/04 *Spain v UK* [2006] ECR I-07917.

Commonwealth citizens residing in Gibraltar,⁹ although they were not EU citizens. It was argued that the right to rule on who is a beneficiary of such rights should be retained by the Member States. Despite Spain's objection, the UK was not in breach of any rules when it decided to give electoral rights to individuals with close links to its territory. In a similar case, *Eman*,¹⁰ the Netherlands excluded some of its nationals residing in Dutch overseas territories (henceforth "OST's"). Although the Court argued that nationals of a Member State residing in an overseas territory could still rely upon Union Citizenship rights, as far as voting rights were concerned, the situation was somewhat different. As per an earlier case of the European Court of Human Rights, residence criteria determining the entitlement to voting were acceptable.¹¹ However, the Court found that the Dutch were in breach of the equal treatment principle because Dutch nationals residing in non-Member States were given the right to vote, although their OST's counterparts were not. In other procedural details, in *Pignataro*¹² the Court held that national requirements which stipulated that a candidate for regional elections be a resident of the region in question were not a breach of European Union legislation.

Despite the limited participation and case-law, political rights are more important that the attention paid to them suggests.¹³ It has been customary for states to provide their citizens with the right to participate in the electoral process (either as voters or as candidates).¹⁴ Apart from the

⁹ Gibraltar is not officially part of the UK but remains a colony of the British Crown.

¹⁰ C-300/04 *Eman v College van burgemeester en wethouders van Den Haag* [2006] ECR I-08055.

¹¹ *Melnichenko v Ukraine*, no. 17707/02 ECHR 2004-X.

¹² C-535/08 *Pignataro v Ufficio centrale circoscrizionale presso il Tribunale di Catania and Others* [2009] ECR I-00050.

¹³ The elevated status of an EU citizen has give rise to a number of cases covering niche areas such as the right to respect the correct spelling of one's name or the recognition of the name. In C-208/09 *Sayn-Wittgenstein v Landeshauptmann* [2010] ECR I-00000 the Court found that EU legislation could not allow for national laws that did not recognise an adopted person's name which contained a title of nobility, because such titles were inadmissible according to Austria's constitutional law. See also C-391/09 *Runevič and Łukasz Paweł Wardyn v Vilniaus* [2011] ECR I-00000 where the Court also prohibited national laws to use only the country's language or only Roman letters when they write a person's name for administrative purposes without marks, ligatures or other diacritical signs that are used in other languages.

¹⁴ In certain cases, individual Member States granted the right to vote to non-nationals before the introduction of citizenship, albeit in exceptional circumstances. Moreover, the right to vote and stand in local elections was also given to states with a certain degree of cultural homogeneity, like Ireland and the UK. Another noteworthy provision was a 1992 Council of Europe Convention which gave the right to vote to non-nationals who had a significant cultural, historic or linguistic link to

democratic importance of voting, there is another argument closer to the topic of this paper: freedom of movement. The Court¹⁵ has scrutinised national legislation which constitutes discrimination of any kind and EU law, either primary or secondary, and it has made it clear that discrimination shall not be upheld. It follows that not having the right to vote in the state to which one wishes to move is a discriminatory rule that could hinder free movement, not to mention the better social integration that voting helps to create and the added substance voting rights represent. Further to the aforementioned democratic importance, it is significant, symbolically and practically, for the European Parliament (henceforth “EP”) to have a membership decided by the European electorate as it would give it the character of a European institution, detached from national interests,¹⁶ while at the same time bridging the democratic deficit and perceived elitism from which the EU has been suffering.

The political rights associated with Citizenship are not devoid of thorny issues, however; two immediately identifiable problems concern, on the one hand, the limited number of rights, and on the other hand the lack of more substantive rights.¹⁷ Regardless of the fact that these rights are of a non-derivative nature as they are independent of the pursuit of economic activity, the truth is that the rights to petition to the EP and to submit applications to the Ombudsman are applicable to any legal or natural person residing in any EU Member State, making the rights to vote and the consular protection the only rights that are appropriately ‘European’. An interesting addition is the Citizens’ Initiative which was introduced by the Treaty of Lisbon,¹⁸ although it is too early to judge its effectiveness

the territory in which they lived. This Convention was ratified by a small number of States and cannot, practically, be considered an influential step but its symbolic importance is vastly more considerable.

¹⁵ The Court’s case-law played an instrumental role in the introduction of the Citizens’ Directive which has been heavily influenced by previous rulings such as this in *Baumbast*. Apart from said ruling, the ruling of *Van Duyn* regarding the assessment of personal conduct was also incorporated in the Directive (see Article 27(2)).

¹⁶ Asteris Pliakos, ‘La nature juridique de l’Union européenne’ [1993] *RTDE* 187. The same effect has the fact that the seating plan is drawn according to political affiliations, not nationalities. Moreover, according to the Charter of the Fundamental Rights of the European Union, (see Article 12(2)), the EP expresses the political will of the EU citizens.

¹⁷ Such gaps have made scholars call citizenship merely ‘symbolic’. See Catherine Jacqueson, ‘Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship’ (2002) 27 *ELRev* 260.

¹⁸ See Article 11(4) TFEU which reads the following: ‘*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*

partly because more time is needed and partly because it is very much dependent on the will and organised actions of EU Citizens, residents of different Member States, and probably with different interests frequently shaped by national policies and mentalities. The Initiative is indeed very representative of most EU rights that remain unappreciated until the need arises and they are then invoked.¹⁹

The second problem identified above concerns the limited substance that some of the political rights carry. For instance, the right to vote applies only to municipal elections. It is indeed curious that the EU has failed even to endeavour to grant full voting rights to EU Citizens residing in a state other than that of which they are nationals, especially as it would seem as a *conditio sine qua non* for being a citizen of the democratic union which the EU treaties describe, an argument supported by the Advocate General (henceforth AG) in the *Spain v UK* case discussed previously. The Court, however, has not endorsed this view yet, which is, arguably, the most striking omission,²⁰ given the need to further differentiate political citizenship from the purely market-oriented rights²¹ and the lack of any argument to support the discrepancy between voting rights at municipal and national levels.²² This presents two problems for EU Citizens who reside in a state where they cannot vote: by moving to another state, a European citizen forfeits the right to vote in his or her country of origin in the same manner he or she forfeits the right to live there. Therefore, EU Citizens are left without the power to participate in the political life of the state in which they reside and, as a consequence of their decision to pursue their rights under the Treaties, they have arguably no reason to vote in their state of origin given that they do not live there. It could be argued that a number of these Citizens would still want to participate in home country elections for personal reasons, but this is missing the point of the gap in the EU political rights.²³

proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties’.

¹⁹ N Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *CMLR* 1597.

²⁰ The Commission has, however, identified the need for a more evidently democratic Union. In 1975, in a report, it was stated that ‘complete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a European Union’. See European Commission, *Towards European Citizenship: The Granting of Special Rights*, COM(75)321.

²¹ The arrangement between the UK and Ireland is an exception which is, however, unrelated to the Union and it concerns Britain’s history.

²² Dora Kostakopoulou, ‘European Union Citizenship: Writing the Future’ (2007) 13 *ELJ* 623.

²³ Understandably, this is a wider point and it can lead to a whole different discussion. Why one would choose to vote and especially participate in the electoral procedure of a country of which one is not a resident is a complex topic. Moreover,

The other problem that arises is reflective of the sometimes *à la carte* nature of the Union; although there is a great variety of rights, which cover working conditions, travel, social benefits, and education, EU Citizens are still unable to make an active contribution to the host states. This argument might seem very similar (if not identical) to the previous one, but there is a distinct difference: while the former argument looks at the issue from the perspective of the rights of the individual, the latter takes the host state into consideration in that it acknowledges that there are also benefits for the host states and it is not a matter of merely offering incentives to those who consider exercising their free movement rights. Despite the positive aspects of granting full voting rights and the sheer contradiction between the case-law, the intentions of the Commission, and the spirit of the law, Member States are not considering changing this situation, as the Lisbon Treaty showcases.

The reasons for this can most likely be found in the customary fear of loss of sovereignty and, to a lesser extent, in the practical difficulties inherent in such a reciprocal agreement. As far as the former argument is concerned, it is possible that the constitutions of (some) Member States prevent them from awarding voting rights to non-nationals, rendering, therefore, the fruition of the endeavour in question problematic but by no means impossible. With regards to the latter argument, although the constitutional reality might be difficult to circumvent, the same could (and was) probably said for the reciprocity we now encounter in the field of social benefits and education. The Court has fought hard, and for a considerable amount of time to stop Member States posing either administrative or legal barriers to free movement, and these efforts have proven successful. The same could be applied to the case of the political rights and this would need a change of approach from the current reality of functionalism²⁴ to a more sentimental approach: Although we are all parts of the internal market, to such a degree that we rarely realise we operate within it, we continue to forget what the Union means to us Europeans

in an ever closer Union, decisions in one country might affect residents and nationals of another Member State making the possibility of double voting a topic in its own right. However, for the purposes of this paper, the lack of comprehensive voting rights in the country of residence is the important omission.

²⁴ This is not to say that functionalism and pragmatism are to be dismissed. Indeed, they have their own role to play especially when the Union tries to promote its policies to national governments. As the 2010 crisis showed, countries are reluctant to offer their funds to bankrupt (or failing) economies but it will be easier to present the case for health care and/or effective protection abroad for all EU Citizens, regardless of what this might mean in terms of costs and sovereignty at national level. Admittedly, such an endeavour seems particularly challenging in times of severe economic turmoil when solidarity is a scarce commodity.

and this is also a failure of the institutions to maintain the history of Europe as a continent in the foreground, given the very existence of the Union is based on its continent's turbulent history.

A different lesson that we can learn from the progress in the area of social benefits is that reciprocity is not enough, and this should also apply to the discussion about further, more comprehensive political rights for EU Citizens. Any reciprocal agreement should be coupled with a (reasonable and proportionate) number of duties.²⁵ Currently, Europeans do not have duties at EU level, apart from general legal principles such as the duty to respect the law of the host state, a principle that is a general attribute of the Law and not a distinct feature of the EU legal order. This lack of duties has not changed even after the introduction of the Lisbon Treaty; normally, this would not be an obstacle as the Court has proven it can interpret the treaties broadly. However, when it comes to duties, the Court will probably consider them to be obstacles to free movement rather than a healthy component of any democracy-based legal and constitutional order²⁶ and will rarely uphold them. This is particularly worrying in the case of abuse of rights²⁷ by EU Citizens²⁸ and it seems that the most prudent solution would be a formal inclusion of duties in a Treaty as the Court would not be wise, or in constitutional terms properly endowed, to replace the legislator and create duties for Citizens.

²⁵ Possible duties that have been mentioned include taxation and military service, although the latter might be deemed inappropriate given the nature of the EU, while the former indirectly exists as each Member State pays due contributions to the EU and these are financed (at least partly) by national taxes. See indicatively, AJ Menendez, 'Taxing Europe: Two Cases for a European Power to Tax' (2004) 10 Colum.J.Eur.L. 297; Norbert Reich, 'Union Citizenship- Metaphor or Source of Rights?' (2001) 7 ELJ 4.

²⁶ For a more general discussion on the role of duties in citizenship see R Rubio Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (CUP 2000).

²⁷ See for instance case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-992. The case did not concern an EU Citizen (but it is nevertheless representative of the argument made above) but a third country national who had been expelled from the UK and subsequently moved to Ireland where she gave birth to a child who bore the Irish citizenship owing to the *ius soli* principle. The UK government argued that Ms Chen used the EU legislation in order to return to the UK but the Court did not accept it although it might as well have been the case. Ireland has ever since modified its law to allow for *ius soli* to operate but only if the parent(s) has been a resident (either permanent or not) of the country for a period of time.

²⁸ Even if a Member State genuinely believes that another Member State citizen residing in its territory is abusing his or her EU rights for personal gain, the Court will rarely accept it without objective evidential material and will have to embark on an investigation on an *ad hoc* basis.

Contrary to what the notion of citizen means at a national level, at the EU level it was not created to be either independent or reminiscent of the legal status of national citizens. It was created as the amalgamation of an enormous free movement case-law backlog and for years it was coupled with the fundamental freedoms of the common market, non-discrimination,²⁹ the right to residence and the principle of equal treatment. However, it has been suggested that owing to the work of the Court, these concepts have gradually lost their blind attachment to market values and, consequently, Citizenship has moved towards the status of a fifth fundamental freedom.³⁰ This progress notwithstanding, the political rights have not been entirely successful (or inclusive) and the following section shall explore this change in approach and how it is reflected in the most recent case-law.

III. CITIZENSHIP AND FREE MOVEMENT CASE-LAW: BRAVE NEW APPROACH

I. *Early constructions of Citizenship*

The first concept to which Citizenship was tied was that of the nationalities of the Member States which were not to be replaced by citizenship but merely complemented. Therefore, only the bearers of one

²⁹ Under the Lisbon Treaty, discrimination is covered by Article 18 TFEU but is not included in the citizenship provisions (although both provisions are under the same title), arguably because non-discrimination has become a basic principle of EU Law and underpins every piece of legislation. It has been argued that the Court has not coherently interpreted EU law by allowing non-discrimination principle to be used even by non-economic actors. However, such an interpretation would be contrary to the objectives of the Union and its internal market. For an example of this criticism see D Martin, 'A Big Step for Union Citizens, but a Step Backwards for Legal Coherence' (2002) 4 EJML 136-144. It is noteworthy that even discrimination is not utterly limitless. In C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703, the Court effectively stated that derogations from the principle might be upheld if evidence arises that suggests that the provision in question has a legitimate aim and the nationality of the litigants is immaterial, but there are other, impartial evidence to be taken into account. This is particularly the case with regards to social benefits, a restricted access to which has been accepted by the Court when it concerns the initial enter to the host state. For instance, the Citizens' Directive excludes social benefits from the benefits EU Citizen may enjoy during the initial 3-month period stipulated by the Directive. In this respect, Member States enjoy a wide discretion.

³⁰ See Editorial Comments, 'Two-Speed European Citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 CMLR 1; Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 1.

of the 27³¹ nationalities of the EU can benefit from the rights associated with EU Citizenship. The trouble in this is that nationalities, and, thus, national citizenships, are governed by national civil codes, and, thus, decisions to grant or, more importantly for this argument, remove one's nationality rests with the Member States. Although this is not unreasonable or uncommon in and of itself, the problem will arise when someone is deprived of his or her national citizenship, they will have no opportunity to use their European rights,³² and, given the authority Member States still have on issues of civil law, invocation of the principle of proportionality may not be an option for the Court, especially if the case concerns a wholly internal situation. It would take a very radical and bold Court to challenge this particular division of powers.

³¹ The case of the 12 new Member States is interesting as, prior to their accession they had to rely upon European Agreements. The case-law that concerns the new states is still limited and it mostly concerns cases that arose while the new states were under the preparatory regime which would allow them to adopt the *acquis communautaire*. See C-162/00 *Land Nordrhein-Westphalen v Beata Pokrzeptowicz-Meyer* [2002] ECR I-1049; C-348/00 *Deutscher Handballbund v Maros Kolpak* [2003] ECR I-4135; C-257/99 *R v Secreary of State for the Home Department ex parte Julius Barkoci and Marcel Malik* [2001] ECR I-6557. These cases dealt with the direct effect of the non-discrimination provisions for the nationals of the Member States which were preparing their accession. Although these Agreements did not provide the right to free movement, they did provide better cover to nationals of the 12 who were already residing in the EU. Equally important is C-327/02 *L.G. Panayotova et al v Minister voor Vreemdelingszaken en Integratie* [2004] ECR I-11055, which established the right to establishment, albeit in a preliminary version which covered only those who, upon entering an EU Member State could be self-sufficient. After the EA's, the treaties that provided for the free movement rights in the new Member States were the Accession Treaties, which gave free movement rights to 10 of the new Member States after a transitional period of 7 years (Malta and Cyprus were excluded). This transitional period was established with the insistence of Germany and Austria, but it is still morally questionable that such long periods had to apply. These restrictions expired in May 2011 and, consequently, we have yet to grasp the effect this will have on the labour markets of the 'old' Member States but judging from the relatively low number of Europeans who exercise their right to move in order to work in another Member States, these effects should not be grave. It is, however, noteworthy, that the transitional rules for students allowed them to work, for a limited period during their studies in a Member State other than their own, as long as they were not workers under Article 39 EC (now 45 TFEU) in which case the host state retained the right to apply national measures. Despite these restrictions, which were inserted for political reasons, it seems that providing citizenship rights (even in a more limited incarnation) was a very plausible way to insert a certain feeling of 'Europeanness' to the new States.

³² The situation between the two distinct types of citizenship is more complicated than that as the citizenship of the Union still affects how Member States grant or remove their citizenships (see C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239; C-135/08 *Rottman v Freistaat Bayern* [2009] ECR 0000; and *Chen and Zhu* (n 27), but, nevertheless, national citizenships have priority.

It could be argued that national citizenships are not as important when exercising EU rights. Ever since the first transitional period to implement the EEC Treaty ended, job-seekers have enjoyed rights related to social benefits, access to employment, residency and education, owing to the adoption of secondary legislation. Additionally, the Court expanded the scope of non-discrimination in order to ensure that 'Community law [...] is based on the freedom of movement of persons, and, apart from certain exceptions, on the general application of the principle of equal treatment with nationals'.³³ The degree of solidarity afforded by the Court to job-seekers and workers³⁴ in terms of access to employment and benefits but also residence without the need to pursue an economic activity has been surprisingly high for a supranational organisation such as the EU, but despite all these Union citizenship is still attached to its national counterparts and the latter have traditionally been outside the scope of equal treatment.³⁵ Claiming, however, that national citizenships are obsolete would be premature partly because there is a lack of a constitutional basis to such a claim given the wording of Article 20 TFEU regarding the relationship between national and European citizenships; and partly because Member States still have the right to protect their heritage and national idiosyncrasies and these would include citizenship.

Citizenship, however, is also attached to the right of residence. When the Community realised that a political union was also necessary if the European project was to be fruitful, it covered residence issues with three Residence Directives which included non-economic actors in their personal scopes. Of course, these provisions were not without reservations, whether these came in the shape of public policy derogations or in that of economic conditions related to income and insurance, but they were inserted in the treaty texts to avoid potential welfare tourism; the Court has been sufficiently protecting free movement rights from abuse and disproportionate measures to restrict them. More importantly, the Lisbon

³³ 8/77 *Sagulo* [1977] ECR I-1495.

³⁴ At a later stage of European integration this list included also students, persons of independent incomes, and tourists. These inclusions have loosened the connection between the market and the free movement provisions.

³⁵ See C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637; see RW Davis, 'Citizenship of the Union... Rights for All?' (2002) 27 ELRev 121; RCA White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54 ICLQ 885. Access to employment in the public services remains one of the most indicative examples of this discrepancy (see Articles 45(4), 51; and 62 TFEU). A less striking example is the reluctance of the Court to recognise war benefits to EU Citizens who are claiming them from countries for which they did not fight during the War, although given the degree of solidarity and union in modern-day Europe this is peculiar.

Treaty has changed the constitutional basis of the right as it is now granted by a Treaty Article (see Article 21 TFEU) and not by secondary legislation. This elevation, combined with the 2004 Citizens' Directive,³⁶ presents a good opportunity for further association of Citizenship with residence; it would be much more substantive to couple these two concepts together than maintain the current configuration as the residence and Citizenship are both EU concepts and the former 'would strengthen the feeling of union citizenship and is a key element of promoting social cohesion, which is one of the fundamental objectives of the Union'.³⁷

As a conclusion, no matter how strictly the Court interprets the provisions on expulsion owing to matters of public policy or how liberal the residence requirements and mutual recognition of qualifications are, national citizenships can be revoked and so can EU rights as a consequence of this. A decoupling of the two notions would greatly ameliorate citizenship both substantially and conceptually as it would give it a more European aspect and would add protection from national actions against EU citizens while it would also achieve a better balance between the need to allow for more regulatory independence at a national level and a more meaningful concept at the European level. Such an arrangement would also resolve the problem that arises when job-seekers apply for benefits;³⁸ although citizens who are employed (*travailleurs*) have equal access to social benefits, unemployed Citizens (*citoyens*) may not be covered so comprehensively because they are not economic actors. This distinction provides an additional argument to those who claim that being a worker is currently better than being a citizen. A further argument could be added to this and which is the material scope of non-discrimination which is not without boundaries, especially in term of areas that are under the exclusive jurisdiction of the host state, such as public posts where non-discrimination cannot fully

³⁶ 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 OJ L 158.

³⁷ Citizens' Directive Recital 17.

³⁸ It has been suggested that citizenship at EU level is an ever-expanding field, both owing to how it has been constitutionally construed and to practical reasons related to its nature, and, thus, it should remain bound to its national counterpart as the latter tends to become weaker as European integration proceeds. Although this argument does seem reasonable in the light of the interdependent powers in EU's constitutional reality, a bold movement towards an independent concept with Community rather than nationally-derived meaning would provide EU movement rights with a momentum they currently lack.

operate.³⁹ It is then a matter of choosing the form which the new citizenship should take after the addressing of the two elements of deficit cited above.

2. *The new approach to citizenship*

The aim of this section is not to provide potential solutions to what the new citizenship concept will be but to present the basis of such a discussion by examining recent case-law, which seems to be improving the citizenship dynamics, and the new approach of the Court in the cases of wholly internal situations. The latter might indicate an effort to create a nucleus of citizenship rights entirely independent from economic activities or even from intra-border movement. This set of cases will be examined alongside another trend, that of basing the notional reasoning on citizenship (via its sister right to residence) while maintaining the free movement provisions as a (arguably more influential) legal basis. Therefore, almost two decades after its introduction, mixed messages are sent with regard to the status of citizenship: although it has progressed sufficiently enough to be mentioned in the case-law as the sole reason behind the granting of more rights, it still needs the support of the free movement provisions.

a. The abandonment of the wholly internal rule

One of the categories under which the free movement case-law can fall concerns the cases of litigants who initiate actions based on EU legislation, but their contextual details have few, if any, actual links to intra-border movement. In these cases the Court would refrain from passing a judgment as it would consider that they lack satisfactory connection to EU law or that the mainly economic subtext of the Treaty and secondary legislation was not related to the situations discussed.

One early example of this was case *Ritter-Coulais*,⁴⁰ where the defendants were working in the Member State of which they were nationals (Germany) but had moved their permanent residence to another Member State. Mr and Mrs Ritter-Coulais requested that the loss of income they suffered as a result of owning a house be considered for the calculation of

³⁹ F. Wollenschläger makes a related point: he cites the possibility to expel an EU Citizen from a Member State which is still permissible under the Treaty but it seems as an extreme example mostly because practically it would be hard to implement mostly owing to the Court's approach to proportionality. However, it is indeed peculiar that the right to expel a Citizen is still present in primary law provisions even if its implementation is harder than the wording suggests. See Wollenschläger (n 30).

⁴⁰ C-152/03 *Ritter-Coulais v Finanzamt Gemersheim* [2006] ECR I-1711.

the tax they should be paying under German law. The German authorities did not accept this as there was no positive income gained from immovable property in another Member State. The Court held that this case had sufficient ties with the Union law as the defendants were exercising their free movement rights, regardless of the non-economic nature of his movement. This might not appear strange at first given that there is a degree of intra-border movement and the example of frontier workers has been found to fall within the Court's competence⁴¹ but the defining element is the fact that the economic activity, on which the internal market is based, was performed in the Member State of origin. Traditionally, in order to invoke EU legislation the movement of a production factor is needed⁴² but in this case the Court was happy to effectively dismiss its previous rulings according to which the intra-border movement took place with a view to pursuing an economic activity.⁴³ The Court addressed the relevance of the case to the Union legislation and it appeared to suggest that any movement in order to take up employment falls within the scope of EU legislation, a reasoning that has attracted attention as legally incoherent owing to the discrepancy between the wording of the judgment and the conclusion which was reached.⁴⁴ A more important problem is the fact that the details of the case relate to 1987, prior to the introduction of the Maastricht Treaty and the inclusion of Article 18 EC regarding free movement. Therefore, the Court was expected to follow the *Werner*⁴⁵ precedent but did not.

⁴¹ There was no reason to suggest that this case concerned a frontier worker as in such cases the country where the task is performed tends to differ from the country of origin, not the country of residence. However, it had been found that such daily commutes could not be left outside the jurisdiction of the Court for any good reason, not because of the need to protect the commute itself, but, rather, owing to the Court's determination to remove any obstacles which might deter people from exercising their right to move.

⁴² Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edn, CUP 2007).

⁴³ See C-293/09 *My v ONP* [2004] ECR I-12013; C-115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, which was the first case to establish the Court's conduct in such cases.

⁴⁴ Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CMLR 1591; D Martin, 'Comments on *Ritter-Coulais* (Case C-152/03) of 21 February 2006 and *Ioannidis* (Case C-258/04 of 15 September 2005)' (2006) 8 EJML 231.

⁴⁵ See C-112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-429. This case concerned a German national who resided in the Netherlands and lived in Germany. The case arose owing to different tax regimes but the important element is that the Court acknowledged that this case would be treated as a purely internal situation had it not been for the movement of Mr Werner to the Netherlands. However, given that this case's circumstances took place prior to the Maastricht Treaty, the Court said that the legislation in force at the time did not justify extending its personal

Another case of reverse frontier worker was *C-527/06 Renneberg*,⁴⁶ where a Dutch national who worked in his state of origin but lived in Belgium was denied the right to have his rent in Belgium considered for tax allowance purposes given the purely internal situation of the case, according to the Dutch arguments. According to the Court, however, the claimant fell under the scope of Article 39 EC (now Article 45 TFEU) owing to the outcome the opposite view would have on the freedom to move to one Member State while still having ties with another. It seems that whether the state where the economic activity is pursued is also the state of origin is immaterial for the purposes of defining the scope of EU legislation on free movement.

A similar reasoning was followed in *C-227/03 A.J. van Pommeren-Bourgondiën*,⁴⁷ during the proceedings of which the *Ritter-Coulais* case was cited; in this case, a Dutch national who had spent her entire working life in the Netherlands but resided in Belgium was found eligible for insurance in the Netherlands despite her not residing there. The Court's justification was that the opposite would constitute discrimination and would hinder free movement. It is interesting that the Court did not endeavour to explain how the case fit within Union law⁴⁸ but this could have been because it realised the importance of making the abolition of borders more substantive. Given that in certain areas the EU operates as a quasi-federation, allowing its citizens to work and reside in different Member States would be a natural implication. It is arguably true that the Court did not entirely change its stance: it still required certain conditions to be met, specifically that an intra-border move takes place and that an economic activity is pursued; the difference in the new approach was that these two actions no longer needed to be connected.⁴⁹

scope to include Mr Werner's claim. Interestingly enough, in the case of *Ritter-Coulais*, Mrs Ritter-Coulais was of dual nationality and the Court could have used this detail to support its argument and avoid the criticism, but did not make use of this opportunity.

⁴⁶ *C-527/06 R.H.H. Renneberg v Staatssecretaris van Financiën* [2008] ECR I-07735.

⁴⁷ *C-227/03 A.J. van Pommeren-Bourgondiën* Raad van bestuur van de Sociale verzekeringsbank [2005] OC C 171.

⁴⁸ The Court did state that the Dutch legislation 'undermines the principle of free movement secured by Article 39 EC'; the only problem with this statement was that this particular provision could not have been applied to the claimant as it did not exist when the facts of the case took place.

⁴⁹ See also *C-544/07 Rüffler v. Dyrektor Izby Skarbowe* [2009] ECR I-3389 where a German national, recipient of two pensions, moved to Poland where he planned to reside without taking up employment. He paid income tax in Poland and applied for his insurance contributions to be factored in so he could pay less tax; these contributions, however, had been paid in Germany during his working life and

In *C-212/05 Hartmann*,⁵⁰ a German national who worked in Germany but moved to Austria in order to be with his wife applied for child-rearing allowance which was denied because he was not a resident of Germany. The Court did not uphold this ban because Mr Hartmann was, for the purposes of this case, a frontier worker and thus eligible for such an allowance.⁵¹ A similar line of reasoning was followed in *Hendrix*,⁵² where a Dutch national was the recipient of a disability allowance, which was discontinued when he moved his residence to Belgium, although he retained his status as a worker in the Netherlands. The Court again did not accept the arguments of the Dutch authorities, according to which residence in the Netherlands was a prerequisite for the granting of the said allowance.

The Court seems to be abandoning the wholly internal situation rule for the sake of a more comprehensive protection of free movement. It also seems that there are only two conditions that need to be met for the Court to initiate action and these are the pursuit of an economic activity and intra-border movement. Despite the somewhat dubious reversals of previous rulings, there are positive attributes that should not be undermined by negative comments on the potential inappropriateness of the Court's judgment. Although the early case-law did offer a qualified right to free movement, the introduction of citizenship and the consequent evolution would not be compatible with the need to meet both requirements mentioned above in the same way the Court had suggested in the past. A new element is that these two conditions do not have to be linked and, thus, the economic activity in question may take place in one's state of origin; the EU legislation will still be applicable irrespective of the fact that the move might take place for personal (relocation) rather than economic (a job abroad) reasons. This is a notable departure from the initial construes of the free movement rights, according to which a movement had an economic rationale first and foremost. Of course, over the years the Court and the Union have recognised that a right to residence would logically complement the right to free movement but this decoupling of the right to residence and an economic activity is an

Poland refused to take them into consideration. The Court did not uphold its refusal since it constituted discrimination and also put those who exercised their free movement rights in a disadvantaged position.

⁵⁰ C-212/05 *Gertraud Hartmann v Freistaat Bayern* [2007] ECR I-06303.

⁵¹ The Advocate General based her reasoning on Article 18 EC (NOW Article 21 TFEU) rather Article 39 EC (now Article 45 TFEU) and Directive 1612/68 as the Court did but it has been suggested this has been a legally incoherent application of the law as Article 18 was not applicable *ratione temporis*.

⁵² C-287/05 *Hendrix v Social Security for Migrant Workers* [2007] ECR I-06909.

indication of a better form of citizenship.⁵³ The Court has been particularly active in its endeavours to offer a new interpretation of free movement by arguing for an independent notion of citizenship, possibly in order to strike a balance between market freedoms and social Europe, a balance which can be elusive.

Similarly, in *Schwarz*⁵⁴ the Court addressed the issues created owing to a German provision according to which school fees could be taken into consideration for tax deduction purposes but only if the said schools were situated in Germany. The Court found this requirement unlawful as it constituted a potential barrier to free movement. The same reasoning was followed in *Morgan*,⁵⁵ where according to a German law, in order to acquire a grant to pursue studies or training in another Member State, the said further studies had to be in continuation of a degree undertaken in Germany. In both cases, the nationals who were affected would be exercising their rights to free movement for educational purposes, namely a non-economic activity. Therefore, the Court once again stripped the free movement from the economic requirements and brought it in line with the citizenship provisions.⁵⁶

However, the Court's approach has not been entirely unproblematic. Although the residence provisions (Article 25 TFEU) are mentioned in the case-law, they tend to be read in conjunction with Article 45 TFEU, which covers the economic freedoms. More worrisome is the fact that the claimants in some of the cases above never, strictly speaking, exercised the

⁵³ This departure, it has to be noted, is not the outcome of *Ritter-Coulais*. The AG in the seminal case of C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 had suggested that there is a right to residence even if the pursuit of an economic activity has moved to another state, although the residence provisions were combined with those of free movement for economic purposes. Nevertheless, it shows how gradual a process the evolution of citizenship rights has been.

⁵⁴ C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-06849.

⁵⁵ See joined cases *Rhiannon Morgan v Bezirksregierung Köln* (C-11/06) and *Iris Bucher v Landrat des Kreises Düren* (C-12/06) [2007] ECR I-09161.

⁵⁶ These two cases along with C-224/02 *Pusa Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-05763; C-406/04 *De Cuypter v Office national de l'emploi* [2006] ECR I-06947; and C-192/05 *Tas-Hagen v Raadskamer* [2006] ECR I-10451 are a testament to the Court's efforts to ensure the independent enforceability of the Citizenship provisions by decoupling them from the non-discrimination principle. In *Tas-Hagen*, for instance, the Court reversed previous rulings on war benefits and decided that they can be granted even when they fall outside the scope of Article 12 EC regarding discrimination (now Article 17 TFEU). Under the Lisbon Treaty these two principles are grouped but when these judgments were delivered the Court tried to interpret the law in such a way as to give citizenship more legal weight.

right to free movement of workers; they only moved to reside in another Member State, which is a citizenship right, valid since 1993. Although the former is understandable in the cases where Article 25 was not still in effect, the Court seems to prefer the safety of using the freedom of movement provisions in order to make its reasoning more substantial, or more 'airtight'. This practice seems to undermine the increasing importance of citizenship and its undeniably positive effects on EU rights that were not explicitly covered by the Treaties⁵⁷ and it calls for a different construction of the relevant rights. The latter situation is further testament to the relevance of such a readjustment. It is still true that the rights of a migrant worker can be suspended, albeit with considerable difficulty as there is little room for maneuver, unless there is an attested act that may affect public security, safety, or health; conversely, an individual who relies purely on their residence rights would have to face additional scrutiny as the Citizens' Directive still speaks of the need to avoid becoming an unreasonable burden on a state's social systems.⁵⁸ It is my conviction that the practical implementation of the strictest elements of the provisions would be difficult and probably disproportionate. Therefore, although 'mere' residents seem to be under a thinner legal regime than their workers counterparts, the end result may be the same. Additionally, the cases above concern areas which are not harmonised and in which Member States still have almost absolute freedom: taxation and non-contributory social benefits.⁵⁹ This is another argument in favour of further integration as such cases will continue to arise for as long as we have free movement rights in the EU, and the Court might again face a case which will result in the adoption of a legally questionable judgment in which the Court or its Advocates General consider the substance of the

⁵⁷ See job-seekers, students, pensioners, and persons of independent means. Their legal status is much better now but this is owing to the work of the Court and the introduction of Citizenship.

⁵⁸ This could also be a problem for an individual who relies upon their free movement rights but has found themselves without employment and thus fails to meet the requirements of Article 45 TFEU. However, it is arguable that this would pose fewer problems in practical terms than the wording of the provisions suggests, partly because said individual would have already worked in the country and would have been able to extend their residence if they could prove they had been looking for a new job or, they would have been in possession of the necessary means to survive on their own (an additional safety net is provided by the Court's view that being asked to provide evidence for such claims would be a disproportionate requirement); and partly because there would have been the possibility to acquire the status of permanent resident of the host state after a 5-year uninterrupted residence. Moreover, one could also prove they have successfully integrated in the Member State in question, not to mention the practical difficulties in justifying expulsion.

⁵⁹ This is particularly relevant in the post-enlargement EU and especially as the transitional period has finally expiring (for the 2004 accession).

question and the potential impact on free movement rather than the strict constitutional basis of the judicial review they will be performing.⁶⁰

Another criticism of the new approach of the Court suggests that it has been maximising the personal and material scopes of the free movement provisions to such an extent that one would wonder why EU citizens who do not exercise the right to move at all should not be included.⁶¹ Although this would resolve the issue of reverse discrimination, it does seem a step too far and an unfair and disproportionate criticism of the Court. What the Court has done is interpret the provisions in a teleological fashion and apply the law in order to give it the substance the legislator intended. It is not for the Court to act as a legislative body and it has refrained from doing so; rather, its endeavours reflect its role of interpreting and reviewing the implementation of EU law and it seems logical that it has been providing those who exercise their free movement rights with more comprehensive cover, regardless of the economic action pursued. The Union is indeed based on a common market but a political union is not beyond its scope.⁶² Quite the contrary, in fact, as ambitions for wider integration have been present ever since the very beginning of the Union and the Court is wisely factoring this in its decisions. However, as noted above, the Court should have used the residence and citizenship provisions as a legal basis (where that was possible) and not Article 39 EC (now Article 45 TFEU), as this practice denotes that the former provisions lack the legal weight of the latter.

This section focused on a new tendency to revisit the established *modus operandi* which governs the purely internal situations and their relevance (or lack thereof) to EU law, which is used as a test by the Court to decide whether a case falls within its jurisdiction. This, however, is not the only new approach which questions the outer limits of Citizenship; two more

⁶⁰ AG Leger, for instance, acknowledged the *Werner* precedent while discussing *Ritter-Coulais* but also said that the case-law has been assessing the impact of cases that appear to have little, if any, actual connection to EU Law and may be discriminatory to workers (even if the claimants are not actually workers for the purposes of Article 45 TFEU).

⁶¹ Tryfonidou (n 44).

⁶² It is true that the wording of the free movement articles has not changed much since the 1950s but this is only one side of the argument. Ever since the ECSC Treaty, other articles have been added, including those regarding residence and citizenship, while secondary legislation has covered groups such as students, who have been deemed beneficial for a better European integration irrespective of the fact that they perform no economic activity. Reading the articles without considering the temporal context and the efforts in other types of legislation in order to prove the Court's imprudence tells only half the truth.

recent cases, *Ruiz-Zambrano*⁶³ and *McCarthy*⁶⁴ also gave rise to a debate about the future of Citizenship and the departure from rules, such as the purely internal situation and the need for an intra-border movement to take place in order to trigger the application of EU law. *Ruiz-Zambrano* referred especially to a new European space, while *McCarthy* is a more limited application of the principles established in the former case but, nevertheless, establishes a new trend which may be used in future Citizenship cases.

b. A new, autonomous European space for Citizenship in the CJEU case-law

The judgment for the *Ruiz Zambrano* case was delivered only a few months ago in April 2011; the case concerned a Colombian national who left his home country and moved to Belgium where he applied for asylum. Although his application was rejected, he remained in Belgium in order to appeal against the initial decision, found employment and, in the meantime, his wife gave birth to two children. These children, by virtue of having been born in Belgium and in order to avoid rendering them stateless, were registered as Belgian nationals and, therefore, became EU citizens. When Mr Zambrano and his wife failed to win their appeal, they were unable to work and applied for unemployment benefits; their application was rejected and they initiated legal action and the case was subsequently referred to the CJEU.

The case is reminiscent of *Zhu and Chen*,⁶⁵ where a non-EU national was granted the right to remain in the Union because her daughter was born in Ireland and, although the UK had previously tried to deport her, this would have resulted in also deporting the baby who was an EU citizen. This finding was affirmed in *Ruiz Zambrano* and expanded as there was a material difference; in the Belgian case, there was no intra-border movement. The young children, upon whom the parents's right to residence was based, had never left Belgium, but, nevertheless, the Court found that any measures which deprive EU citizens of their rights are against EU law (in this case, deporting the parents would constitute such a measure). Moreover, another qualification added by *Zhu and Chen*, that regarding the parents's financial independence was removed.

The important elements of the case are threefold: one concerns the right

⁶³ C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-000000.

⁶⁴ C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-000000.

⁶⁵ C-200/02 *Zhu and Chen* (n 27).

to residence conferred to parents via their children's status of EU citizen; the other is the lack of intra-border movement, which seems not to be needed in order to trigger the application of the Citizenship rights; thirdly, the judgment refers to a new European space and a new European territory, which is more than the sum of the territories of the Member States. The first element is important because it recognises an independent feature of Citizenship: one can invoke one's rights simply by being an EU citizen, without the need to pursue an economic activity and without the need to have exercised their free movement rights, which is the second element of the judgment. In the past, the Court would look for an intra-border movement to establish a connection to EU law but, according to recent case-law, citizenship seems to be a bearer of rights in and of itself. This is indirectly relevant to the third point identified above, regarding the new European space. In the first years of Citizenship, one would talk about a type of European integration which would work at a transnational level, namely among the Member States and, especially to those involved in the intra-border movement, which would trigger the application of EU law.

However, the *Ruiz Zambrano* judgment has given rise to a debate on the meaning of 'European space'. According to the Court, this European territory is more than a geographical reference and it denotes an area of rights, a common identity, and European values. Therefore, the Court is approaching the founding ideals of personal fulfillment and the amelioration of one's wellbeing by referring to rights which are applicable to individuals who are physically in the Union, without the need for an intra-border movement⁶⁶ or the exercise of an economic activity (or even the need to be financially independent). In many ways, one can see in *Ruiz Zambrano* the principles first established in the earlier case of *Rottman*;⁶⁷ Citizenship was referred to as providing independent rights to its beneficiaries and was regarded as a source of rights. Contrary to previous decisions, Citizenship should now be protected in order to protect the

⁶⁶ Interestingly, the preamble of Directive 2004/38 does mention that citizenship is to be the fundamental status of the EU citizens when they move to another Member State but the Court chose to use Article 20 of the Treaty as a legal basis for the judgment rather than the Directive.

⁶⁷ C-135/08 *Rottman v Freistaat Bayern* [2009] ECR 0000. The case concerned an Austrian national who moved to Germany after a case of fraud had been initiated against him in Austria and acquired the German nationality. He did not disclose his dealings with the Austrian authorities and when the German authorities discovered the case which was pending against him decided to remove his nationality. This would have rendered him stateless. The Court did agree with Germany's decision but it demanded the proportionality principle be respected in order not to disadvantage him by rendering him stateless. In was, however, up to the Austrian Courts to decide whether his nationality could be reinstated.

rights to which it gives access and the European identity which it helps to create.

However, the reasoning of the case was not repeated in an otherwise very similar instance, in *McCarthy*. Ms McCarthy was a resident of Northern Ireland who held dual British and Irish nationality. She had never left Ireland or taken up employment and was relying upon state benefits. Following her marriage to a Jamaican national who had no valid residence permit for the UK, she tried to use her own residence rights to make a case for her husband by acquiring an Irish passport. The Court found that she could not benefit from EU legislation because she had never exercised her free movement rights and the Court also referred to the *Ruiz Zambrano* case but failed to find any parallels between the cases as in Ms McCarthy's case, her situation did not prevent her from enjoying her citizenship right fully. Moreover, the decision of the British court, which referred the case to the CJEU, did not mean that she would be expelled from the territory of the Union, as was the case with the Zambrano children.

It appears from the case-law presented above that *McCarthy* and *Ruiz-Zambrano* are uncomfortable bedfellows and the latter has a limited exportability, which would only apply to the situation of a carer. However, this might be a premature statement given the tendency of the Court to approach every case in a different fashion, depending on the material details of each situation and the *ad hoc* assessment of each case's circumstances. Therefore, it is not improbable that the Court will use the above reasoning again. What is of importance is to ensure that the Court has the necessary constitutional basis upon which to base its decision. The final section will focus on the suitability and potential of the Treaty of Lisbon to act as the said legal basis.

IV. THE CONSTITUTIONAL RELEVANCE OF A NEW FORM OF CITIZENSHIP

The previous sections have examined the political aspect of Citizenship and its ties with the pursuit of an economic activity and have identified a number of solutions that could make the concept more meaningful and relevant to Europeans of today, especially given the low degree of integration in specific areas or policy. However, there is another element that needs to be factored in any effort to move towards a new Citizenship: the constitutional basis upon which it will be built. The Treaty of Lisbon is still fairly recent but it can provide the said basis for any new endeavours to re-assess and revisit citizenship and also can provide for more social (and, eventually, political) rights which could form the building blocks for citizenship 2.0.

1. *First signs of change*

The case-law of the Court comprises cases where Citizenship rights are deemed to be independent and cases where they are so in theory but not in essence. Despite this dichotomy, steps towards a more substantial concept can be identified and, in conjunction with the social aspect which is becoming more prominent, one can identify the premise of the efforts to offset the effects of liberalisation of services and employment in the EU. For instance, the Court was following the letter of the law when it delivered the judgments for *Laval*⁶⁸ and its progeny but it had its victims, in the form of the social character of the Union. Therefore, EU Citizenship has the potential to be used as a means to counterbalance this and the Treaty of Lisbon may provide the necessary constitutional ground for such an endeavour.

In fact, a very good case in point is the evolution of the case-law from the four Posted Workers' Directive (PWD) cases to the most recent one, *Santos Palhota*;⁶⁹ *Viking*⁷⁰ and *Laval* were two cases regarding industrial action and its lawfulness under EU Law. In the former case, a Finnish company running ferries between Finland and Estonia wanted to reflag one of its ships in order to lower running costs, prior to Estonia's accession to the EU. The Finnish Seamen Union (FSU) threatened with industrial action while the International Transport Workers' Federation (ITF) participated in the negotiations regarding the ferry's crew and demanded that the ferry be governed by Finnish law even after the re-flagging. This proved unsuccessful and negotiations were halted after an ITF circular to that effect. After Estonia joined the EU the negotiations resumed without success, and Viking referred the case to the English courts. In *Laval*, a Latvian firm won a commission for a construction project in Sweden and the Swedish unions wanted to ensure that the workers whom Laval would post to Sweden would be entitled to all their rights under Swedish law. Laval was not willing to agree to all suggestions made by the builders' union and the latter blocked Laval's construction site. Other unions joined in solidarity and in the end Laval's Swedish branch declared bankruptcy.⁷¹

⁶⁸ C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet avd. 1 Byggettan and Svenska Byggnadsarbetareförbundet Elektrikerförbundet* [2007] ECR I-11767.

⁶⁹ C-515/08 *Criminal Proceedings Against Santos Palhota and Others* [2010] ECR I-00000.

⁷⁰ C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

⁷¹ The PWD quartet also includes C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989 and C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323 but, for the purposes of this paper Viking and Laval are more relevant. The reader is reminded that *Commission v Luxembourg* concerned the transposition of the Directive in the Luxembourgish legal order; while Rüffert

In both these cases, the thorny issue concerned the right to strike. Although the Court did recognise the right as being fundamental, it also pointed out that it can be a barrier to free movement and, thus, subject to judicial review and the proportionality test. Furthermore, and maybe more importantly, the Court also acknowledged the need to safeguard the right to strike in the battle against social dumping and the unpleasant effect of an open market based on competition; however, it stated that a minimum of standards could be provided for and this would be sufficient protection of fundamental working rights.⁷² Neither of these cases has been welcomed but it could be argued that the Court was actually using its long-established teleology to interpret the then current legal status quo.

Since then, however, the Treaty of Lisbon has come into force and another case, the aforementioned *Santos Palhota* case, was referred to the Court. The case concerned a Portuguese company posting workers to Belgium and the national regulations by which it had to abide. According to these rules, the Portuguese company had to produce specific documents for the social protection of the workers involved in the posting, whereas it also had to set up accounts for the payment of wages. It was the view of the company in question that the Belgian requirements were an obstacle to free movement of services. The Advocate General found that the case should be seen through a constitutional light and he based his opinion on the Treaty provisions rather than the PWD. As a consequence, he suggested that owing to the new constitutional reality, social values and the protection of workers cannot be deemed to be contrary to the market-based aims of the Union; rather, they have equal standing and the manner in which they are treated should reflect this. The Court agreed with the essence of AG's points but did not pay the same attention to the constitutional debate he opened.

Why the Court chose to do this is not exactly clear; maybe it felt it was

concerned minimum wages in a Land of Germany which differed from the minimum wages applicable elsewhere in Germany.

⁷² The literature on the PWD case-law is vast and not all issues attached to the cases can be covered here. Indicative reading includes See ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 ILJ 126; C Joerges and F Rödl, 'Informal Politics, Formalised Law, and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 ELJ 1; Barnard, 'Social dumping or dumping socialism?' (2010) 67 CLJ 262; Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 ILJ 122; P Davies, 'The Posted Workers Directive and the EC Treaty' (2002) 31 ILJ 298; Nicole Lindstrom, 'Service Liberalisation in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?' (2010) 48 JCMS 1307.

not constitutionally endowed to act as the legislator as it is the responsibility of the drafters of new treaties to set the aim of the primary law documents of the Union. In any case, *Santos Palhota* may become the basis for more judgments with a bias towards the social aspect of the EU; similarly, if the above reasoning is applied to the case of Citizenship, the Lisbon Treaty may be able to justify a new stance on Citizenship rights with a gradual move towards a more independent configuration. The next section will focus on changes in the Treaties which may help with such a departure.

2. *How could Lisbon bridge the gap*

Although no major amendments were made in the wording of the Citizenship provisions, the structure of the Treaty on the Functioning of the European Union led to grouping of the citizenship and non-discrimination provisions and extended their scopes to include the entire Area of Freedom, Security and Justice,⁷³ owing to the abolition of the pillar structure, first introduced by the Maastricht Treaty.⁷⁴ Similarly, the right to residence is part of the citizenship rights, which in turn means that economically inactive persons have a right to free movement granted by primary law and not by *ad hoc* secondary law provisions. Another problem which has been identified is the gap between social Europe and the market. One of the solutions suggested concerned a shift in priorities or, at the very least, better efforts to balance conflicting priorities such as fairer social rights and economic advancement. The Treaty of Lisbon seems to have addressed that by the insertion of a provision regarding services or general economic interest⁷⁵ and the removal of the old reference to ‘free and undistorted competition’.⁷⁶ Rather, the Lisbon Treaty now makes reference to a social market economy, which might sound like an oxymoron but demonstrates the Union’s wish to retain the social character for which European welfare states are known, but also to invest in open market policies in an increasingly competitive

⁷³ Equally, the jurisdiction of the Court now covers the entire Area of Freedom, Security and Justice.

⁷⁴ Editorial Comments (n 30).

⁷⁵ See Article 16 TFEU. It should be read along with the EU Charter of Fundamental Rights. These provisions aim at ensuring that all EU citizens live in a socially advanced Union where the negative effects of free competition are not left unaddressed.

⁷⁶ This reference was not entirely omitted; it can still be found in a Protocol on the internal market and competition. The Protocols attached to the Treaties carry the same legal significance but the omission from the text of the main Treaty might be more symbolic than it seems.

environment.⁷⁷ If these changes seem to be less than substantive and mere changes to the wording, one has to remember that the institution trusted with the interpretation of the Treaties, the Court has proven to be a liberal and radical interpreter of the Treaties. Therefore, these changes, minor as they may seem, will be more influential depending on the Court's conduct.

This is not to say that the Treaty of Lisbon introduced only welcome changes. Member States have the right to stop the drafting of a Directive destined to provide social security incentives for free movement if they find it to be against their social security systems. The process may, of course, be resumed but there is the option to do so even if as few as nine Member States reach an agreement, which is a double-edged sword: although such an arrangement will lead to the adoption of a potentially beneficial directive, it will create a fragmented *à la carte* European Union and will jeopardise all the efforts towards a more legally coherent Union. Additionally, and maybe more importantly, the balance mentioned above would appear to be a lost battle, mostly owing to the competences afforded to the European institutions. First of all, the efforts towards a social Europe will always have to be measured against the need to have an open market; this would not be a problem in and of itself were it not for the little independence the Union enjoys in the area of social policy. Industrial relation in the EU Member States are based on at least three different models which rarely converge and when they clash with the EU policies, the results are unwelcome to say the least.⁷⁸ This seems like another reason for further harmonisation as, sooner or later, it will become more evident that the dichotomy between social and economic competences is no longer attainable.

The former are covered by articles whose wording has hardly changed and which make reference to 'harmonisation' but also to its exclusion from certain policy areas. Unsurprisingly, Member States retain the right to adopt national laws which are stricter than their EU equivalent, provided the former comply with the Treaties.⁷⁹ This requirement probably refers to

⁷⁷ Loïc Azoulay, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 CMLR 1335.

⁷⁸ A relevant point concerns the legal significance given to the Charter of Fundamental Rights under the Lisbon Treaty and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The former might not be as important an addition as it seems. The latter addition will mean that the European Court of Human Rights will have jurisdiction over the EU institutions and such a change should prove more substantive.

⁷⁹ Phil Syrpis, 'The Treaty of Lisbon: Much Ado... But About What?' (2008) 37 ILJ 219.

the aims of the Treaties (and thus the Union's) and the principles of non-discrimination and proportionality. Therefore, there is scope for judicial review as the Court might be asked to rule on the compatibility of national provisions with EU legislation, prompted either by the Commission or by a Citizen or other legal person; however, this does not change the fact that in order to rule on the said compatibility an action has to be initiated and, more importantly, harmonisation does not become easier as the fragmented state of the EU legal regime is protected.

Notwithstanding these shortcomings, the changes in the Union's aims and objectives reveal a certain bias in favour of social policies and even if this is not particularly outspoken or explicit, the Court will probably take this shift into consideration in its teleological reasoning. Despite reservation expressed over how possible this is⁸⁰ the Court has a long story of loyalty to the letter of the law and such an example can be seen in the *Santos Palhota* case mentioned previously. This seed of a new stance towards fundamental freedoms read in conjunction with the Citizenship provision and the emphasis on social provisions afforded by the Lisbon Treaty may provide the latter with a solid constitutional basis and much-needed independence. However, the Court is not a panacea when it comes to finding the necessary ground for an elevated form of Citizenship and a proper constitutional revisiting of the provisions would be a longer-term solution.

V. CONCLUSIONS

This paper's premise was the evolving nature of the citizenship provisions and their potentially independent construction. The distinction between a citizen as a political entity (*citoyen*) and a citizen/worker (*travailleur*) was a means to paint the picture of ever changing and growing material and personal scopes. The first section focused on the voting rights attached to Citizenship and criticised their limited scope. Despite the fact that the EU is not a state and, thus, cannot be expected to be organised as one, the rule of law and democracy are among its founding principles and this should be reflected in its political arrangements.

The second section of the paper focused on the case-law of the CJEU in order to depict the changing attitudes towards what means to be a citizen of the EU. To do so, the first part presented a series of cases which seemed to signal a departure from the established rules on wholly internal situations, while the second part examined the most recent case-law which takes the aforementioned departure a step farther by revisiting the

⁸⁰ Ibid.

requirements which need to be met in order for the application of EU law to be triggered. This set of cases has been particularly important as it gave rise to a discussion about the new borders of Europe. It is arguable that we are moving towards a less geographical notion of Europe and towards a new construe whereby Europe is regarded as a common space of rights and common values, where EU citizens have rights by virtue of their physical presence in the Union rather than their exercise of free movement rights.

The final part of this paper sought to explore the Lisbon Treaty's potential to form the constitutional basis upon which this new configuration can be based. The first signs of the new approach were evident in the cases presented previously in this paper and, provided the Court follows similar reasoning, one could speak of a new dawn for citizenship, with a more independent character and less reliance upon market values and crossing of borders. Clearly, as *McCarthy* showed, this will not be always the case but, the Court's *modus operandi* relies heavily upon *ad hoc* assessment of facts which means that each case will be judged differently, rather than on a 'one size fits all' basis.

This is where the Lisbon Treaty comes in; given the changes it introduced, and the apt demonstration of said changes in the *Santos Palhota* reasoning (albeit reflected only in the AG's opinion but not in the Court's judgment), the Court could use this as a starting point for a more inclusive version of citizenship. It is indeed too early to talk about more political rights, a lack which the first part of the article noted, but the independence of the Union citizenship is ambitious could act as a catalyst for further change towards an independent source of rights and, maybe given time, a residence-based Citizenship with further political rights in a more democratic Union.

**CITIZENSHIP, MIGRATION AND REGIONAL INTEGRATION:
RE-SHAPING CITIZENSHIP CONCEPTIONS
IN THE SOUTHERN CONE**

M. Belén Olmos Giupponi*

The paper examines the relation between citizenship and regional migrations in recent legislative changes in Argentina from a comparative perspective. The article discusses how these legislative changes are shaping a new migration paradigm and conceptions of citizenship; providing with relevant information about migration and citizenship in the Common Market of the Southern Cone (MERCOSUR). The article first gives a general review of the literature on citizenship and migration, with a focus on Latin America. In this framework, the contribution explores the factors which have driven recent legislative changes on migration and citizenship in Argentina and their implications in the light of the Supreme Court's case law on migrant's rights and access to citizenship. The article further underlines the impact of MERCOSUR regulations on migration and citizenship issues at internal level

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I. INTRODUCTION

Although there is a vast literature on the interplay between citizenship and immigration in European and North American countries, no extensive research has so far been carried out on other countries. In the case of Argentina, new migration patterns and the signature of regional agreements on migration have brought legislative and policy changes regarding migration and citizenship.

In the paper, we present a study on how these factors have driven a shift in the migration paradigm in Argentina. Thus, the main goal is to analyze the relation between citizenship and regional migrations in recent legislative changes in Argentina from a comparative perspective. We aim at examining how these legislative changes are shaping a new migration paradigm and conceptions and representations of citizenship. Furthermore, the study provides with relevant information about migration and citizenship in South America.

From 1870 until 1913, migration flows were from Europe to the Americas. Argentina was one of the main receiving countries: approximately seven million European people arrived in the country. On the contrary, in the last decades of the XX century Argentina converted into an emigration country, in particular, of highly skilled migrants. At the same time, the country was receiving regional migration flows coming from neighboring countries.¹

Since 1876, the immigration policy had been partially covered by rules adopted by executive decrees and a law enacted during the last dictatorship. Only towards the end of 2003, and after two decades of the return to democracy, the Congress repealed the previous immigration law and approved a new migration act (2004 Migration Act - Ley de Migraciones No. 25 871). This law represents the first general legislation on migration enacted by a democratic government in compliance with international standards on the protection of fundamental human rights of migrants. At the same time, and since 2000 Argentina's Supreme Court has introduced more flexible criteria to interpret the requirements to access to citizenship.

Another relevant development is the signature at regional level of the 2002

¹ In 2001 migrants from neighbouring countries in Argentina represented 2.6 % of the total of the population. In 2010, approximately 3 %. Source: INDEC (National Institute for Statistics and Census).

agreements to regularize undocumented migrants from MERCOSUR (Common Market of the Southern Cone)² member and associated states. Consequently, Argentina has introduced specific provisions in its immigration legislation to grant a special status based on nationality to citizens from MERCOSUR member and associated states and implemented a regularization programme for undocumented regional migrants present in its territory.³

By examining these legal ‘turning points’ we intend to shed new light and present a new focus on the construction and evolution of contemporary conceptions of citizenship in Argentina. In this paper, we will use the term “citizenship” with two different meanings: formal and substantive.⁴ By formal citizenship we understand the “formal link between an individual and a state, to the individual belonging to a nation-state, which is juridically sanctioned by the possession of an identity card or passport of that state”.⁵ As for substantive citizenship, it consists of “the bundle of civil, political, social, and also cultural rights enjoyed by an individual, traditionally by virtue of her or his belonging to the national community”.⁶ Even though these two aspects are closely linked, sometimes it is possible to enjoy citizenship rights under another legal status.⁷

This paper is organized as follows. The first section gives a general review of the literature on citizenship and migration, with a focus on Latin

2 MERCOSUR was established by the Treaty of Asuncion signed in 1991 by Argentina, Brazil, Paraguay and Uruguay. Venezuela was admitted as member state in 2006, but its full membership is still pending upon its approval by the Paraguayan Congress. Up to the present Bolivia, Chile, Colombia, Peru and Ecuador are associated states.

3 See R Benencia and A Gazzotti, 'Migración Limítrofe y Empleo' (1995) 10 (31) Estudios Migratorios Latinoamericanos 373; S Montoya and S Pertcará, 'Los inmigrantes en el mercado de trabajo urbano. Alcances y perspectivas' (Seminar 'Impacts of immigration on Argentinean society', Buenos Aires, 1995); L Reboiras Finardi, 'Migración internacional en el Gran Buenos Aires: sus vinculaciones con el desempleo y la discriminación en el ámbito laboral' (Centro Latinoamericano de Demografía 1995) 39.

4 There is no general agreement on the concept of citizenship itself. As Martiniello points out, “conceptions of citizenship vary according to the academic discipline but also according to the school of thought within the various academic disciplines”. See M Martiniello, 'Citizenship of the European Union' in T Aleinnikoff & D Klusmeyer (eds) *From Migrants to Citizens* (Carnegie Endowment for International Peace 2000) 345.

5 Ibid.

6 Ibid.

7 This situation is defined as “citizenship rights of non-citizen residents”. See R Bauböck (ed), *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press - IMISCOE Reports, University of Chicago 2006) 23.

America. The second section provides with an explanation about the empirical factors which have driven recent legislative changes in Argentina. The third section addresses the main modifications regarding Argentinean citizenship and migration laws and the Supreme Court's case law on migrant's rights and access to citizenship. The fourth section is devoted to the study of MERCOSUR and how its regulations have an impact on migration and citizenship issues at internal level. The author's opinion is summarized in the last section.

II. CONTEMPORARY DEBATES ON CITIZENSHIP AND INTERNATIONAL MIGRATIONS IN EUROPE AND THE AMERICAS: AN OVERVIEW

Over recent years, the linkage between citizenship and immigration has become an important topic. Indeed, scholars of citizenship have shown how migration has brought various changes to the traditional Marshallian concept of citizenship.⁸ The debate in Europe and in the United States about citizenship in the context of international migration has been on the agenda for a long period.⁹ Scholars have mainly focused on the study of citizenship and immigration in industrialized states, in particular in North America and Western Europe, overlooking other geographical areas.¹⁰ There is little knowledge of these ongoing processes in other geographical areas, such as Latin America. Preliminary evidence would seem to suggest that this is a broader trend.

A brief overview of the main theories and mainstream debates on

8 Ch Jopkke, 'How immigration is changing citizenship: a comparative analysis' (1999) 22 (4) *Ethnic and Racial Studies* 629. The conception provided by TH Marshall on the evolution of citizenship from the civic arena to the political and on to the social one has been frequently the basis for developing new conceptualizations about citizenship. See TH Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) 28, 29.

9 S Castles and A Davidson, *Citizenship and migration - Globalization and the politics of belonging* (MacMillan 2000); C McKinnon and I Hampsher-Monk (eds), 'Civil Citizens' in *The Demands of Citizenship* (Continuum Publishing 2000). L Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008). In the past decade there has been a proliferation of research on 'citizenship' in different contexts. Thus, it was discussed in the context of political transformations of Central and Eastern Europe, with respect to the renewed challenges of globalization and migration and in the decline of the welfare state since the 1980s.

10 Even in the case of Europe, studies have addressed the question by focusing on the traditional receiving countries such as France, Germany, the United Kingdom and the Netherlands. See, for instance, E Ersanilli and R Koopmans, 'Rewarding integration? Citizenship Regulations and the Socio-Cultural Integration of Immigrants in the Netherlands, France and Germany' (2010) 36 (5) *Journal of Ethnic and Migration Studies* 773.

migration and citizenship provides with the theoretical framework for our study. At the same time, and in order to complete the analysis, it is necessary to take a look at contemporary conceptions of citizenship in Latin America.

In the migration context, for the purposes of this study, three different approaches to citizenship can be distinguished. The first is the approach oriented towards the analysis of the traditional liberal concept of formal citizenship as a legal status linked to the nation-state.¹¹ In this perspective, citizenship laws and migration legislation are two fundamental aspects of the definition of who is entitled to hold the status of citizen. Citizenship at birth can be based on place of birth (*jus soli*) or parental origins (*jus sanguinis*), or in certain cases on both. In the case of migrants, citizenship can be acquired through naturalization based on legal residence in the receiving country. In this case, migrants must meet certain requirements such as possessing knowledge about the country or of its main language. Only under certain conditions are migrants allowed to retain their citizenship of origin (dual citizenship).

According to the second approach, substantive citizenship is more relevant than the formal possession of citizenship status. Scholars following this approach emphasize migrants' entitlement to and enjoyment of citizenship rights more than formal citizenship. With regard to the substantive concept of citizenship, Castles suggests that the European debate on citizenship for immigrants has focused mainly on the issue of formal citizenship – in particular on the rules for access to citizenship for immigrants and their descendent – and that less attention has been paid to the rights and obligations connected with being a member of a state (substantial citizenship).¹² K. Calavita refers to this as “*de facto*” citizenship.¹³ The second approach also encompasses theories which consider citizenship as a process of negotiation of rights articulated through the concepts of practices and agency.¹⁴

The third perspective, however, goes beyond the boundaries of the nation-

¹¹ R Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

¹² S Castles, 'Migration and Community Formation under Conditions of Globalization' (2002) 36 (4) *International Migration Review* 1143.

¹³ K Calavita, 'Law, Citizenship, and the Construction of (Some) Immigrant "Others"' (2005) 30 (2) *Law & Social Inquiry* 407.

¹⁴ S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (Colección Fragmentierte Moderne in Lateinamerika, Tranvía – Verlag Walter Frey 2008).

state and takes into account notions such as transnationalism¹⁵ and Soysal's concept of a new form of "postnational membership" in the European post-war context based on a discourse on human rights.¹⁶ This third approach starts from the idea of a separation between citizenship and the nation-state in the analysis of international migration¹⁷ and includes theories about "transnational citizenship", "postnational citizenship", "transborder citizenship" and "flexible citizenship".¹⁸

As can be perceived, when it comes to immigration there is a tension between the formal and the substantive notions of citizenship.¹⁹ In the migration context, a shift in the correspondence between these two concepts can be noticed. Some scholars of citizenship have argued that formal citizenship is no longer as relevant as it was before in the dichotomy between foreigner-citizens and other legal memberships guaranteeing the enjoyment of rights.²⁰ Y. Soysal, for instance, argues in the case of guest workers that they have achieved membership status without becoming citizens.²¹ K. Calavita destabilizes the traditional citizen-foreigners dichotomy by recognizing different degrees of

15 N Glick Schiller, L Basch and C Szanton Blanc, 'Transnationalism: a new analytic framework for understanding migration' in N Glick Schiller, L Basch & C Szanton Blanc (eds), *Towards a Transnational Perspective on Migration* (New York Academy of Sciences 1992) 1, 24.

16 YN Soysal, *Limits of citizenship- Migrants and Postnational Membership in Europe* (University of Chicago Press 1994) 144.

17 S Sassen, 'The repositioning of citizenship: emergent subjects and spaces for politics' (2002) 46 *Berkeley Journal of Sociology* 4.

18 R Bauböck, *Transnational Citizenship. Membership and Rights in International Migration* (Edward Elgar 1994); L Bosniak, 'Universal citizenship and the problem of alienage' (2000) 94 (3) *Northwestern University Law Review* 963; S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (n 14); A Ong, *Flexible Citizenship: The cultural logic of transnationality* (Duke University Press 1999) 1,8.

19 Quoting Brubaker, it can be said that formal citizenship "(...) is neither a sufficient nor a necessary condition for substantive membership (...): one can possess formal state membership yet be excluded (in law or in fact) from certain civil, political, or social rights". R Brubaker, *Citizenship and Nationhood in France and Germany* (n 11) 36.

20 M Martiniello in problematizing the formal concept of citizenship and following the terminology used by T Hammar, distinguishes between various categories among migrants: "full citizens" (who enjoy the legal status of nationality), "denizens" (legally staying foreigners) and "margizens" (undocumented migrants). See M Martiniello, 'Citizenship of the European Union: a Critical View' in R Bauböck (ed) *From Aliens to Citizens-Redefining the Status of Immigrants in Europe* (Avebury, Aldershot 1994) 28, 47.

21 T Hammar, *Democracy and the Nation-State: Aliens, Denizens and Citizens in a World of International Migration* (Avebury, Aldershot 1990) 15, 23.

membership: the so-called “in between” memberships.²² As A. Ong in an analysis of current international migrations suggests, “we have moved beyond the idea of citizenship as a protected status in a nation-state, and as a condition opposed to the condition of statelessness”.²³

In this general debate on citizenship and migration, it is worth referring to the main theoretical approaches in Latin America. Most of them take the marshallian conception of citizenship (and the revision by T. Bottomore on the enjoyment of civil and social rights) as starting point.²⁴ In particular, these theories acknowledge the distinction between formal citizenship and substantive citizenship: formal citizenship, as membership to a nation-state and, substantive citizenship, which implies entitlement to rights and the enjoyment of them, with participation in the public and private sphere, within the three areas defined by Marshall. The common feature of these theories is the crisis of the conception of formal citizenship, due to various phenomenon, such as migration and the internationalization of legal work.²⁵

In Latin America, citizenship is in the middle of the dualism between inclusion-exclusion. After a period of dictatorships, in a democratic context the emphasis is on building up social systems which guarantee inclusion. In this framework, citizenship is understood as the effective enjoyment of certain “basic rights”. There is a further distinction made in the Latin American context between “full citizenship” and “uncompleted citizenship” (*ciudadanías deficitarias*).²⁶

In the contemporary debate on citizenship in Latin America, various approaches can be recognized. For instance, we can mention N. García Canclini (1995), who in his study on the consumption and cultural policies, emphasizes that citizenship reflects the fight for certain rights to be recognized and the “others” as subjects with valid interests, pertinent values and legitimate demands.²⁷

22 K. Calavita, ‘Law, Citizenship, and the Construction of (Some) Immigrant ‘Others’ (2005) 30 (2) Law & Social Inquiry 401.

23 A. Ong, ‘Mutations in Citizenship’ (2006) 23 (2-3) Theory, Culture & Society 499 <<http://www.humnet.ucla.edu/mellon/Mutations.pdf>> accessed 7 December 2011.

24 T. Bottomore, ‘Citizenship and social class, forty years on’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto Press 1992).

25 Ibid.

26 This lack of the enjoyment of a full citizenship can be seen in the case of women or members of ethnic groups.

27 N. García Canclini, *Consumidores y ciudadanos. Conflictos multiculturales de la globalización* (Grijalbo 1995).

Scholars like Calderón, Hopenhayn and Ottone (1996) focused on the analysis of the construction of a social citizenship and inclusion. In their view, the progress of the process of social integration in the field of extended citizenship does not occur in a sequential and organized way.²⁸ On the contrary, there is a tendency towards the enlargement of the equity on a symbolic level.

There are also approaches to citizenship which emphasize the idea of citizenship and rights as the outcome of a social process. In this regard, E. Jelin (1993) up-rises the social construction of rights, as a process giving rise to rights that engender social responsibilities.²⁹ According to Jelin and following up on H. Arendt's theory, the essential right is the right to have rights.³⁰ In the same venue, according to Sojo citizenship's substantive rights are not accumulative; they are not recognized in the law and are the outcome of social conflict.³¹

As for the studies on migration and citizenship in Latin America, they have focused on the relationships between immigration and the nation-building process in the XIX and the first half of the XX century.³² In Argentina, for instance, G. Germani conducted extensive research on the political participation as "assimilation" of immigrants.³³ In the contemporary migration context, most of the studies have examined the migrations from Latin American countries to developed countries. Some scholars have addressed the impact of regional migrations in the conceptions of citizenship. In Central America, S. Kron has studied processes which are transforming citizenship, underlying the transnational conception of citizenship, such as transborder movements on the frontier between Mexico and Guatemala.³⁴ In South America, E. Jelin argued that

28 F Calderón, M Hopenhayn and E Ottone, *Esa esquivia modernidad: Desarrollo, ciudadanía y cultura en América Latina y el Caribe* (UNESCO/Nueva Sociedad 1996).

29 E Jelin, 'Cómo construir ciudadanía? Una visión desde abajo' (1993) 55 *Revista Europea de Estudios Latinoamericanos y del Caribe* 25.

30 H Arendt, *The origins of totalitarianism* (Harcourt, Brace & World 1973).

31 C Sojo, 'La noción de ciudadanía en el debate latinoamericano' (2002) 76 *Revista de la CEPAL* 37.

32 See H Sábato and E Cibotti, 'Hacer política en Buenos Aires: Los italianos en la escena pública porteña: 1860-1880' [1990] 3 (2) *Boletín del Instituto de Historia Argentina y Americana Dr. E. Ravignani* 7.

33 G Germani, *Política y sociedad en una época en transición. De la sociedad tradicional a la sociedad de masas* (Paidós 1968). However, the nationalization rates those days were extremely low. Germani found the explanation for this in the loyalty to the country of origin, the low educational level and the low political participation of immigrants in their respective countries of origin.

34 S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (n 14) 259.

new conceptions of “nation and nationhood” are emerging in the case of MERCOSUR.³⁵ In particular, and concerning migrants, E. Jelin advocates the need to study substantive citizenship (*ciudadanía sustantiva*) alongside formal citizenship. This implies real access to citizenship rights and duties and effective participation in the receiving country.³⁶

As can be observed, there is a broad array of conceptions on migration and citizenship, with the peculiarities arising from the Latin American context. In the following sections, we will discuss to what extent these conceptions are present in recent legislative changes introduced in Argentina.

III. REGIONAL MIGRATIONS IN LATIN AMERICA AND ARGENTINA : CURRENT PATTERNS AND CHALLENGES

Relevant empirical data shows a significant change in the migration patterns in the Americas over the past thirty years.³⁷ Apart from the internal rural-urban migration, an increase in the international periphery-centre migrations can be observed.³⁸ Migration literature has focused mainly on these migratory patterns.³⁹ However, other migration flows can be observed among peripheral countries, which consist of intra-regional migrations.⁴⁰

These intra-regional migrations are driven by different factors: economic, social, cultural and political.⁴¹ Within these patterns of intra-regional migrations, some scholars describe these movements as “horizontal migrations”. Horizontal migration is defined as “a type of migration which does not result from push-pull effects on the macro-level of social development but from differences of opportunities due to specific

35 E Jelin, 'Cultural Movements and Social Actors in the New Regional Scenarios: The Case of MERCOSUR' (2001) 22 (1) *International Political Science Review* 85.

36 A Grimson and E Jelin (eds) *Migraciones regionales hacia la Argentina – Diferencia, desigualdad y derechos*, (Prometeo Libros 2006).

37 ECLAC/CEPAL, 'International migration and development in the Americas Symposium on International Migration in the Americas' (CEPAL 2000).

38 See J Rodríguez, G Busso, 'Migración interna y desarrollo en América Latina entre 1980 y 2005. Un estudio comparativo con perspectiva regional basado en siete países' (CEPAL 2009).

39 See, for instance, the analysis of Di Filippo on South-North migrations in the Americas and the comparison with intra-regional migration. A Di Filippo, 'Globalización, Integración Regional y Migraciones' (CEPAL/Siglo XXI 2000).

40 Since most countries do not publish migration data on cross-border flows, most of the studies on migration in Latin America rely on Census data.

41 It is the case, for instance, of migration flows between Haiti and Dominican Republic or Costa Rica and Nicaragua.

individual interest or qualifications".⁴²

In this general context, the particularities of migration patterns in Argentina should be emphasized. On the whole, Argentina can be seen as the outcome of the contributions made by diverse groups of immigrants to the economic, demographic, and cultural structure of the country, from immigration from overseas to contemporary cross-border immigration.⁴³

Transoceanic migrations that took place from mid of the XIX century contributed to the settlement of the country. In the period 1881-1914 more than 4.200.000 people migrated to Argentina.⁴⁴ The main migration flows arrived before the First World War. In 1914, the stock of immigrants in the country reached its highest level ever, in relative terms, representing 30% of the total population.⁴⁵ At that time, the return rate of migrants was also relevant, around 35%, however, it remained below the level observed in other American countries.⁴⁶ European immigration was mostly composed by male young people of rural origin, which arrived in the country by the influence of migration chains, having settled in urban areas but also contributed to development within the country, colonizing the land so far not-exploited.⁴⁷ These immigration flows took place in a context of the growth of Argentina's economy.

In the last few decades, migration flows from neighboring countries have increased in Argentina.⁴⁸ The main migration drivers, among others, are the favorable labor market conditions, the availability of social services, and perceptions about possibilities for personal improvement. These migratory flows can be seen to a certain extent as horizontal migrations. Paradoxically, meanwhile, nationals migrate to other countries due to the lack of job opportunities, better prospects for personal and professional

42 W Hein, 'International Migration and Regional Integration: The Case of Central America' in H Kleinschmidt (ed), *Migration, Regional Integration and Human Security* (Ashgate 2006) 153, 157.

43 International Organization for the Migrations (IOM), Report on Argentina. 'Perfil Migratorio de Argentina 2008' (IOM 2008) <http://publications.iom.int/bookstore/free/argentina_profile.pdf > accessed 10 October 2011.

44 Among them, the prevalent communities were: Italian (2.000.000), Spanish (1.400.000), French (170.000) and Russian (160.000).

45 IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

46 Ibid.

47 Ibid.

48 According to the 2010 Argentinean Census, citizens from MERCOSUR neighbouring countries amount to 1.245.054 distributed as follows: Bolivia 345.272; Brazil 41.330; Chile 191.147; Paraguay 550.713; Uruguay 116.592 and Peru 157.514. Source: INDEC (National Institute for Statistics and Census).

development and institutional problems.⁴⁹ Nowadays, immigrants arrive in Argentina mostly from countries in the region, and in less number from Asia and Eastern Europe.⁵⁰ Whereas Argentinean migrants head mainly to Spain, the United States, as well as Israel, Canada, Italy, and Australia. At the moment, the immigrant stock in Argentina represents 4,5 per cent of the total population.⁵¹ In contrast, according to the records, the number of Argentinean nationals living abroad has risen.⁵²

Taking into account these migratory movements in Argentina, one can notice how the country assumed a dual role in recent years, becoming both a host country and a country of emigration. The role of receiving country distinguishes it from other countries in the region, due to the ability of attracting people, reflected in the stock of foreigners registered in its territory, which transformed it into a reference point of migration in the Southern Cone (sub-regional migration center).⁵³

In most of the cases, migration to Argentina is linked to labor mobility.⁵⁴ Migrant workers search better conditions for their insertion in labor markets, higher salaries, or possibilities for social improvement. Many of these migrant workers are excluded or marginalized from labor markets in their countries of origin, where they face limited possibilities for professional advancement, migrants move abroad in search of better opportunities.⁵⁵

Traditionally, border migrations were driven by seasonal work. Indeed, neighboring migration has always played a certain role in the form of seasonal migration of agricultural workers across the borders. Migrants perform different activities in rural areas, such as, sugar harvest, wool, and production of yerba mate, among others.⁵⁶

49 IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

50 For a detailed analysis on the contemporary migration flows to Argentina, see MI Pacecca and C Courtis, 'Inmigración contemporánea en Argentina: dinámicas y políticas' (CELADE 2008).

51 Ibid.

52 Approximately 800.000 Argentinean nationals are living abroad. World Bank, *Development Prospects Group Migration and Remittances Factbook* (World Bank 2008).

53 Latin American and Caribbean Demographic Center (CELADE), IMILA (Investigation of International Migration in Latin America).

54 MI Pacecca and C Courtis, 'Inmigración contemporánea en Argentina: dinámicas y políticas' (n 50).

55 Ibid. In general, the labor insertion of migrants is complementary and additional, as they take up jobs that national workers are less willing to accept because of low salaries or the low-skilled type of employment and associated labor conditions. See, as well, IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

56 Ibid.

In this respect, it should be emphasized that neighboring immigration has represented along Argentina's history between 2% and 3% of the total population.⁵⁷ The origin of these communities has changed over different periods: from the predominance of Uruguayans in the early twentieth century to the predominance of Paraguayans and Bolivians in the beginning of the new millennium.

In the pattern of migration coming from neighboring countries, one can observe that until the mid twentieth century, migrants established in areas closed to the borders, supplying rural workers in areas lacking population. From mid of the twentieth century onwards, a significant part of migrants from neighboring countries is directed towards urban areas, with a preference for the metropolitan area of Buenos Aires.⁵⁸

Furthermore, the recent migration phenomenon in Argentina has other connotations, such as: the growth of transnational migration; the spread of social networks linked to migration; the increased activity linked to remittances; the larger role of women in migration flows; the creation of associations of and for migrants; the rise of smuggling and trafficking in persons; forced migration; seasonal migration with new time periods and underlying strategies; the specific character of migration of qualified workers.⁵⁹

Migratory issues have gained increased prominence on the agenda of governmental authorities. In order to address contemporary migration's challenges, different bilateral and multilateral migration policies have been adopted. In recent years, Argentina shows various achievements in its migration policy. Such developments focused on the approval of new norms (migration and refugee laws) and the ratification of bilateral and

57 The Latin American and Caribbean Demographic Center (CELADE) have conducted since the early seventies in Latin America a project (Investigation of International Migration in Latin America- IMILA), aimed to collect and consolidate data on migration of various national censuses that are carried out in the Americas. According to CELS (Centro de Estudios Legales y Sociales/ Center of Legal and Social Studies), the 1869 Census showed 41.000 residents in Argentina which were born in neighbouring countries; in 1895, there were 115.000 migrants coming from neighbouring countries; in 1914, 206.000; in 1947, 313. 000; and in 1991, 817. 000. In the 1991 Census, the total number of foreigners living in Argentina amounted to 1.800.000, of which approximately a little less than half were from neighbouring countries. See CELS, 'Annual Report' (CELS 2000) <http://www.cels.org.ar/common/documentos/informe_2000_cap_6.pdf > accessed 10 October 2011.

58 IOM Report on Argentina 'Perfil Migratorio de Argentina 2008' (n 43).

59 Ibid.

multilateral agreements, which are all inspired by international treaties on human rights.

IV. PAST AND PRESENT IMMIGRATION AND CITIZENSHIP LEGISLATION IN ARGENTINA

The above describe trends and modifications in the migration patterns have been reflected in the legislation and migration policy adopted in Argentina over the different centuries. The analysis of the legislative changes in migration and access to citizenship gives us a clear idea of the transitions operated in Argentina towards the adoption of a new paradigm. It is also relevant to consider the way in which the Supreme Court (the main judicial body) fostered the change, issuing rulings on the access to citizenship and protection of migrant's rights.

As in other Latin American countries, in Argentina the formation of the nation-state in the past century was shaped by immigration, which implied the adoption of the *jus solis* at birth principle in the citizenship laws.⁶⁰ Accordingly, the Argentinean Constitution in Article 20 establishes: "Foreigners enjoy within the territory of the Nation all the civil rights of citizens; they may exercise their industry, trade and profession; own real property, buy and sell it; navigate the rivers and coasts; practice freely their religion; make wills and marry under the laws. They are not obliged to accept citizenship nor to pay extraordinary compulsory taxes. They may obtain naturalization papers residing two uninterrupted years in the Nation; but the authorities may shorten this term in favor of those so requesting it, alleging and proving services rendered to the Republic (sic)."⁶¹ This provision is complemented by Article 25: "The Federal Government shall foster European immigration; and may not restrict, limit or burden with any tax whatsoever, the entry into the Argentinean territory of foreigners who arrive for the purpose of tilling the soil, improving industries, and introducing and teaching arts and sciences (sic)"⁶²; and also by Article 75 par. 12 when referring to the Congress' power "to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina (sic)."⁶³

60 For a detailed analysis on citizenship laws from a historical point of view, see G Bertocchi and Ch Strozzi, *Citizenship laws and international migration in historical perspective* (Verlag WZB 2004).

61 Argentinean Constitution. Official version
<http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf>
accessed 9 December 2011.

62 Ibid.

63 Ibid.

Following the constitutional provisions, the Citizenship law is based on the application of the *jus soli* principle at birth and the acquisition of citizenship after two years of residence.⁶⁴ Dual citizenship is not generally recognized by Argentina, except in the case of countries with which Argentina has an agreement providing for that.⁶⁵

In the XIX century Argentina adopted an open immigration policy. The first norm on migration was the Law No. 817 of Immigration and Settlement passed in 1876, known as "Avellaneda law", which created institutional arrangements that promoted and facilitated the entry, residence, employment and social inclusion of foreigners which arrived until the first decades of the twentieth century.⁶⁶ Under this legislation, all foreigners entering the country with the required documentation were granted immigrant status and residence permits, and enjoyed the same civil rights as nationals. Regarding labor rights, they were not subject to any prohibition or restriction.

Even after the period of immigration from overseas, European immigrants continued to be the focus of immigration law and policies to encourage immigration. According to the legislation enacted after the Avellaneda law, Latin American migration was not object of promotion policies, and rarely appeared as an explicit target of migration norms taking into account its features.

Moreover, when analyzing the subsequent legislative changes, especially since 1960, one can observe that the rules became more restrictive, introducing distinctions (illegal entry and stay), specific admission criteria

64 The first citizenship law (Ley N° 346) was adopted in 1869. This law was replaced by a new legislation (Ley de nacionalidad N° 21.795) enacted on 18 May 1978, during the dictatorship. In 1984 with the return of the democracy, the law 21.795 was abolished and the previous legislation was re-established. The consolidated version of the citizenship law (Law 346 including all its reforms) was approved in 2004.

65 As of May 2005, such countries were: Colombia, Chile, Ecuador, Honduras, Nicaragua, Panama, El Salvador, Spain, Italy, Switzerland, Norway and Sweden.

66 The first law on immigration policy is called the "Avellaneda law" No. 817 (1876) after the President who was in charge when was enacted (Nicolás Avellaneda). It should, however, be noted that later on two restrictive laws were passed: the Residence Act No. 4114 (1902) and the Law of Social Defence No. 7209 (1910). The latter rules, altogether, are considered as the first regulations that legitimize the discretionary actions of the executive branch in immigration matters. For a further analysis of the previous regulations on migration, see among others, G Romagnoli, *Aspectos Jurídicos e Institucionales de las Migraciones en la República Argentina* (Organización Mundial para las Migraciones- OIM 1991) and F Devoto, *Historia de la Inmigración en la Argentina* (Sudamericana 2003).

fragmenting the categories of permanence (transit stay, temporary stay, precarious stay, permanent residence) and, in general, making the requirements more complicated.⁶⁷

Parallel to these restrictions, which hindered the legalization of the residence of neighboring migrants, there was an increased delegation of police power in administrative instances. The norms adopted were namely inspired by the doctrine of national security, resulting from the sum of a fragmented and unsystematic series of rules approved outside the regular parliamentary process.

In this context, the General Law of Migration No. 22.439 (known as “Videla law”) was passed in 1981 under the last military regime.⁶⁸ This law was in force for a long period and for over twenty years of democracy in Argentina, in violation of fundamental rights enshrined in the Constitution.

It is worth referring briefly to this law and its implications. The “Videla law” distinguished between legal and illegal entry for permanence, and defined three categories: permanent residents, temporary residents and people in transit, establishing that only the first category enjoyed constitutional rights. In fact, one of the main critiques to this law was the restriction imposed on the enjoyment of fundamental rights (civil, economic and social) to those migrants who found themselves in irregular situation. In particular, the law provided the legal obligation to report before the migration authority, the existence of any foreign person without a residence permit.⁶⁹

In the meantime, and since the mid-twentieth century, successive

67 For instance, several personal documents sealed and a labour contract signed before a public notary were required, the law established to prove certain skills (related to working capacity and ability to integrate in the society, etc.) and implemented prohibitions (eg to turn a tourist visa into a temporary residence permit). Different migrant rights' organizations verified an increase in the controls concerning undocumented migration in Argentina since 1966. See Comisión Chilena de Derechos Humanos, Centro de Estudios para el Desarrollo Laboral y Agrario de Bolivia (CEDLA), Centro de Asesoría Laboral de Perú (CEDAL) and Centro de Estudios Legales y Sociales (CELS), *Derechos Humanos de los Migrantes. Situación de los derechos económicos, sociales y culturales de los migrantes peruanos y bolivianos en Argentina y Chile* (Capítulo Boliviano de Derechos Humanos, Democracia y Desarrollo 1999) 122.

68 Ley N° 22.439/81, Ley general de migraciones y fomento de la inmigración, 25 June 1981 <<http://www.unhcr.org/refworld/docid/3db93ab74.html>> accessed 6 December 2011.

69 This obligation affected teachers, doctors, clerks, civil servants, merchants and entrepreneurs.

democratic governments attempted to remedy the situation of irregularity caused by these restrictive regulations, through the mechanism of amnesty programs. There were in total six amnesties: three generals (1949, 1958, 1984) and three specific for migrants born in neighboring countries (1964, 1974, 1992). Moreover, in 1994 a facilitation program provided for the regularization of Peruvian migrants.⁷⁰

The persistence of the “Videla law” on migration represented a heavy burden to the democratic governments, until the approval of a new Migration Act (Ley No. 25.871) at the end of 2003.⁷¹ The enactment of this law was the outcome of a continuous struggle over decades of religious institutions, human rights organizations, migrant associations, NGOs and researchers.⁷² This new Migration Act constitutes the core of what the government has called the “new paradigm” on migration, and involves a discursive shift that incorporates two innovations: a human rights perspective and a regional approach.

The new Migration Act (Law No. 25. 871) recognizes the human right to migrate and the right to family reunification, including different guarantees for migrants during the proceedings.⁷³ Besides, the law provides with specific regulations on the residence and work permits for citizens from South American countries. On the whole, the new law is in line with international standards defined by the Inter-American Court of Human Rights in the protection of migrant's rights.⁷⁴ The law specifically mentioned as state responsibility, to ensure equal treatment of aliens who are in a regular situation. The law recognizes on an unrestricted basis (regardless of the migrant's legal status) the right to basic education and

70 Resolution 3850/94 of the Ministry of Interior, this process covered approximately 9.900 Peruvian nationals who had entered Argentina prior to 1 October 1994.

71 The Law 25.781 was approved by the Congress on 17 December 2003 and enacted by the Executive branch on 20 January 2004. The regulation defining specific aspects of the law (Reglamento Migratorio) was passed in 2010 through the adoption of the Decree 616/2010 on 6 May 2010.

72 See S Caggiano, 'Migrantes y luchas por derechos: Posibilidades y limitaciones de la articulación entre organizaciones, (Crisis global y estrategias migratorias: hacia la redefinición de las políticas de movilidad', FLACSO , Quito, Ecuador, May 2011 < http://www.flacsoandes.org/web/imagesFTP/1309206623.Ponencia_Sergio_Caggiano.pdf> accessed 30 November 2011.

73 According to B Hine this principle “is not found in the immigration laws of any other large immigrant-receiving country nor explicitly in any international human rights conventions”. See B Hine, ‘The Right to Migrate as a Human Right: The Current Argentine Immigration Law’ [2010] 43 Cornell Int'l LJ 471.

74 *Opinión Consultiva “Condición Jurídica y Derechos de los Migrantes Indocumentados”/ Advisory Opinion on the rights of Undocumented Migrants* (2003) IACHR OC-18/03.

the access to health care.⁷⁵

Moreover, the law specifies that foreigners enjoy social rights on an equal basis with Argentinean citizens.⁷⁶ Besides, it overrides the obligation to report irregular migrants that the old law established, and encourages the promotion and dissemination of the obligations and rights of migrants. The new legislation also refers to the actions on the part of the state to promote the integration of migrants⁷⁷ and to facilitate the consultation or participation of foreigners in decisions concerning public life and administration of communities (cities, towns) where they reside. Another significant change in the new legislation has to do with the affirmation of the right to due process in situations of detention and deportation. Currently, the law establishes that deportation can not be based on administrative prerogatives and it has to be ordered with the intervention of the judiciary.

The new migration policy was completed in 2006, when the Congress passed the law on the Recognition and Protection of Refugees (Ley No. 26.156) also promoted by different social actors and the United Nations High Commissioner for Refugees (UNHCR).⁷⁸ Finally, in 2010 through a consultative process involving human rights organizations, religious institutions and UN agencies, the government enacted the regulation of the Migration Act.⁷⁹

In line with this migration policy, it is also worth mentioning the agreements signed by Argentina with Latin American countries related to the situation of the Bolivian, Peruvian and Paraguayan migrants in Argentina aiming at fulfilling the legal requirements in order to comply with current immigration criteria. Thus, in 1998 Argentina signed an

75 See Centro de Estudios Legales y Sociales (CELS), Federación Internacional de Derechos Humanos (FIDH), 'Argentina. Avances y asignaturas pendientes en la consolidación de una política migratoria basada en los derechos humanos' (CELS/FIDH 2011).

76 The law recognizes and protects the following rights: right to equal treatment (Article 5); the right to access of the immigrant and his family, on a non discriminatory basis, to social services, public goods, health, education, justice, labour, employment and social security (Articles 6, 8, 19); the right to information (Article 9) and the right to family reunification (Article 10).

77 For example, public authorities shall understand and appreciate cultural expressions of immigrants and offer courses to learn Spanish.

78 This Act replaced the decree 464 of 1985, which had created a basic mechanism for the eligibility of petitioners for asylum in the Argentinean territory.

79 Decree 616 (2010), B. O. 6th May 2010
<<http://infoleg.mecon.gov.ar/infolegInternet/anexos/165000-169999/167004/norma.htm>> accessed 11 October 2011.

agreement with Bolivia⁸⁰ and Peru.⁸¹ In November 2000 Argentina signed the Additional Protocol to the Convention on Migration between Argentina and Bolivia, with the main goal of regularizing the situation of immigrants staying in both countries.⁸²

With respect to the inclusion of a regional perspective (which will be further analyzed in the next section) the new Migration Act reflects the nationality criteria outlined in the Agreement on Residence for Nationals of the States of MERCOSUR, Bolivia and Chile. This opens the possibility for those migrants who did not meet any of the criteria established by the previous law or by bilateral agreements.

The issues concerning migration and access to citizenship have been reflected in the Argentine Supreme Court's case law. For this reason, a closer look at the case law is in order. Since the first migration wave, the Argentine Supreme Court's have addressed in its case law different issues concerning the implementation of immigration and citizenship laws, having gone through different periods.⁸³

During the first period (1890-1920) the Supreme Court decided in various cases on the situation of undocumented migrants, using broad criteria in order to recognize rights.⁸⁴ On the contrary, between 1920 and 1970 the Supreme Court upheld restrictive migration policies. Accordingly, the state could establish rules to control the entry and stay of foreigners in the territory, and in case of breach of rules, to proceed with administrative expulsion or reject applications for nationality submitted to federal judges.

80 The agreement was approved by Law 25.098 and then ratified by the Executive Branch.

81 The agreement was approved by Law 25.099 and then ratified by the Executive Branch

82 However, the regulations issued by the Dirección Nacional de Migraciones (DNM) ignored negotiations and international commitments. Thus, the Argentinean state itself through the DNM took a position contrary to international commitments, creating an assumption of international responsibility.

83 See the following cases before the Supreme Court (SC): *Eladio Rodríguez* [SC 1943 197:332]; *Sosa, Lino* [SC 234:20]; *Brítez, Silvestre, B de Zlatnik, Juliana* [SC 182:39]; [SC 205:628]; *Bairamis, Jorge y otros* [SC 206:165]; *Grunblatt, Jeno* [SC 293:154 and 741]; *Gorza, Marini, Edilio* [SC 293:663]; *Lerer, Boris* [SC 293:741]; *Cristoff, Miron* [SC 294:9]; *Imundo, José Carmelo* [SC 298:541].

84 L Ricart, 'Los derechos de los extranjeros en la jurisprudencia argentina (1994-2005)' in V Abramovich, A Bovino and Ch Courtis (eds), *La aplicación local de los tratados de derechos humanos: la experiencia de una década (1994-2005)* (Ed Del Puerto 2007); E Rodríguez Miglio and L Toledo, 'Jurisprudencia argentina en materia de derechos de los migrantes' in Ceriani y Fava (eds) *Políticas Migratorias y Derechos Humanos* (UNLa-Universidad Nacional de Lanús 2009).

The only exception admitted to the expulsion was to prove “good civic behavior” through a certificate. The Court established that this certificate had to demonstrate “correct behavior and the absence of criminal or police records.”⁸⁵ However, it was not clear who was supposed to issue the certificate or on which grounds it was granted. In the 80's and the 90's the few precedents on migration confirmed the decisions of administrative authorities which rejected requests for residence and, without judicial supervision, detained and expelled foreigners from Argentina.⁸⁶ In this phase among the rulings issued by the Court on the rights of foreigners, there have been almost no exceptions against restrictive immigration policies.

Since 2005, the Supreme Court's case law on the human rights of migrants has changed partly because immigration policy was also modified. The judicial interpretation of the legislation on migrations and access to citizenship suggests a more flexible approach. It can be said that with these precedents the Supreme Court accompanied the legislative reform, as a way of backing up the transition from the restrictive “Videla law” to the new law adopted in a democratic context. This new case law, along with the mechanisms of free legal advice, strengthened the institutional framework for effective advocacy for human rights of migrants embodied in the legislation.

Therefore, the Supreme Court has recently issued judgments on the access to citizenship, for instance in the cases Zhang (2007) and Ni, I Hsing (2009).⁸⁷ In the Zhang case, the Supreme Court established that the immigration procedures should be considered as additional evidence to prove the two years of residence in Argentina in the process to obtain the citizenship. In the Ni case, the Supreme Court overturned a judgment with a restrictive interpretation of the requirement of residence in order to obtain the so-called “carta de ciudadanía”.⁸⁸ The Supreme Court found that the two year- period does not refer to the accreditation of legal residence (in terms of the old law of migration) but rather to a matter of fact to be justified through various forms of evidence. In both judgments,

85 See for instance, the case *Hermogenes Imaz Vda de Zabalza –solicita carta de ciudadanía* [SC 1951 220:51].

86 This trend can be seen in the following cases: *Victor Antonio Cardozo Galeano* [SC 1990 313:101] and *De la Torre, Juan Carlos s. Habeas Corpus* [SC 22 December 1998].

87 See *Ni, I Hsing s/carta de ciudadanía*, Corte Suprema de Justicia de la Nación [SC 2009 330:4454].

88 The Supreme Court reversed the decision of the Federal Chamber of Córdoba, which had denied the request for Ni, since it had not established legal residence in Argentina, according to the report provided by the National Directorate of Migration.

the Supreme Court adopted a broad interpretation of the requirement of two years of residence in Argentina in order to apply for citizenship by naturalization under the citizenship law. Thus, the Supreme Court reversed a generalized restrictive interpretation of that requirement applied by federal courts.

Besides, there have been cases dealing with the enjoyment of rights by migrants and long-term residents. In the Reyes Aguilera Case (2007), the Supreme Court overthrew a provision requiring a minimum of twenty years of residence, in order to access to social benefits.⁸⁹ In particular, judges Petracchi and Argibay underlined that the norm itself was in contradiction with the constitutional provision which forbids any discrimination based on the national origin.⁹⁰ The judges stated that the rule in question "... provides differential treatment between nationals and foreigners, imposing greater demands on the latter to access a benefit conferred by the state. This situation determines that in its literal sense the article 1, paragraph "e" of the Decree 432/97 (the norm in question) is directly opposed to the constitutional norms that prohibit discriminatory treatment based on national origin (...) This is in direct contradiction to the text of the Constitution, and forced to consider the categorization made by the decree as "suspected of discrimination" and therefore the presumption of unconstitutionality applies ...".⁹¹

In the Supreme Court's case law, it is worth mentioning as well other previous cases dealing with migrants' rights such as Repetto (1988), Calvo (1998), Hooft (2004) and Gottschau (2006). In the Repetto Case, the Supreme Court examined and recognized the right of an American professor to teach in Argentina without being a national.⁹² In the Calvo

89 See *Reyes Aguilera D and others v. Estado Nacional-Ministerio de Desarrollo Social* [SC 15th September 2007]. The controversial issue was the access of a disabled child of Bolivian citizenship (Daniela Reyes Aguilera) to social security disability benefits. In the ruling, the Court declared the provision in question inapplicable to the case, and the girl could obtain the benefits. This solution, however, was *inter alia* and it is only applicable to that specific case.

90 The remaining votes of the majority sustained the constitutionality of the norm in other criteria and methods of interpretation. Justices Zaffaroni and Fayt, considered that the provision affected the minimum standard of social security law, and that the right to life and health of Reyes Aguilera was at stake. Justice Maqueda, meanwhile, conducted an analysis of reasonableness and considered that the requirement of 20 years of residence to access to social benefits was not justified and, therefore, unconstitutional. Justice Lorenzetti voted in minority, considering that the distinction was fair.

91 Ibid.

92 See *Repetto, Ines v Provincia de Buenos Aires, s/acción declarativa de inconstitucionalidad* [SC 8th November 1988].

Case, the Supreme Court addressed the right of a Spanish psychologist (whose admission was denied due to the lack of nationality) to practice in a public hospital.⁹³ In the Hooft Case, the Supreme Court guaranteed the possibility that a judge of Dutch nationality (who succeeded in the Argentina national competitions to access to the judiciary) could integrate a Chamber.⁹⁴ In the Gottschau Case, the Supreme Court recognized the right of a German lawyer to participate in the public competition for the position of Deputy Clerk of a Court in the City of Buenos Aires.⁹⁵ All these foreigners had legally entered the country for a certain period of time, with a career and income. The Supreme Court held in these cases that the distinctions were “categories suspected of discrimination” and that the state should explain the reasons and purposes of such limitations.

Yet, the cases cited do not refer to migrants belonging to groups particularly vulnerable (such in the case of undocumented migrants) or historically discriminated or, at least, it does not arise from the facts of the cases. In the past, when the Supreme Court faced a discrimination of groups particularly vulnerable or historically discriminated against, in order to assess the constitutionality of the government's decisions or omissions, the Court established before the list of rights that have been affected rather than considered the existence *prima facie* of “categories suspected of discrimination”.⁹⁶

In the aforementioned Reyes Aguilera Case, the Court left open the possibility for a wider application of the criteria of “categories suspected of discrimination”. The judges Petracchi and Argibay sent a message to the judiciary as a whole by stating: “The judges of the case have not done a proper analysis of the constitutional provision in question, as they have followed an opposite path to the one they should follow for cases like this, according to the jurisprudence of this Court. Indeed, both the judge of first instance and the Court of Appeal departed from the presumption of constitutionality of the norm and have conducted a simple test of reasonableness, which (...) is insufficient to assess the categorization of a *prima facie* unconstitutional discrimination.”⁹⁷

As can be seen, there has been a shift in the migration paradigm in Argentina, not only regarding new legislation on migration and asylum, but

93 See *Calvo y Pesini, Rocio v Provincia de Cordoba* [SC 24th February 1998].

94 See *Hooft Pedro Cornelio v Provincia de Buenos Aires, s/acción declaración de inconstitucionalidad* [SC 16th November 2004].

95 See *Gottschau, Evelyn v Consejo de la Magistratura de Buenos Aires s/amparo* [SC 8th August 2006].

96 For instance cases dealing with indigenous peoples' rights.

97 *Reyes Aguilera D and others v Estado Nacional-Ministerio de Desarrollo Social* (n 89).

also with respect to the way in which these provisions are interpreted. The measures taken, aimed at protecting migrants, granting them citizenship and guaranteeing the enjoyment of rights, evidence the present Supreme Court's position. Moreover, the current interpretation about the discrimination based on the national origin may have a significant impact in the future. Hence, the assessment of the right at stake, the levels of enforcement and the scope of the legislation will be important in the light of the classification of such distinctions as "categories suspected of discrimination".

V. INTERNATIONAL MIGRATION AND REGIONAL INTEGRATION: THE CASE OF MERCOSUR.

Another important factor in the modifications of the migration paradigm and the legislation was the adoption of agreements at MERCOSUR level on the legal status of regional migrants. Indeed, one recent feature of regional migrations in South America concerns the relationship between the politics of regional integration and the intensification of migration flows among countries.

In general, and from a push-pull perspective, regional integration could impact migration flows in different ways.⁹⁸ First of all, if regional integration successfully contributes to give citizens similar opportunities it might reduce the push-pull differential between the countries in the region.⁹⁹ On the contrary, regional integration can create or strengthen previous structures of uneven development within a region, as a consequence, there is going to be an increase in the migration occurring predominantly between regions with different levels of economic development.¹⁰⁰ But also, regional integration might generate other migration dynamics, such as the above referred horizontal migration.¹⁰¹

The creation of an intergovernmental integration project¹⁰² such as

98 See W Hein, 'International Migration and Regional Integration: The Case of Central America' (n 42) 153, 157. See also A Di Filippo, 'Globalización, Integración Regional y Migraciones' (n 39).

99 Ibid.

100 Ibid.

101 Ibid.

102 The 1991 Asuncion Treaty provided for an intergovernmental set-up with different decision-making bodies. The main MERCOSUR bodies are: the Common Market Council; the Common Market Group and its various Working Sub-groups; the MERCOSUR Trade Commission; the Parliament of MERCOSUR (created in 2005 and in function since 2007); the Economic-Social Consultative Forum and the Secretariat.

MERCOSUR¹⁰³ suggests an increase in the migration between the countries which are involved in the integration process (mainly Argentina, Brazil, Paraguay, Uruguay and Venezuela as member states and Chile and Bolivia as associated countries).¹⁰⁴ Besides, economic integration should facilitate the movement of people between the member states.¹⁰⁵ However, the founding treaty (1991 Asuncion Treaty) did not reckon the free movement of individuals in its provisions.¹⁰⁶ In fact, among MERCOSUR goals, the treaty contained only references to “the free movement of goods, services and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures”.¹⁰⁷ In sum, at an initial stage MERCOSUR was conceived as a pure economic integration process and, therefore, the freedom of circulation of individuals was not explicitly recognized.

Some scholars have argued that in this wording, individuals are included in the formula, not as human beings but rather as “productive factors”.¹⁰⁸ According to this interpretation, labor was considered as a productive factor in the achievement of the common market.¹⁰⁹ This conception implies the elimination of any kind of restrictions to migrant workers which are national of MERCOSUR member states within their territories.¹¹⁰

103 MERCOSUR belongs to the so-called a sub-regional integration agreement or, in other words, an integration process in which states have a shared history, cultural links, and sense of interdependency. Under this category, we include MERCOSUR, the Andean Community (CAN), the Central American Integration System (SICA) and the Community of the Caribbean (CARICOM).

104 A Pellegrino, 'Las migraciones entre los países del Mercosur: tendencias y características' in *Las migraciones humanas en el Mercosur. Una mirada desde los derechos humanos* (Observatorio de Políticas Públicas de Derechos Humanos en el Mercosur 2009) 17.

105 As a significant precedent, we should mention that in the 1970's the Andean Community adopted norms concerning the free movement of people and granting a permanent status. Nevertheless these norms were not enforced.

106 H Mansuetti, 'Circulation of Workers in MERCOSUR' in F. Filho, L. Lixinski and B. Olmos Giupponi (eds), *The Law of MERCOSUR* (Hart 2010).

107 Treaty Establishing a Common Market between the Argentinean Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay. See article 1, first part.

108 See the discussion on this question in H Mansuetti, 'Circulation of Workers in MERCOSUR' (n 106).

109 Ibid.

110 O Ermida Uriarte, 'Derecho a migrar y derecho al trabajo' in *Las migraciones humanas en el Mercosur. Una mirada desde los derechos humanos* (Observatorio de Políticas Públicas de Derechos Humanos en el Mercosur 2009) 27.

Despite these limitations, the evolution of MERCOSUR in the 1990's and 2000's brought significant modifications in terms of freedom of movement, migrant worker's rights and regional migration. This evolution can be seen as the outcome of two related processes. On the one hand, the subsequent developments occurred in MERCOSUR introduced the recognition of migrant workers' rights. On the other hand, the discussion of migratory issues within MERCOSUR and the debates on the MERCOSUR citizenship fostered the adoption of specific agreements at regional level.

Concerning the protection of migrant workers, we must mention the signature of various binding instruments related to free movement of MERCOSUR citizens¹¹¹. It is worth emphasizing, for instance, the protocols on educational integration, with mutual recognition of certificates and elementary school and secondary school- non technical degrees¹¹²; recognition of secondary school and technical degrees¹¹³; recognition of university degrees in order to attend post-graduate studies in universities of MERCOSUR member states¹¹⁴, and also to teach at university level as well¹¹⁵ and post-graduate human resources level.¹¹⁶

In this process of recognition of migrant workers' rights, in the mid 1990's the adoption of a sub-regional human rights charter was included on the agenda of MERCOSUR, becoming a crucial topic.¹¹⁷ Different actors were involved in these debates and the Southern Unions Federation (Coordinadora de Centrales Sindicales del Cono Sur – CCSCS) submitted a proposal on the approval of a comprehensive Charter of Fundamental Rights in 1994.¹¹⁸ Besides, in 1997 member states signed the Multilateral

111 See AM Santestevan, 'Free Movement Regimes in South America: The experience of the MERCOSUR and the Andean Community' in R Cholewinski, R Perruchoud and E Mac Donald (eds), *International Migration Law* (Asser Press 2007) 363.

112 Signed in Buenos Aires, 5 August 1994, ratified by Argentina by law 24.676.

113 Signed in Asuncion, 5 August 1995, ratified by Argentina by law 24.839.

114 Signed in Fortaleza, Brazil, 16 December 1996, ratified by Argentina by law 24.997.

115 Signed in Asuncion, 14 June 1999, ratified by Argentina by law 25.521.

116 Signed in Fortaleza, Brazil, 16 December 1996, ratified by Argentina by law 25.044.

117 The debates on the adoption of a Social Charter in MERCOSUR could be perceived as a mirroring trend, following the European Union's experience with the European Social Charter.

118 For an analysis of the draft project on MERCOSUR Declaration of Human Rights see MB Olmos Giupponi, *Derechos Humanos e Integración en América Latina y el Caribe* (Tirant Lo Blanch 2006).

Social Security Agreement¹¹⁹. As a consequence of this process, the MERCOSUR Socio-Labour Declaration (Declaración Socio Laboral – “DSL” in Spanish, hereinafter referred to as the “Declaration”) was adopted in 1998.¹²⁰ The Declaration recognizes a series of principles and rights at the workplace. It includes, *inter alia*, the decision of the states parties to strengthen through a common instrument, the progress already achieved in the social dimension and support future and ongoing advances in this field particularly through the ratification and implementation of ILO main agreements, as well as other international instruments mentioned in preamble of the DSL.¹²¹

With regard to the second process, the migratory issues were first discussed at the MERCOSUR Meeting of Interior Ministers (Reunión de Ministros del Interior) established in 1996. In this framework, the Specialized Forum on Migrations (Foro Especializado Migratorio del MERCOSUR) was created in 2003, with the objective of analysing regional migrations and proposing regional measures and migration agreements. Among the outcomes of this Forum, it must be underlined the adoption of the Santiago Declaration on Migratory Principles (Declaración de Santiago sobre Principios Migratorios) in 2004.¹²²

Apart from the inclusion of migratory issues in the agenda, and likewise the EU's ideas of citizenry¹²³, scholars have been arguing about the

119 The MERCOSUR Multilateral Social Security Agreement was signed in December 1997 by MERCOSUR member and associated states.

120 The Socio Labour Declaration of MERCOSUR was approved by the Common Market Council (CMC) in the framework of the Summit of the Heads of State of MERCOSUR, held in Rio de Janeiro in 1998.

121 The Declaration has been adopted as a soft law instrument, it consequently was not ratified by member states and nothing in its provisions requires compliance, approval or a mechanism for its internalization and implementation. However, internal courts have been applying it as a guideline in the interpretation of labor rights. See MERCOSUR Secretariat, *Segundo informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales* (2004) <<http://www.mercosur.int/innovaportal/file/734/1/2infaplicaciondermcs.pdf>> accessed 6 December 2011.

122 Some of MERCOSUR achievements in terms of regional migrations have been included in the negotiations of UNASUR (South American Union). See A Chueca Sancho, ‘Libre circulación de personas en Sudamérica: Una aproximación’ (2008) 2 (1) REIB

<http://www.urjc.es/ceib/investigacion/publicaciones/REIB_02_01_A_G_Chueca_Sancho.pdf> accessed 5 December 2011.

123 In Europe, the intra-European migration and the establishment of an EU citizenship for nationals of the member states have contributed to the debate on citizenship. There are a multitude of studies on European Union's citizenship. For the relevance for this study, we would like to underline Bauböck's work on the EU's

MERCOSUR citizenship.¹²⁴ In this vein, there has been a discussion on the idea of a MERCOSUR citizenship based on the recognition of human rights including those related to migrant workers.¹²⁵ From a different theoretical perspective, some commentators emphasize that even if the core of MERCOSUR is the economic integration and it is a top-down process, there would be the space for non-governmental actors and social movements to participate and to build up citizenship rights through a bottom-up process.¹²⁶ Additionally, on a rhetorical level, official authorities and also scholars reaffirmed ideas such as “regional identity”, “common identity and destiny” or “brotherhood”.¹²⁷

These two processes altogether contributed to include regional migrations in the MERCOSUR agenda and to the recognition in formal agreements

citizenship and the access to citizenship for migrants in Europe. See, for instance, R Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 (2) Theoretical Inquiries in Law <<http://www.bepress.com/til/default/vol8/iss2/art5>> accessed 6 December 2011; R Bauböck (ed), *Migration and Citizenship. Legal Status, Rights and Political Participation* (Amsterdam University Press, IMISCOE Report Series, 2006) and R Bauböck 'Three citizenship regimes in the European Union' in *EU Citizenship and the Market* (UCL/EUI, London, 2011) <http://www.ucl.ac.uk/european-institute/comment_analysis/publications/Final.pdf> accessed 8 December 2011.

124 In our previous article on MERCOSUR citizenship we explained the question in the light of the implementation of MERCOSUR Parliament, MB Olmos Giupponi, Chapter: 'Mercosur y ciudadanía (Mercosur and citizenship)' in *Modelos de integración y procesos integradores* (Pre-textos 2008). See as well J Grugel, 'Citizenship and governance in MERCOSUR: Arguments for a Social Agenda' (2005) 26 (7) Third World Quarterly 1061.

125 See O Ermida Uriarte, 'La ciudadanía laboral en el Mercosur' [1998] XLI (190) Revista Derecho Laboral 321. See as well K Schaffer, 'Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States' [2006-2007] 45 Colum J Transnat'l L 829.

126 E Jelin, 'Los movimientos sociales y los actores culturales en el escenario regional: el caso del Mercosur' in G. De Sierra, *Los rostros del Mercosur* (CLACSO 2001) 257, 274.

127 In the wording of different instruments, treaties and declarations emerge the notion of a regional identity. E Jelin, 'Dialogues, understandings and misunderstanding: social movements in MERCOSUR' (1999) 31 (159) International Social Science Journal 37. See as well A Grimson, 'El debate de la identidad en la bibliografía sobre MERCOSUR', paper presented at the Second Meeting on 'MERCOSUR: A space for interaction, a space for integration' (ANPOCS, Brazil, 1997). A Grimson, 'Fronteras, estados e identificaciones en el Cono Sur' in D Mato (ed), *Cultura, política y sociedad Perspectivas latinoamericanas* (CLACSO-Consejo Latinoamericano de Ciencias Sociales 2005) 127, 142 <<http://bibliotecavirtual.clacso.org.ar/ar/libros/grupos/mato/Grimson.rtf>> accessed 6 December 2011.

of a legal status for citizens from MERCOSUR member and associated states. Thus, after more than ten years of the signature of the Asuncion Treaty, the MERCOSUR Regularization and Residence Agreements (Acuerdos de Regularización y Libre Residencia de MERCOSUR) were approved at the end of 2002.¹²⁸ These agreements represent a step forward in the direction of guaranteeing a legal status to MERCOSUR citizens and, at the same time, addressing the situation of undocumented regional migrants.

In terms of guaranteeing a specific legal status to MERCOSUR citizens, the agreements contain a series of fundamental rights to be respected. The main principle included is non discrimination or, in other words, “equal enjoyment of rights”: nationals of MERCOSUR states who have been granted the residence will enjoy the same than the nationals of the receiving country. The agreements also comprise the right to family reunification; the right to receive an equal treatment, the right to transfer remittances and to access social security benefits. A relevant provision ensures the rights of the children of regional migrants to have a name and a nationality, to be registered and to have access to basic education.¹²⁹

With regard to the situation of undocumented regional migrants, the agreements provided the basis for a regularization programme to be applied by each state. This regularization programme designed for migrants from MERCOSUR member and associated countries was undoubtedly a measure expected and demanded for years. However, MERCOSUR Regularization and Residence Agreements only entered into force in 2009 and not all states that have signed them launched regularization programmes.¹³⁰ This lack of enforcement undoubtedly

128 Agreement approved by the Council of the Common Market (MERCOSUR/CMC/DECNo28/02). The agreements adopted on 5th and 6th December 2002, are: 1. Agreement No. 11/02, International Migratory Regularization of MERCOSUR Citizens, 2. Agreement No. 12/02, International Migratory Regularization Citizens of MERCOSUR, Bolivia and Chile, 3. Agreement No. 13/02, Residence for Nationals of the Member States of MERCOSUR, and 4. Agreement No. 14/02, Residence for Nationals of the Member States of MERCOSUR, Bolivia and Chile, implemented by Argentina through Resolution 345/2003 of the Ministry of Interior.

129 According to the agreements, the access of children of migrants to basic education can not be denied or limited because of the irregular stay of their parents.

130 The agreements entered into force on 4 December 2009. Argentina ratified the agreements on 19 July 2004; Bolivia on 11 April 2005; Brazil on 18 October 2005; Chile on 18 November 2005; Uruguay on 8 March 2006 and Paraguay on 28 July 2009.

Source: MERCOSUR
<<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm>> accessed 9 December 2011. On the implementation of the

affects the recognition and enjoyment of migrant's rights and hampers the efforts to ensure free movement and residence to MERCOSUR citizens in the region.

As we claimed in the introduction, these provisions on migration at regional level have driven modifications at internal level in Argentina. And this is reflected in the inclusion of a specific status for MERCOSUR citizens in the migration law and in the adoption of a specific programme to regularize undocumented migrants from MERCOSUR member and associated states. The current legislative changes on migration being implemented in Argentina represent as well a good occasion to test how these MERCOSUR regulations are being implemented.

Up to the present, MERCOSUR citizens living in Argentina are mainly from Uruguay, Bolivia, Paraguay and Peru. Traditionally, citizens from Uruguay represented the first group, but this situation has change over recent decades: although they continued to migrate to Argentina, they preferably went to developed countries like the United States and Spain.¹³¹ In these changes in the migration patterns, three migrant groups (Bolivians, Paraguayans and Peruvian) have shown dynamism in recent times and, therefore, their numbers have increased significantly. According to the last census, Paraguayan and Bolivian immigrants represent the main groups. In the period 1980-2001, immigration from Bolivia has increased steadily. Although the increase in its stock was relatively moderate in the early eighties (up to 21.5%), the unfavorable economic conditions in Bolivia joined the job placement opportunities in Argentina and a favorable exchange rate, impacted on immigration and the migration flows intensified in the nineties.¹³² These new flows were also promoted by the existence of extensive social migratory networks.¹³³

agreements, see T Muñoz Bravo, 'El proceso de internalización del Acuerdo sobre Residencia en el Mercosur: Una evaluación del compromiso de seis Estados de crear un área de libre residencia y trabajo' (Red Internacional de Migración y Desarrollo, 2011) <http://rimd.reduaz.mx/ponencias_flacso/PonenciaTomasMunoz.pdf> accessed 7 December 2011.

131 W Cabella and A Pellegrino, 'Una estimación de la emigración internacional uruguaya entre 1963 y 2004' (2005) Programa de Población de la Unidad Multidisciplinaria - Facultad Ciencias Sociales, Working Paper 70/2005.

132 See R Benencia, 'Apéndice. La inmigración limítrofe' in F Devoto, *Historia de la inmigración en la Argentina* (Sudamericana 2003).

133 In these years the stock increased by 62.3%, so over the past two decades the number of Bolivians living in Argentina has almost doubled. From a transnational perspective, various studies on the migrant associations have been conducted. In the case of Bolivians in Argentina, for instance, CEMLA and IOM developed a diagnostic study in 2004 on the associations of the Bolivian community in Argentina. The study found the existence of 161 associations of this community settled in the

The new migration law included a new category to access migratory regularization and obtain a residence in the country, based on the citizenship from MERCOSUR countries. While the traditional criteria are maintained, such as work, family ties or because of studies, a new category has been added directly linked to the vast majority of migrants living in Argentina: the access to a residence permit on the basis of holding the nationality of a MERCOSUR member or associated country. In fact, Article 23.d) of the Act provides that " (...) It shall be considered as temporary residents those foreigners who enter the country, under the conditions prescribed by regulation, in the following subcategories: [...] 1) Nationality: Native Citizens of MERCOSUR States, Chile and Bolivia have authorization to remain in the country for two (2) years, renewable with multiple entries and exits."¹³⁴

The implementation of this criterion of nationality as a ground to access to a residence permit is regulated in the Programme called "Patria Grande", launched in April 2006.¹³⁵ The initiative envisaged that regularization of all migrants living in the Argentinean territory prior to April 17, 2006 who are nationals of Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Uruguay and Venezuela and could obtain a residence within two years.¹³⁶ For immigrants who enter the country since April 2006, the criterion of nationality (of the countries mentioned) begin to

following cities: Buenos Aires, Buenos Aires, La Plata, Partido de la Costa, Bahía Blanca, Mendoza, San Luis, Salta, Jujuy, Santa Fe, Córdoba, Tucumán and in several towns in Patagonia. These immigrant associations focus their attention on current problems of immigrant communities such as health and social care, fighting discrimination and legal advice for immigrants. The federations are a form of collective organization and represent the set of organizations, like social clubs, sports and cultural associations. See M Santillo, 'Las organizaciones de inmigrantes y sus redes en la Argentina', Simposio sobre Migración Internacional en las Américas (San José de Costa Rica, 2000).

¹³⁴ This criterion was applied by order of the National Directorate of Migration in 2004, affecting first citizens from Bolivia, Brazil, Chile, Paraguay and Uruguay, then it was extended to nationals of other MERCOSUR associated countries. This DNM second resolution does not expressly mention the countries, but includes a generic reference to the States of the regional bloc. Therefore, its scope will be extended automatically to all people from countries that are part of (or subsequently join) MERCOSUR.

¹³⁵ M Cerrutti, 'Diagnóstico de las poblaciones de inmigrantes en la Argentina' (Serie de Documentos de la Dirección Nacional de Población 2009) <http://www.mininterior.gov.ar/poblacion/pdf/Diagnostico_de_las_poblaciones_de_inmigrantes_en_Argentina.pdf> accessed 6 December 2011.

¹³⁶ For a critical appraisal of the programme see E Domenech, 'La `nueva política migratoria' en la Argentina: las paradojas del programa `Patria Grande'' in C Pizarro (ed) *Migraciones internacionales contemporáneas: Estudios para el debate* (CICCUS 2011).

take effect according to article 23 inc. d of the new Migration Act.

According to information released by the National Directorate of Migration (Dirección Nacional de Migraciones-DNM), between April 2006 and February 2008, as part of the “Patria Grande” Programme, 448.433 people (living in the country before 2006) benefited from the regularization, and 119.886 people started procedures to obtain their residence permits based on nationality.¹³⁷ The DNM had to extend three times the validity of temporary residence certificates issued within the framework of the “Patria Grande” Programme, in response to a significant number of people who were unable to complete the formalities for obtaining a permanent residence in Argentina.¹³⁸ The number of people who applied for regularization in the framework of the “Patria Grande” gives an idea of the large number of people covered by the immigration policy described above.

The regularization process in Argentina represents a progress in granting legal status and rights to regional migrants. Despite this, some MERCOSUR states have not yet implemented comprehensive regularization programmes.¹³⁹ The full application of the agreements will only be achieved when all member and associated states have implemented them by adopting similar criteria.¹⁴⁰ Thus, these agreements will not benefit all migrants in the region until then. Regardless of the decisions and policies adopted by each state under its own immigration policy, the non-enactment of the agreement contradicts the scope of MERCOSUR (including member and associates states) which is, at the present, to create and consolidate an area where people can move freely and choose their country of residence, only proving their nationality, without needing other requirements such as a contract or work permit.

¹³⁷ It is noteworthy to mention the following distribution taking into account the different nationalities of the migrants participating in the programme: Paraguay (52.8%), Bolivia (27.1%), Peru (12.3%), Uruguay (2.6%), Chile (1.8%), Brazil (1.5%), Colombia (1%), Ecuador (0.5%) and Venezuela (0.3%).

¹³⁸ In this sense, according to the National Immigration Office: 423.697 people were enrolled in the program; 98.539 people were granted permanent permits; 126.385 people were granted temporary permits; 187.759 people enrolled did not complete the required documentation for filing the regularization. Official data released in August 2010 evidence that many people could not obtain a temporary or permanent residence permit in Argentina, even in the context of a regularization programme.

¹³⁹ Chile has implemented a regularization programme as well. As for Paraguay, a regularization programme for Brazilian migrants living in that country was launched in 2010.

¹⁴⁰ The ratification of the agreements took so long, and even if they are in force the implementation at internal level is different in each country.

The successful accomplishment of these agreements can eventually lead in the future to the establishment of a MERCOSUR coordinated immigration policy.¹⁴¹ In this regard, it is necessary to make some considerations related to the project of regional integration of MERCOSUR in terms of migration. On the one hand, member states should consider the adoption of policies that ensure all human rights to all persons within their countries. This requires targeting inequalities that exist within and between countries, such as overcoming the structural lack of enjoyment of social rights. On the other hand, regional integration should be achieved without restricting the rights of migrants from other regions. In other words, freedom of movement and residence for nationals from the countries of the region can not justify the restriction or denial of human rights for migrants who come from other countries or regions.

The debate on regional integration and the recognition and protection of regional migrants is still ongoing. In this process, it is important to bear in mind that the new categories cannot lead to create broad differences among migrants whose rights would be recognized, awarded, expanded and reduced according to nationality they possess.

VI. CONCLUDING REMARKS

As discussed above migration is changing the conceptions of citizenship and this phenomenon has a broad impact. In this framework, the specific migratory profile of Argentina shows that this country has become as a sub-center of regional migration. In the Argentinean case, we can observe as well a link between the regional integration process and intra-regional migration patterns. The last legislative changes introduced can be seen as an attempt to adjust to the current migration patterns and regional regulations adopted in MERCOSUR.

The 2004 Migration Act represents the assumption of a human rights-based approach to migration. The new regulation resulted in clearer requirements for obtaining residence permits and the recognition of migrants' rights in line with international standards. Besides, the new law guarantees the access to basic health care and education to all migrants, regardless of their legal status. In particular, the legislative change has contributed to improve the situation of regional migrants by introducing a residence permit based on the possession of the citizenship of

141 S Novick, A Hener, P Dalle, 'El proceso de integración Mercosur: de las políticas migratorias y de seguridad a las trayectorias de los inmigrantes' (2005) Gino Germani Institute Working Paper 46/2005
<<http://lanic.utexas.edu/project/laoap/iigg/dt46.pdf>> accessed 6 December 2011.

MERCOSUR member and associated states.

In the adoption of this new migration paradigm, the judicial interpretation of the norms on migration and citizenship has contributed to protecting migrant's rights. The Argentine Supreme Court's case law in the last decades shows the shift from restrictive migration policies to open migration policies. Through the protection of migrant's rights in controversial cases, the judiciary confirmed this trend and supported the transition to the current migration paradigm.

The signature of MERCOSUR agreements aiming at granting specific legal status for regional migrants represented another relevant exogenous factor in the modifications operated in the Argentinean migration policy. The application of these agreements and the regularization programme implemented in Argentina provided legal status to a large number of undocumented regional migrants. At the same time, these advances in MERCOSUR promoted the debates on the emergence of a regional membership and the development of regional approaches in order to coordinate migration policies.

As result, we can conclude that these various changes are shaping new conceptions of citizenship in the migratory context in Argentina. These new conceptions are reflected in the adoption of more flexible criteria in the access to formal citizenship (nationality) and in the enforcement of migrant's rights as a basis for the enjoyment of substantive citizenship.

ILLEGALITY REGIMES AND THE ONGOING TRANSFORMATION OF CONTEMPORARY CITIZENSHIP

Juan M. Amaya-Castro*

This article introduces the notion of 'illegality regimes' and argues that the creation, enhancement, and strengthening of these regimes has a transformative, and perhaps even corrosive effect on the meaning and value of citizenship itself. The notion of illegality regimes refers to the complex normative and policy framework that is either intended to, or otherwise has the effect of marginalizing or otherwise excluding irregular migrants, and to assist the authorities in the process of localizing and deporting them. Much of the political and scholarly attention in the context of illegality is focused on how illegality regimes affect migrants and refugees, how these regimes weaken their human rights, and generally run contrary to liberal principles such as equality before the law and non-discrimination. However, the objective here is to explore how it is not just the undocumented migrant that is directly or indirectly affected by the illegality regimes, but also regular migrants, asylum seekers, and finally full citizens themselves. The ways in which this happens is by a progressive transformation of what it means to be a citizen, and by means of a re-accommodation of the relation between the citizen and the state. As globalization unleashes migratory processes, the state adapts. Citizenship adapts along.

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I. INTRODUCTION

[W]e can think of citizenship as a type of natural experiment for observing how a highly formalized institution can undergo significant transformations without going under.¹

This article argues that the creation, enhancement, and strengthening of strong illegality regimes has a transformative, and perhaps even a corrosive effect on the meaning and value of citizenship itself. Much of the political and scholarly attention in the context of illegality is focused on how illegality regimes affect migrants and refugees,² how these regimes weaken their human rights,³ and generally run contrary to liberal principles such as equality before the law and non-discrimination.⁴ However, it is my objective to indicate how it is not just the undocumented migrant that is directly affected by the illegality regimes, but also regular migrants, asylum seekers, and finally full citizens themselves.⁵ The ways in which this happens is by a progressive transformation of what it means to be a citizen, and by a re-accommodation of the relation between the citizen and the

¹ Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 319.

² See, e.g., Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006); Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008); W.R. Brubaker, *Immigration and the Politics of Citizenship in Europe and America* (University Press of America 1989); D. Jacobson, *Rights and Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press 1996).

³ See, e.g., Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds) *Irregular Migration And Human Rights: Theoretical, European And International Perspectives* (Brill: Martinus Nijhoff 2004); David Hollenbach (ed), *Driven from Home: Protecting the Rights of Forced Migrants* (Georgetown University Press 2010); Marie-Bénédicte Dembour and Tobias Kelley (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011).

⁴ See, e.g., Philip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh University Press 2000).

⁵ By full citizens I mean people with formal nationality, recognized according to the rules and procedures of the law of the state that grants it. I am not referring to the complicated contested cases, but to the people who, at least in theory, need not worry about the legality of their presence on the territory of 'their' state.

state. As globalization unleashes migratory processes, the state adapts, and citizenship adapts along.

This article starts by explaining the notion of an illegality regime, as a way of conceptualizing the overall logic and effect of a whole set of rules and policies aimed at marginalizing and excluding irregular migrants, or otherwise having that effect, and aimed too at localizing the undocumented, with a view to detaining and deporting them. The logic of illegality regimes is then further explored, as the article explains how these regimes are based on the assumption that everybody is potentially illegal. This involves the proliferation and intensification of moments of identity control. For illegality regimes to be effective in contemporary multi-ethnic societies that value non-discrimination, the control of identity control needs to be as pervasive and comprehensive as possible. However, this does not necessarily mean that there is no significant racial dimension, an aspect that is further articulated in this article. In the second part I continue to develop a first overview of an analysis that explores how illegality regimes affect citizenship. This is done in a systematic way, taking into account the enormous diversity there is in the long history of theorizing about the citizen and her relation to others, as well as to the state and the political community as a whole.

II. ILLEGALITY REGIMES, WEAK AND STRONG

Most countries nowadays practice some type of immigration control.⁶ However, not all immigration control policies are created equal: they range between the very lax and the very strict. They may also employ a variety of different means of enforcement. Even the most lenient immigration regimes, however, include a category of people who are not allowed to be present in a country's territory and are therefore present 'illegally'.⁷ This

⁶ See, e.g., Wayne A. Cornelius, Philip L. Martin and James Frank Hollifield (eds), *Controlling Immigration: a Global Perspective* (Stanford University Press 1994); Jeanette Money, *Fences and Neighbors: The Political Geography of Immigration Control* (Cornell University Press 1999); Jeroen Doomernik and Michael Jandl (eds), *Modes of Migration Regulation and Control in Europe* (University of Amsterdam Press: IMISCOE Reports 2008);

⁷ This so called 'illegality' might be an actual crime or misdemeanor under domestic law, or it may not. The point is that the status of 'irregular' or 'undocumented' makes one the subject of the overall illegality regime. For sure, the term is controversial, for some the symbol of the moral fault of those who 'break' the law by trespassing into another state, while for others it is the symbol of how the state overreacts to what is essentially a systemic and social justice problem. This multiplicity in symbolic meaning wonderfully illustrates the underlying political tensions within the term and concomitantly, within illegality regimes themselves, and so I find it very useful for the purposes of this analysis. See generally, Dauvergne (n 2); Bill Ong Hing, 'The

might be a relatively small group of people or a relatively large group. How the state chooses to deal with this group is what I will refer to as its 'illegality regime'. However, I have chosen this term because it allows for an appreciation of the full extent of the states' preoccupation with and determination to mold society and its legal system to accommodate its drive to fight irregular immigration.

This notion intersects and interacts with the similar but distinct notion of the 'deportation regime', developed by Nicholas de Genova and others.⁸ One can see an illegality regime as subsumed within a more general deportation regime. In this perspective the deportation regime, as developed by de Genova and others, has a more Agambean⁹ signification than the notion of illegality regime that I want to develop here. One can also see it in the opposite direction: a deportation regime is subsumed within the more general illegality regime, of which it forms a part. Analytically, the distinctiveness allows for a different focus. If a deportation regime focuses on how "the whole totalizing regime of citizenship and alienage, belonging and deportability, entitlement and rightlessness, is deployed against particular persons in a manner that is, in the immediate practical application irreducibly if not irreversibly individualizing",¹⁰ the notion of an illegality regime focuses on the accommodation of the entire sovereign and legal landscape to the figure of the illegal migrant. An essential purpose of the notion of an illegality regime is to argue that both illegality and deportation regimes do much more, and with much more systemic implications, than to perpetually threaten with deportation. Ultimately, I hope, both notions will be able to nourish each other.

Illegality regimes can be lax, or strong, in various ways. First, the group of people affected by the regime can be either significant or marginal. Second, the state involved may care a lot about enforcing this regime, about tracking down and deporting the illegal migrants, or it may not care very much. It is in this second sense that I refer to illegality regimes as

Immigrant as Criminal: Punishing Dreamers' (1998) 9:1 Hastings Women's Law Journal 79; David Bacon, *Illegal people: how globalization creates migration and criminalizes immigrants* (Beacon Press 2008); Nicholas de Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 Annual Review of Anthropology 419.

⁸ See the various contributions to Nicholas de Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010).

⁹ See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 2008); Giorgio Agamben, *The State of Exception* (Kevin Attell tr, University of Chicago Press 2005).

¹⁰ Nicholas de Genova, 'Theoretical Overview', in de Genova and Peutz (eds) (n 8) 33, 34-35.

being 'strong' or 'lax', although the first dimension will usually influence the development and strengthening (or not) of such a regime.

States with weak illegality regimes devote very few resources to their enforcement. There are a number of possible reasons for this. It may be because the illegality regime is limited in scope, or the state does not draw many migrants, so the number of affected people is small or nonexistent. It may be that the number of affected people is large, but the state has different problems that it considers more important. It may be that the state accepts the presence of the irregular migrants because it believes that it benefits from them. Or it may be that the state would like to enforce its regime more strictly, but is generally weak, and therefore lacks the administrative resources for distinguishing between citizens and irregular aliens.¹¹

States with strong illegality regimes, by contrast, devote substantial resources to their enforcement.¹² This can be because the state's illegality regime is broad in scope or because the state, for all types of reasons, attracts a large number of migrants, so the number of affected people is large. It may be that the state considers the problem of illegal migration very important. It may be that the state has very low tolerance for irregular migrants because it considers that they are a drain on its resources. Some combination of lax and strong policies may also occur, as a state may care more about some types of irregular aliens than others, or care about them in some contexts more than others, again for a variety of reasons.

Of course, a state's position along this axis is not static: as conditions and priorities shift, states may choose to strengthen or weaken their illegality

¹¹ Wendy Brown argues that much of the loud and visible energy and resources that go to the construction of walls and other barriers, and that do not have any significant impact on the numbers of irregular migrants entering the state serves a symbolic function, by which the state is trying to compensate for its diminished relevance in times of globalization. See Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books 2010).

¹² It is difficult to disentangle how many resources go to immigration control, especially when the actual tasks of immigration control are spread out over a large number of agencies and departments. The United States Immigration and Customs Enforcement (ICE) alone had a 2011 budget of US\$ 5.8 billion, while the 2011 budget for the US Customs and Border Protection (CBP) is US\$ 11.1 billion. See U.S. Department of Homeland Security, *Budget-in-Brief Fiscal Year 2011* <http://www.ice.gov/doclib/foia/secure_communities/fy2011budgetinbrief.pdf> accessed 10 October 2011. Meanwhile, Frontex, which only *coordinates* the migration control efforts of the national authorities of EU member states spent around 80 million Euro in 2010. Frontex, 'Budget and Finance' <http://www.frontex.europa.eu/budget_and_finance/> accessed 10 October 2011.

regimes. There are a number of reasons why states may choose to enhance or strengthen their illegality regimes. It may be that the number of irregular immigrants is perceived to increase, or actually increases. It may be that the state gains additional resources with which it can enforce its migration preferences. Alternatively, the political atmosphere in a country may shift, leading it to focus more closely on irregular migration.

Conversely, a state may also choose to make its illegality regime more lax. It may be that the number of irregular migrants is perceived to decrease, or actually decreases. The state may lose resources, and be unable to enforce its regime. Or the political atmosphere in the country may shift, leading it to de-emphasize migration in comparison with other priorities.

These illegality regimes come in various forms and shapes and may be monitored and enforced by means of a number of mechanisms, with varying degrees of legality. They may focus on border control, such as in the building of walls or fences,¹³ or they may involve more pervasive techniques of surveillance and monitoring. The stronger the illegality regime, the more it will focus on mechanisms of surveillance and control.¹⁴ This will be the case even if it still allocates many resources to border control mechanisms. In most democratic states under the rule of law, however, illegality regimes are primarily *legal* regimes. They are created by law and implemented by law enforcement agencies, even when much of the authority or actual responsibility for enforcement is delegated to private actors.¹⁵

The fact that illegality regimes are legal regimes leads to something of a paradox: the 'illegality problem' is entirely the product of a state's decision to make irregular entry 'illegal'. As St. Paul understood, the law makes the sin.¹⁶ When a state finds itself confronted with a situation in which the presence of irregular foreigners is, rightly or not, perceived as a problem of considerable priority, this presence becomes an *illegality problem* only once

¹³ See generally Brown (n 11).

¹⁴ See generally Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009); Dennis Broeders and Godfried Engbersen, 'The Fight Against Illegal Migration: Identification Policies and Immigrants' Counterstrategies' (2007) 50 *American Behavioral Scientist* 1592; Huub Dijkstra and Albert Meijer (eds), *De Migratiemachine: De rol van technologie in het migratiebeleid* (Van Gennep/Rathenau Instituut 2009).

¹⁵ Gallya Lahav, 'Immigration and the state: The devolution and privatisation of immigration control in the EU' (1998) 24:4 *Journal of Ethnic and Migration Studies* 675.

¹⁶ St. Paul, 'St. Paul's letter to the Romans' ('sin is not imputed where there is no law.').

the state chooses to create and enforce an illegality regime. The scope of the state's illegality problem is thus directly related to the scope of its illegality regime.

In some ways, therefore, there is nothing easier (even if politically difficult) than 'solving' the illegality problem: it is immediately eliminated when a state declares all migrants 'legal', or announces an amnesty. In this way, with one stroke of the pen, the problem of 'illegal' migrants disappears. This may be done incidentally or (very unlikely) permanently. Another option, however, is to allow an illegality regime to weaken, to phase itself out. The state can allocate fewer resources to its enforcement, use permitted discretion to make it more lax, or formally change the regime to diminish its reach. By the same token, if a state finds itself 'forced' for internal political reasons to address the migration issue and create, enhance or strengthen an illegality regime, it may also find that it is making the problem worse.¹⁷

Let's imagine a state that has a 'big' irregular migration problem, in the sense that it affects a large number of people. This state decides to confront the issue by, gradually and in jerks, making its illegality regime stronger. How will it go about doing so? What are the mechanisms that it has at its disposal? Whether it proceeds by means of the old-fashioned, brutal methods associated with a police state, such as razzias and checks, or by more gentle or sophisticated means, what becomes important—or more important, or essential—is that this state must enhance *its ability to distinguish between citizen and regular alien, on the one hand, and irregular alien on the other*. In other words, illegality regimes will be primarily focused on 'finding the illegal'.

This process of distinguishing legal from illegal has a number of important effects. In particular, as has been often pointed out and amply documented, strong illegality regimes push people into an increasingly difficult position, making irregular immigration more and more difficult, and increasing the cost for the potential migrant of being in an irregular status. As in other areas of illegalization, the purpose is not just to correct,

¹⁷ In the absence of an illegality regime, and therefore of an illegality problem, a state may have a 'immigration problem'. It is a sign of the times that it is difficult *not* to translate an immigration problem into an illegality problem, and therefore to arrive at the almost inevitable 'solution' to the problem, which is to create and develop an illegality regime. However, one may resist such a move and consider alternative perspectives that will lead to different approaches, responses, and/or 'solutions'. For instance, the social theorist Ulrich Beck, who has endorsed a 'right to migrate', has proposed a legal regime that would regulate migration through varying tax-regimes. Ulrich Beck, 'Recht auf Migration' (*Zeit Online*, 12 May 2007) <<http://www.zeit.de/online/2007/18/migration-beck>> accessed 6 October 2011.

but also to deter.¹⁸ In other words, they make regular status more important.

For those who do not have access to 'legal' status, however, especially in cases where many people are affected, illegality regimes can lead to the creation of a society within a society.¹⁹ Marginalized irregular immigrants rely on each other and on others for their social, economic, and political needs. An industry of smugglers, also known as 'human traffickers', may develop to provide entry into the territory, and sometimes employment, too.²⁰ A new economy in which irregular migrants can subsist will emerge and thrive, enhancing the already existing informal dimensions of the state's economy.²¹ The more important IDs become, the more lucrative the market for their falsification.²² The more difficult the access to social services, such as health, education, and housing becomes, the more lucrative (or morally compelling) it will be to provide them. In short, the more elaborate and forceful the illegality regime, the more autonomous and complex the 'gray' society and the illegal realm of the state will become.

As such, there is a compulsive dimension to the dynamics of illegality regimes: created by the state to enhance control, they work to create elaborate areas outside of the state's control. The challenge of having to 'find the illegal' is produced by the process of 'seeking' them in the first place. In doing so, governments justify ever greater efforts to control this society within society. The more pervasive the society and economy that serves irregular migrants and their employers, the more illegality itself will be perceived as a problem that needs tackling. Problem and solution feed on each other, each one making the other bigger in a positive feedback loop. In the meantime, the difference between regular and irregular, legal

¹⁸ Broeders & Engbersen (n 14).

¹⁹ I do prefer this way of looking at things, rather than the perspective that sees irregular migrants as excluded from society.

²⁰ Raimo Väyrynen, for example, helpfully notes that 'illegal immigration and human smuggling, and even trafficking, are interrelated and result in a 'terrible paradox' ... the more strictly the laws of immigration against the illegal entrants are enforced, the more sinister forms of criminality are used in human trafficking to overcome barriers that are needed for making a profit.' Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organized Crime' (United Nations University Discussion Paper No. 2003/72 2003) 5.

²¹ There is a great deal of work on the operation of the informal economy in migrant enclaves. See, e.g., Saskia Sassen, 'The Informal Economy: Between New Developments and Old Regulations' (1994) 103 *Yale Law Journal* 2289.

²² Not just fake resident status, but even fake citizenship. For example, the number of people in Malaysia with fake citizenship cards is estimated to be in the hundreds of thousands.

and illegal becomes more and more important.

I. *Illegal and Potentially Illegal*

The logic of a growing illegality regime that is increasingly eager to 'find the illegal' is to enhance the number of checkpoints in society. The first place this will happen is at the border. A strong border control system, with barriers and a competent border control agency with the ability to screen legal from illegal,²³ will form the initial 'line of defense'. The effectiveness of this border control system will be enhanced by all those elements that suggest the imagery of a fortress, and thereby preempt attempts to enter through the side or back door. This means the designation of valid points of entry,²⁴ formal 'legal' entrances to a country, and the policing of the remainder of the boundaries, by land, sea, or air. Additionally, it may also entail the construction of physical barriers.²⁵ These sites and metaphors serve to filter people on their way in, acting as a porous membrane to allow in those who are legal and keep out those who are not.

This extensive infrastructure, this gigantic filter at the territorial edge of the state, is only the most visible physical manifestation of an illegality regime. In fact, it is but one expression of the logic of control that is at the heart of illegality. When a body enters a country, say at an international airport, there may be different lines or cues for nationals and visitors. Once one confronts a customs officer, however, every body is the same. This sameness is essential, because it means that *everybody is potentially illegal, until proven otherwise*. A valid passport or other ID is what gets you through the checkpoint at the airport, and legally into the country. The logic at the heart of an illegality regime is the logic of identity control.²⁶

This logic extends itself beyond the physical border and the physical checkpoint. A truly strong illegality regime has to deal with the fact that no matter how much it invests in border control, its boundaries are permeable and imperfect in keeping irregular migrants out. This may be because the border is too long and too hard to police for geographical reasons. It may also be because there are too many ways to enter on a temporary basis, and then overstay. Tourists, workers, students, and others

²³ With legal I refer to both citizens and regular migrants, with valid visa or residence status. By illegal I mean the people on the other side of the formal legal divide.

²⁴ See the Annexes to Schengen agreement, for an example of a (very long) list of formal places of 'entry' into the Schengen area.

²⁵ Brown (n 11).

²⁶ John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge University Press 2000).

may all abuse their rights to temporary entry. It may also be that because a state is very strict in terms of how it deals with asylum seekers, some will escape into the realm of illegality rather than wait to see their claims processed and denied. Some may abscond after rejection of their claims. In other words, there are many ways of entering a country, and staying there.

Once they have crossed the border, and entered the metaphorical fortress, all of these people will walk the streets, looking for jobs and housing, opening bank accounts, buying cell phones, attending schools and making use of health care facilities. They will become the subjects of the *internal* border control problem. At this point, a state may choose to shrug its shoulders and let things be. Or, it may choose to tighten its illegality regime, and focus on these internal legal anomalies. They do this by trying to 'find the illegal', by intensifying the logic of the illegality regime, by increasing the number of checkpoints.

Checkpoints are not necessarily posts manned by government officials. They are moments of identity control. They can be set up and operate in a variety of ways. Most commonly, they are translated into formal requirement to gain access to services and facilities, such as jobs and housing.²⁷ The more of these types of checkpoints there are, the 'stronger' or more developed and sophisticated an illegality regime can be said to be. They are also ways to keep the direct costs of such a regime relatively low, since they do not necessarily require direct expenses by the state to carry out these controls. Instead, they distribute the task of identity control among the network of individuals performing these checks. By linking identity checks to as many services and facilities as possible, the regime closes the net around irregular migrants, isolates them, and effectively changes what it means to be *inside* a territory, by assimilating a regime of exclusion, an *outside*, into the jurisdiction of the state.

The essential point here though is that once such an internal illegality regime is established, then just as at the airport, nobody is exempt from this control. Everybody is potentially illegal.

The expansion of identity control may be justified on the grounds that it protects consumers or citizens from being mistaken for other people. For example, the requirement that a customer identify herself when opening a bank account may be justified on the grounds that it protects others by preventing her from opening a bank account in their name. Such justifications may be absolutely valid. However, they do not diminish their effect on illegality. Identity controls can serve multiple functions: they are

²⁷ Broeders (n 14).

not all about enforcing illegality regimes.²⁸ But each set of controls does, whether intentionally or unintentionally, extend their reach. What is more, such controls are often explicitly focused on controlling illegality in addition to their other functions. Demanding the presentation of an ID as a requirement for basic transactions, such as opening bank accounts, has been an explicitly stated policy of legality control,²⁹ and part of a strategy of raising the price and discomfort of irregular status for those whose presence in a country has not been formally approved.³⁰

2. *Fault Lines of Racialization and Class*

Identity control, as a manifestation of systemic exclusion or differentiation, can of course happen in many ways. Countries with formally racist historical regimes, such as the United States and South Africa, did not need very elaborate or sophisticated mechanisms to filter desirable from undesirable people--the evidence was (often) right in front of their eyes.³¹ Similarly, in political regimes where ethnicity is an important category, such as that of Israel, screening processes can happen much more informally and loosely, or even voluntarily. However, in this genre of cases in which race and ethnicity are important categories there are usually other forms of segregation that operate in conjunction with the illegality regime. There might be designated territories to which the subordinated group is confined, as in the case of Israel and South Africa. Or, there might be a correlation between race/ethnicity and class, such as in the US or in most of Latin America, which comes with its own territorialized means of segregation. In these places the 'gray' society of the subordinated group functions openly and this is seen as part of the way things are, not as a problem in and of itself, since the 'real' problem, the presence of a particular group of people, is managed by means of territorialized segregation. It is not just that the segregation is embodied in the race or ethnicity of the excluded person, it is that the parallel society in which they live, with its schools and churches and dwellings, is not

²⁸ David Lyon, *Identifying Citizens: ID Cards as Surveillance* (Polity Press 2009) 133 (describing the US Real ID system, which, though adopted in the context of enhancing national security and the 'war on terror', was also supported by the Heritage foundation and other anti-immigrant groups because of it restricted immigration through imposing harsher identification standards).

²⁹ However, some people argue that legality control is more of an excuse to expand the powers of the state. See, e.g., Johan van Someren, 'Mobiele vingervan de identificatieplicht en de Paspoortwet' (*Vereniging Vrijbit*, 8 August 2011) <<https://www.vrijbit.nl/dossier/handhaving/politie-en-justitie/item/843-verlengstuk-van-de-identificatieplicht-en-de-paspoortwet.html>> accessed 10 October 2011.

³⁰ Broeders & Engbersen (n 14).

³¹ Note, however, that apartheid laws needed more than a hundred pages to define the individual races.

excluded from, but rather *part of the segregated regime*.

Because of this, the paradoxical situation arises that those states that are the most multiracial and multiethnic, the most antiracist and egalitarian in terms of class, must also employ the most rigorous, sophisticated, and intrusive means of enforcing their illegality regimes. In other words, egalitarian and anti-racist societies with strong illegality regimes must be more *indiscriminate* in their enforcement, spreading the net as wide as possible and employing the most rigorous checks on the most different types of people.

A lot of the political debate about the development of illegality regimes and the specific measures thereof is about how this might lead to instances of racial or ethnic profiling in circumstances of identity control. Recent years have seen a number of US states allowing police to verify the illegality status of any person who is part of some other inquiry.³² These regulations have been controversial, and elicited a great deal of protest.³³ However, most political protests against these regimes of control have focused on how they will play out with respect to the United States' politics of race.³⁴ This nicely demonstrates the paradox described above: complaints that focus on the potential for 'racial profiling' are in some sense complaints that the illegality regime is not indiscriminate enough and should be applied *more broadly*. As such, and to put the finger on the irony: one of the hallmarks of a righteous egalitarian and *truly* anti-racist state to have a thoroughly indiscriminate and invasive illegality regime, in which everybody, independent of race, ethnicity, and class, can and in fact will be subjected to ID control. The best way of being indiscriminate is to make sure that everybody's identity is actually controlled, and the best way

³² See, e.g., the laws of Arizona, Georgia, Alabama, and others. Alabama House Bill 56; 2010 Arizona Session Laws 113 (State Bill 1070) (the most significant and controversial parts of this bill were enjoined following a federal challenge on supremacy grounds); Georgia House Bill 87.

³³ Indeed, Nobel Peace Prize Laureate and activist Desmond Tutu even cautioned that the Arizona law was the first step down the road to apartheid. Desmond Tutu, 'Arizona: The Wrong Answer' (*Huffington Post*, 29 April 2010) <http://www.huffingtonpost.com/desmond-tutu/arizona---the-wrong-answer_b_557955.html> accessed 10 October 2011.

³⁴ See, e.g., Kieth Aoki & John Shuford, 'Welcome to Amerizona--Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism is an Idea Whose Time has Come' (2010) 38 *Fordham Urban Law Journal* 1; Andrea Christina Nill, 'Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement' (2011) 14 *Harvard Latino Law Review* 35; Mary Romero, 'Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff"' (2011) 14 *Harvard Latino Law Review* 337.

of being rigorous is to make sure that this control happens often.

However, it seems likely that identity controls will nevertheless be selectively applied and enforced, with more controls taking place in some neighborhoods than in others, with some areas of economic activity, such as construction and catering, more often investigated, with more emphasis on urban areas than on rural areas, and so on. In this way, existing class structures based on income, ethnicity, etc. will be reinforced as some groups bear the brunt of the illegality regime.³⁵

Even so, *everybody* will be affected by strong illegality regimes, as its main manifestation is not that of officers in the street, but of building check points into an increasing number of moments in the daily life of citizens. These check points will be manned by a growing number of private individuals.

III. CITIZENSHIP TRANSFORMED

As explained above, a strong illegality regime makes formal citizenship, or at least some degree of legal status, more important. However, this importance is not necessarily a blessing. It means that formal citizenship becomes more necessary, and that its absence becomes more consequential.³⁶ It means that citizenship is haunted by a Sword of Damocles, for being a citizen no longer provides certainty, as an intrinsic part of one's political identity in the world at large, but becomes instead a status that entails a degree of constant anxiety. It also means that any confusion about one's citizenship, such as mistaken identity, or loss of ID through carelessness or theft, is even less of a laughing matter and becomes an urgent problem, for without proof of legal status ordinary life loses many of its comforts. Where illegality regimes are rigorously enforced, citizenship becomes something that you can never leave home without.

³⁵ Michael Wishnie, 'State and Local Police Enforcement of Immigration Laws' (2004) 6:5 University of Pennsylvania Journal of Constitutional Law 1084, 1113 (describing the US Immigration and Naturalization Service's selective enforcement of immigration rules on those who were speaking Spanish, listening to Spanish music, or had a Hispanic appearance).

³⁶ As Hannah Arendt argued, because rights are not 'natural' but a construction of society, they are fundamentally attached to an individual's membership in the political realm. To the extent that this membership is marked by citizenship status, citizenship becomes a matter of crucial importance. '[N]ot the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity'. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1968) 297.

Instead of being a formal status, which brings with it important but mostly symbolic rights such as the right to vote or to hold public office, it becomes the key to your most basic needs, such as the ability to buy a house, to have a job, to set up internet access, and so on. From a badge of honor, shown during the festive moments of the life of the body politic, citizenship becomes the object of constant scrutiny and mistrust. In a weak illegality regime, you may never need of a passport, or other ID, if you never travel abroad. Under a strong illegality regime, however, your ID is the thing that gives you access to a 'normal' (legal) life. Moreover, the more pervasive the identity controls imposed by an illegality regime, the more you will be held hostage not just to your citizenship, but also to the formal and tangible evidence thereof, the ID. As one's citizenship becomes more and more important, the person underneath that citizenship will start to melt away; from a person with citizenship, you become close to nothing without it.

I. *Theories of Citizenship*

This dynamic engages most of the traditional theories of citizenship. Theories about citizenship abound and are as old as political philosophy and/or law.³⁷ They range from the so-called republican approaches that emphasize the connection between citizenship and participation in the realm of politics, and which focus on the arena of political engagement³⁸; through Liberal approaches that are built around law and rights, and have a cosmopolitan or universalist vocation³⁹; through communitarian approaches that emphasize cultural belonging and community⁴⁰; to radical pluralistic approaches that offer the image of a differentiated citizenship,

³⁷ For one famous historical overview, see J.G.A. Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99 *Queen's Quarterly* 35. See also Derek Benjamin Heater, *Citizenship: the civic ideal in world history, politics and education* (first published 1990, 3rd edn, Manchester U. Press 2004); Gershon Shafir (ed), *The Citizenship Debates: A Reader* (University of Minnesota Press 1998).

³⁸ See e.g., Aristotle, *The Politics* (T.A. Sinclair tr, Penguin 1962); Arendt (n 36). For neo-republican theories that seek to update republicanism for the modern era, see Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard 1996); Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

³⁹ See, e.g., John Rawls, 'Justice as Fairness, Political not metaphysical' (1985) 14 *Philosophy and Public Affairs* 223; Jurgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1.

⁴⁰ See, e.g., Michael Walzer, *Spheres of Justice* (Basic Books 1983); Charles Taylor, 'The Politics of Recognition' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994); Will Kymlicka, *Multicultural Citizenship* (OUP 1996).

one in which any identity can find its place.⁴¹

These theories of citizenship are the products of enveloping narratives of political and legal ideas of community and state. These narratives offer both a normative background as well as a factual account of the life of the state, its sovereignty, its subjects, and their legal and political status. As such, when we speak of citizenship, we are not talking about a fixed or uncontested institution, let alone a too formally defined one.⁴²

Theories about citizenship are seen here as interventions into debates about what the best and most accurate account is about what is going on in the life of the contemporary state of affairs. For the purpose of this project this article will offer such an account, but one that is centered around a phenomenological exploration of the social practices that constitute citizenship, and how it is embedded in legal rules about rights as well as about duties, and about competences and jurisdiction. This account has normative dimensions, but these are backgrounded, sacrificed in the attempt of figuring out how the chimera of citizenship is affected by illegality regimes.

2. *Under siege: citizenship as protection*

Citizenship, then, can be many things. And in each of its guises, it is both produced and affected by the presence of illegality regimes.

To begin with, citizenship can be understood as a form of protection.⁴³ Illegality regimes are justified in a number of ways: by reference to economic stability and/or welfare,⁴⁴ by reference to cultural homogeneity

⁴¹ See, e.g., Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250.

⁴² As Judith Shklar has written, 'There is no notion more central in politics than citizenship, [yet] none more variable in history, or contested in theory'. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Harvard U. Press 1991) 1. Kivisto and Faist give a sense of this when they list the "proliferation of adjectives" that characterize citizenship literature. Peter Kivisto & Thomas Faist, *Citizenship: discourse, theory, and transnational prospects* (Blackwell 2007) 2-3. Contestation over this term goes back a long way: 'The nature of citizenship ... is a question which is often disputed; there is no general agreement on a single definition'. Aristotle (n 38) 93.

⁴³ As the geographer Yi-Fu Tuan once asserted, 'every human-made boundary on the earth's surface--garden hedge, city wall, or radar 'fence'--is an attempt to keep inimical forces at bay. Boundaries are everywhere because threats are ubiquitous.' Yi-Fu Tuan, *Landscapes of Fear* (University of Minnesota Press 1979) 6.

⁴⁴ See, e.g., Peter Brimelow, *Alien Nation: Common Sense About America's Immigration Disaster* (Random House 1995) 137-177.

or social cohesion,⁴⁵ or by reference to a combination of security and criminality concerns. In each of these stories, illegal migration is constructed as an invasion, as hordes of people 'breaking the law'.⁴⁶ Though the language of formal illegality rules and the rhetoric surrounding the rise of illegality regimes on the political agenda may differ,⁴⁷ the instruments used to enforce them are generally fixed. These involve very visible measures of police or administrative measures, the construction of physical barriers,⁴⁸ and the deployment of a variation of stealth controls by labor inspectors and other administrative inspections.⁴⁹ The detention of irregular migrants equates them with criminals, holding them in detention centers that are, like prisons, designed to keep people in and prevent them from disappearing into the population.⁵⁰

Whether draconian or lenient, however, illegality regimes are ultimately justified and implemented as a response to a threat or even a danger. Physical manifestations of citizenship, such as an ID card or passport, are now required not only to give access to territory or consular assistance abroad, or for the exercise of voting rights. They also serve as a symbol of the efforts of the state to protect the integrity of its territory, and the economic and social welfare enjoyed by its citizens. In the weak version,

⁴⁵ David Miller, for example, worries that the presence of foreigners might put social democracy at risk because social democracy requires a unity of community and purpose. David Miller, *On Nationality* (OUP 1995).

⁴⁶ A number of scholars have commented on the military language used to describe immigration. In one interesting study, Leo Chavez describes the militaristic costumes and props used by the Minutemen vigilante border patrol groups in the United States, and examines the way that these performative strategies reinforce the narrative of invasion. Leo R. Chavez, 'Spectacle in the Desert: The Minuteman Project on the US-Mexico Border' in David Pratten and Atreyee Sen (eds) *Global Vigilantes* (Hurst Publishers 2007).

⁴⁷ For example, though seldom actually so implemented, political debates sometimes make reference to the use of the military in pursuing irregular migrants. Physical walls can, in this sense, be seen as deploying military means (walls) without deploying the actual military. The big exception though is the patrolling of waterways and maritime borders, which is done by actual military components of the state: navies.

⁴⁸ P. Andreas, 'Redrawing the line: Borders and security in the twenty-first century' (2003) 28 *International Security* 78; Phillip Cole, 'The American Fence: Liberal Political Theory and the Immorality of Membership' in Gideon Calder, Phillip Cole & Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State* (Palgrave Macmillan 2010); Wendy Brown, *Walled States, Waning Sovereignty* (MIT Press 2010).

⁴⁹ What Broeders and Engbersen call 'weapons of mass detection'. Broeders and Engbersen (n 14) 1593.

⁵⁰ See generally M. Welch, *Detained: Immigration Law and the Expanding INS Jail Complex* (Temple University Press 2002); Mary Bosworth, 'Border Control and the Limits of the Sovereign State' (2008) 17 *Social and Legal Studies*.

citizenship serves to protect citizens' access to their 'birthright', to the spoils collected by previous generations.⁵¹ In the stronger version, citizenship serves to protect the privileges themselves, by ensuring, through the operation of illegality regimes and restrictive immigration policies, that economic welfare and social cohesion are maintained.

However, there is a more concrete dimension to this protection. Citizenship, in its material expression, serves to protect subjects from suspicion and prevents their exclusion from everyday activities such as getting a job or health insurance. This protection, however, is only necessary because of the illegality regime itself, which cordons off large proportions of public life. The logic is therefore circular: citizenship protects the public from the dangers of illegality, which are themselves the product of the citizenship regime.

3. *Belonging: citizenship as membership*

Citizenship can also be about membership and belonging, and illegality about strengthening this community.⁵² Citizenship here is about what connects subjects to the body politic, what connects them to one another. To be a citizen means to share in the sovereignty over the state of affairs.⁵³ Illegality regimes can be seen as aiming to increase the value of these connections, to close them off from cultural contamination, to root the political community in the territory, and to make sure that only those selected to enter into the political community by the appropriate procedures can actually do so.⁵⁴ Thus, illegality regimes are meant to

⁵¹ See Ayelet Shachar and Ran Hirschi, 'Citizenship as Inherited Property' (2007) 35 Political Theory 253.

⁵² Michael Walzer, for example, sees citizenship as about protecting communities: 'The theory of distributive justice begins, then, with an account of membership rights. It must vindicate at one and the same time the (limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities'. Walzer (n 40) 63.

⁵³ As Walzer writes, 'we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have. Membership is a social good is constituted by our understanding; its value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution'. Walzer (n 40) 32. 'Citizenship, conventionally understood, marks full and permanent membership in a political community; ... it defines the circle of our greatest trust and of our most extensive common endeavors'. Peter H. Schuck, 'Citizenship in a Post-9/11 World: An Exchange Between Peter H. Schuck and David Cole' (2007) 75 Fordham Law Review 2531, 2534.

⁵⁴ The rise of language and 'shared values' tests for newcomers is evidence of this conception of citizenship. See Sue Wright, 'Citizenship Tests in Europe' (2008) 10 International Journal of Multicultural Studies 1.

strengthen the connection of citizens to the body politic; to extend the reach of the political community to more areas of life, such as renting an apartment or even getting a bank account. Citizenship becomes important in all sorts of places where it never was before.⁵⁵ As the external lines of the public realm are made stronger, the connection among those who have access and are part of the community may increase as well.

At the same time as they strengthen some community ties, however, these lines cut straight through others. This happens as individuals are separated by ethnicity and national origin, dividing up those immigrants with legal status from those without.⁵⁶ And it happens geographically too, with effects that are accommodated territorially. As described above, illegality regimes create localities and sites where underground markets and service providers are more densely concentrated. This process, too, is circular: illegality regime creates sites with increased illegality. These sites are not the exclusive domain of irregular migrants, but are shared by other groups, often groups that are themselves at the margins of the public realm and the body politic. Illegality regimes increase the distance between center and periphery within a community, and, as such, change the economy between cohesion and division, not necessarily in desirable ways.

Just as with 'citizenship as protection', then, the notion of 'citizenship as cohesion' sets up an illegality regime that ends up undermining its goals in the name of promoting them. The way in which this happens is via the slow but relentless development of an illegality regime that feels that it needs to reach further and intrude deeper into the fabric of social life. The more citizenship operates as an anxious overcoming of a constant distrust about one's membership and overall legality, the less it can comfortably function as a symbol of belonging to a political community. In short, by becoming more, citizenship becomes less.

4. *Vita activa: citizenship as engagement with the body politic*

A third way of seeing citizenship is as a sign of political engagement. Illegality, understood through this paradigm, is intended to protect the exclusive nature of the political realm.

Especially in the republican tradition, citizenship is concerned with the capacity and desirability of engaging in the realm of politics. In contemporary societies, there are a number of formal and less formal

⁵⁵ For example, a few supermarkets in Amsterdam only accept electronic payment, using debit accounts, for which you need a bank account, for which you need some type of regular status

⁵⁶ It inevitably will divide couples, lovers, and families too.

institutions that aim to facilitate this engagement, including the different elements and levels of the state (local, regional, national), non-state organizations, and civil society in general. Each national culture has informal dimensions too, which might include disruptive public demonstrations, or mobilization through radical or fringe political parties. All this and much more is part of the social organizing of political engagement that is part of the institution of citizenship.⁵⁷

In order to be meaningful, however, this citizenship must be limited to those who are both prepared and capable of participating in the public sphere. Illegality regimes are thus put in place to cordon off the realm of political life, and to ensure that the arena of public engagement is only accessible to formal citizens. That is, that only those with the right and capacity to do so can engage as equals in political life.⁵⁸

At the same time, though, the means and techniques used to enforce an illegality regime in this paradigm work to undermine political engagement. The degree to which this happens depends very much on local circumstances, formal and informal political cultures, and the nature of the illegality regime itself, as well as on the 'size' of the perceived illegality problem. One can imagine situations in which a relatively weak illegality regime would continue to allow engagement and participation in all types of formal and informal political and judicial procedures. But, one can also imagine situations in which a very strong or repressive illegality regime leads to situations in which a large number of people are denied access to formal and informal legal and political channels. If this is the case, such an illegality regime will basically create new forms of politics, primarily in the

⁵⁷ As Michael Sandel describes it, 'the republican tradition emphasizes the need to cultivate citizenship through particular ties and attachments. More than a legal condition, citizenship requires certain habits and dispositions, a concern for the whole, an orientation to the common good. But these qualities cannot be taken as given. They require constant cultivation. Family, neighborhood, religion, trade unions, reform movements, and local government all offer examples of practices that have at times served to educate people in the exercise of citizenship by cultivating the habits of membership and orienting people to common goods beyond their private ends.' Sandel (n 38) 117.

⁵⁸ This type of cordoning off will also exclude non-citizens with legal status. Michael Sandel justifies this exclusivity as flowing from the 'special demands of republican citizenship'. As he puts it: 'If sharing in self-rule requires the capacity to deliberate well about the common good, then citizens must possess certain excellences—of character, judgment, and concern for the whole. But this implies that citizenship cannot be indiscriminately bestowed. It must be restricted to those who either possess the relevant virtues or can come to acquire them'. Sandel (n 38) 318.

informal realm,⁵⁹ but perhaps in ways that openly defy existing political and legal structures of citizenship in the sense of the dynamics of political engagement. This may be a good thing in and of itself, but it may also be potentially destabilizing. In its quest to delimit and thereby protect public life, therefore, illegality regimes can end up eliminating pathways for political engagement and creating separate, privatized spheres of social action that are disengaged from the broader public world.

5. *Guarantees: citizenship as having rights*

Citizenship has acquired, in the last fifty or so years, perhaps the most sophisticated legal and institutional environment it has ever had. This has happened primarily through the framework of human rights and through the ways in which rights discourse is part and parcel of the entire legal institutional edifice. Since their introduction as political rights, human rights have enshrined the most important aspects of what citizenship means:⁶⁰ equality, individual autonomy, access to legal and political institutions, etc. They have not only been the objectives in various emancipatory struggles, such as voting rights for women, basic social rights for the poor; they also have created institutional mechanisms to achieve these results.⁶¹ Moreover, notions of what citizenship means have followed a trajectory that has been closely connected to theoretical, doctrinal, and legislative developments in human rights. For example, social rights and cultural rights have been developed in periods when the issues of social solidarity and cultural identity were polemical points of articulation in the broader discussions about citizenship and about the relation between the state and its citizens.⁶²

As human rights institutions grew in strength and authority, they came to

⁵⁹ See, e.g., Anne McNevin, *Contesting Citizenship: Irregular Migrants and the New Frontiers of the Political* (Columbia UP 2011); E.C. Hughes, 'Bastard Institutions' in L. Coser (ed), *Everett C. Hughes on Work, Race, and the Sociological Imagination* (first published 1951, Chicago U. Press 1994); S.J. Mahler, *American Dreaming: Immigrant Life on the Margins* (Princeton 1995); Broeders & Engbersen (n 14).

⁶⁰ T.H. Marshall provided one influential statement of this conception of citizenship as rights just after World War II. T.H. Marshall, 'Citizenship and Social Class' (1950) in T.H. Marshall, *Class, Citizenship and Social Development* (Anchor 1965). And Hannah Arendt, famously, defined citizenship as the 'right to have rights'. Arendt (n 36). See also Simon Szreter, 'The right of registration: Development, identity registration, and social security--a historical perspective' (2007) 35 *World Development* 67 (arguing for a human right to identity registration, which would help ensure that all individuals have access to civil and political rights).

⁶¹ For Marshall, for example, full citizenship requires a liberal-democratic welfare state that can guarantee civil, political and social rights to every member of society. Marshall (n 60).

⁶² Marshall (n 60).

be perceived as guarantors of the basic rights of citizens, to the point of offering a check on the power and authority of the (democratically elected) legislature. In this way, they have contributed to the construction of citizenship as a set of guarantees, enshrined in rights that are legally enforceable, if necessary against the grain of democratically articulated will.⁶³

A paradox ensues. An illegality regime puts significant pressure on this reliance and on the function of a human rights framework in general, even if at the same time it seems to continue its job unscathed. For one, recent decades have seen a fairly meek response by human rights institutions to the claims of migrants in general, and to the claims of irregular migrants in particular. The general argument goes like this: "As a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals. However in exercising control of their borders, States must act in conformity with their international human rights obligations. In certain specific categories of cases, States may be required by international law to permit a migrant to enter or remain: where a migrant meets the criteria for refugee status, or complementary protection; or where entry to the territory is necessary for purposes of family reunification."⁶⁴ In fact, human rights institutions have supported the general idea, explained above, of a state under siege, of a state that needs protection against the phenomenon of migration in general, and irregular migration in particular.⁶⁵ The reasons mentioned above have in fact been the justification of the human rights institutions: social cohesion and economic welfare. As such, illegality regimes carry *the general seal of*

⁶³ As Seyla Benhabib notes, 'cosmopolitan norms enhance the project of popular sovereignty while prying open the black box of state sovereignty. They challenge the prerogative of the state to be the highest authority dispensing justice over all that is living and dead within certain territorial boundaries. In becoming party to many human rights treaties, states themselves 'bind' their own decisions.' Seyla Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' in Heather Gautney et al. (eds) *Democracy, States, and the Struggle for Social Justice* (Routledge 2009) 82.

⁶⁴ International Commission of Jurists, *Migration and International Human Rights Law* (International Commission of Jurists 2011) 43.

⁶⁵ Since the *Abdulaziz* case, the European Court of Human Rights has always started its analysis of cases related to migration with a reiteration of a state's sovereign right to control entry to its territory; protecting the domestic labor market was cited as one possible legitimate justification. Par. 78 of *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, European Court of Human Rights, Appl. 9214/80, 9473/81, 9474/81; Judgment of 28-05-1985; published in Series A-94. In this, and to deal with irregular migration, the European Court has also allowed states to use coercive measures, such as detention. See generally Galina Cornelisse, *Immigration Detention and Human Rights* (Martinus Nijhoff 2010). In the words of Catherine Dauvergne, *supra* note 3 at 21: "human rights norms have done little to assist illegal migrants."

human rights approval.

However, the construction of an illegality regime also means that a state has to limit some of the rights of its citizens, such as the right to privacy, in its quest to verify everybody's legal status.⁶⁶ The rights of citizens are vulnerable to this in the same way that they are vulnerable to an anti-terrorism regime. This limitation of some rights in the context of counter-terrorism however, is nothing compared to the limitations endured by aliens and by irregular migrants. This fissure in the general framework of equality generally guaranteed by human rights frameworks can, however, mean that the standard of normality changes. The degree of protection and guarantee is now measured by reference to the inferior level of protection enjoyed by irregular migrants.⁶⁷ This shift in turn raises the stakes of being confused with irregular migrants, either by error or by bad intentions.⁶⁸

Finally, illegality regimes tend to increase the amount of power, authority and competences in the hands of the public administration: that is, increasing the power in the hands of the executive, and decreasing the power of the judiciary.⁶⁹ Whereas the criminal law system has a long tradition of checks and guarantees, the administrative law system in many countries is not really designed to deal with the tracking down, rounding up, and deporting of thousands of people. In short, an illegality regime affects the very realm of law designed to regulate relations between citizens and the state.⁷⁰

⁶⁶ See Conor Friedersdorf, 'Why Alabama's Immigration Bill is Bad for Citizens' *The Atlantic* (13 June 2011).

⁶⁷ Beyond civil and political rights, one can see the downward effect or pressure that illegality produces on labor standards and on wages.

⁶⁸ There is the famous case of Vivian Solon, an Australian citizen who was deported to Manila, where she had been born, after being unable, due to mental health problems, to adequately explain her situation to the immigration authorities. See http://en.wikipedia.org/wiki/Vivian_Solon (last accessed 10 October 2011). Then there is also the growing practice of Dutch authorities to put under immigrant detention demonstrators who refuse to identify themselves. This administrative detention does not require a formal criminal law charge and can last up to eighteen months. See Juan M. Amaya-Castro, 'Tegenwoordig ben je hier illegaal tot het tegendeel is bewezen', *De Volkskrant* (6 August 2011) 36.

⁶⁹ See, e.g., Donald S. Dobkin, 'The Rise of the Administrative State: A Prescription for Lawlessness' (2008) 17:3 *Kansas Journal of Law and Public Policy* 362 (describing the increase in administrative power that came along with the Bush administration's increased focus on immigration as a security threat).

⁷⁰ An interesting general case is made in favor of the notion of citizenship over the institutionalized one of human rights by Paulina Tambakaki, *Human Rights, or Citizenship?* (Birkbeck 2011).

6. *The world: citizenship as universal equality*

Increasingly, the idea of democratic states fulfilling the promise of making the way for a humanity in which all are equal is coming under pressure.⁷¹ In this promise, citizenship based on democratic institutions and equality was not just a birthright for the happy few, but the promise that the rule of law and democratic rule held out to humanity.⁷² Egalitarian and democratic citizenship has been constructed as the West's claim to universal moral, legal, and political authority. Even recently, when we have seen a surge in illegality regimes, democracy and egalitarianism are held out as evidence of Western superiority, for other countries to emulate. However, this idea is coming under pressure as these same states start treating citizenship as a birthright and as a privilege, and not as the West's gift to mankind. Having growing numbers of people being excluded from the regular political, social and cultural life of a body politic can of course be ignored, but only for so long as politics of defiance and visibility are suppressed. In short, it is very difficult not to see states with strong illegality regimes as not being discriminatory and repressive states, even if their illegality regimes as such are designed to be indiscriminate. As birthright and privilege become stronger elements in the conception of citizenship, equality and non-discrimination give way.⁷³ In this way, the idea of citizenship as a manifestation of universality is undermined, while the idea of citizenship as the exclusionary politics of privilege is enhanced.

IV. CONCLUDING: THE CHECKPOINT, CITIZENSHIP AND SUSPICION

It is important to keep in mind that we are not merely talking about a symbolic dimension in which citizenship means one thing or another, even if this dimension is highly relevant in the context of developments in law and legal doctrine. Moreover, it is also not about merely referring to these legal and doctrinal accommodations of illegality regimes, even if this legal formalization of surveillance and checkpoint practices is a fundamental piece of the puzzle. What is at the core of this argument is the sweeping transformation of our political and therefore our physical environment by

⁷¹ In this sense, scholars such as Yasemin Nohoglu Soysal have written of the development of a 'postnational' citizenship that 'challenges the predominant assumption, both scholarly and popular, that national citizenship is imperative to membership in a polity'. Yasemin Nohoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (U. of Chicago Press 1994) 3.

⁷² Martha Nussbaum, for example, recently declared herself a 'citizen of the world', arguing that 'If we really do believe that all human beings are created equal and endowed with certain inalienable rights, we are morally required to think about what that conception requires us to do with and for the rest of the world'. Martha Nussbaum, 'Patriotism and Cosmopolitanism' (1994) Oct.-Nov. Boston Review.

⁷³ Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard UP 2009).

technologies that allow for mass surveillance and continuous control,⁷⁴ as well as for the linking together of the growing flows of information collected by the state.⁷⁵ It is these technologies, as much as the various developments that trigger migratory flows themselves, that imposes itself as the new material environment in which citizenship acquires concrete significance in the experience of its subjects.

⁷⁴ Lyon (n 28).

⁷⁵ See generally, Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies* (Routledge 2010).

CATCH ME IF YOU CAN? THE MARKET FREEDOMS' EVER-EXPANDING OUTER LIMITS

Pedro Caro de Sousa*

This Article submits that questions of institutional ability and legitimacy should play a more important role in the Court of Justice's decision-making process. In effect, both the legal literature and the Court's reasoning process tend to disregard such questions, thereby ignoring relevant comparative institutional choices which take place whether they are acknowledged or not. The deficiencies arising from the current approach will be exemplified by an analysis of developments in EU's free movement law on the requirements of cross-border elements, economic aim of free movement, and on the complementarity of these two requirements. In particular, it will be argued that the absence of properly reasoned institutional comparative analysis, when coupled with under-theorised normative foundations and the introduction of European Citizenship, has potentially explosive consequences for the scope of the EU's market freedoms.

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I. INTRODUCTION

Recent developments in the case-law of the Court of Justice of the European Union's (the "Court" or the "CJEU") seem to have extended the substantive scope of the market freedoms¹; this has occurred through a diminution of the number of situations deemed to be purely internal, an extension of the scope of activities deemed to have an economic nature and the use of the market freedoms to deal with situations beyond their traditional "*telos*". It will be submitted that this results partially from an absence of dully theorised normative underpinnings for the case-law, but also from an absence of consideration of the institutional implications of adopting particular decisions.

The main argument of this Article is not only that better theorisation by the Court of the normative underpinnings of the case-law is in order, but also that the Court and legal commentators should start taking into account institutional considerations alongside purely substantive ones. The insight underlying this is a very simple one: what a court should do is effectively limited by what it can do. In other words, evaluative and prescriptive assessments of courts and judges can only be fruitful if they are informed by a correct descriptive understanding of what they do, and what hidden comparative institutional choices are at play.² The recent expansion in the scope of the market freedoms will be used to demonstrate how the institutional context matters to the development of law by courts; and to evidence the issues arising from the Court ignoring institutional consequences of its decision-making, particularly when the relevant normative foundations of the case-law are under-theorised to begin with. It will be submitted that a proper consideration of the different substantive and institutional normative foundations of the case-law, and of the ways in which they interact, leads to better descriptive frameworks and prescriptive approaches to the case-law.

II. CONTEXTUALISING COURTS

Courts are institutional bodies operating within specific institutional frameworks that constrain and shape their actions. Institutions, for our purposes, include formal rules, such as constitutions, statutes, common

¹ For the avoidance of doubt, these are the economic freedoms – free movement of goods, services, establishment, capital and workers.

² Arthur Dyevre, '*Making Sense of Judicial Lawmaking: A Theory of Theories of Adjudication*' (EUI 2008/09) <http://cadmus.eui.eu/dspace/bitstream/1814/8510/1/MWP_2008_09.pdf> accessed 10-4-2010, 46.

law, regulations and even contracts; but they also include informal rules, which:

Arising to coordinate repeated human interaction, [...] are (1) extensions, elaborations and modifications of formal rules, (2) socially sanctioned norms of behaviour, and (3) internally enforced standards of conduct.³

Institutional bodies – organizations – and institutional frameworks continuously interact and mutually constrain each other. In particular, all organizations have to operate under the existent institutional framework and thus have to navigate the options that such a framework provides. But they are also the major agents of institutional change: as organizations evolve and adapt, they alter institutional frameworks – the rules applying to them – as well. The path of institutional change is thus shaped by both the lock-in and path-dependency that comes from the symbiotic relationship between rules and organizations – with organizations being the result of an institutional framework which changes as a result of organizations adapting and trying to modify it – and the feedback process by which human beings perceive and react to the existent choice-set. In particular, incremental change comes from the perceptions of agents in political and economic organizations that they could do better by altering the existent institutional framework at the margin. On the other hand, this perception usually results from incomplete information processed through mental constructs, which leads to the institutional developments not being strictly those envisaged by those advancing them.

This is particular the case with legal systems, namely those which are precedent-based. In these systems:

past decisions become embedded in the structure of the law, which changes marginally as new cases arise involving new, or at least in terms of past cases unforeseen, issues; when decided these become, in turn, a part of the legal framework. The judicial decisions reflect the subjective processing of information in the context of the historical construction of the legal framework. (...) However we account for the judicial process, the institutional framework is continuously but incrementally modified by the purposive activities of organizations bringing cases before the courts.⁴

In other words, history matters: the selection of a prior path determines current behaviour. Particularly in systems which follow precedent, but also

³ Douglass C North, *Institutions, institutional change and economic performance* (Cambridge University Press, Cambridge 1990) 40.

⁴ Ibid., 97.

in systems which are not formally bound by *stare decisis*, legal rules gradually build upon one another over time, with the consequence that an earlier decision influences the later decisions of courts. This is related to the insight that organizations can maximise their situation by altering the institutional framework at the margin.⁵ Litigants argue within the bounds of existent precedent and law; potential beneficiaries of new precedent have the incentive to push the law further, creating path-dependencies for both courts and subsequent litigants.⁶ Path dependence can be said to lead to three autonomous, if interconnected, phenomena⁷: the first is non-ergodicity, meaning that small early events have a large impact on the eventual outcome of the case law. The second effect is lock-in, or inflexibility: once a court has taken a decision on a legal question, precedent and other informal rules lock in the legal rule. Nonetheless, it should also be pointed out that there are ways for judges to eschew precedent within the accepted scope of judicial reasoning, such as relying on different precedents, linguistic imprecisions and factual distinctions.⁸ In this particular, considerations of scope and ability might be serious determinants in a court's decision to eschew past precedent.⁹ The third consequence is indeterminacy of outcome: a decision choosing between different solutions which were possible at an initial stage is adopted on the basis of imperfect information as to its consequences and ends up affecting the subsequent development of the case-law.

The CJEU is simultaneously empowered and constrained by rules both formal – the Treaties, specific procedural rules – and informal – the parameters of correct judicial discourse – which lead to it being path-dependent. On top of this, the Court is also constrained by its own limitations as to what it can effectively do: this relates both to their

⁵ North (n 3) 8.

⁶ Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' 86 Iowa L.Rev. 601, 627-630. On the role of litigants in shaping the development of the European economic freedoms, see Miguel Poiares Maduro, *We, the Court - The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 1998) 25ff.

⁷ I here follow Hathaway (n 6) 630-634.

⁸ Clayton P. Gillette, 'Lock-In Effects in Law and Norms' (1998) 78 B.U.L.Rev. 813, particularly 824-5; Hathaway (n 6) 624-625.

⁹ This is even sometimes made clear by the Court itself. In para. 12 of Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] E.C.R. I-6097, it justified its changing of *Dassonville* by stating that: 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter'.

physical resources and their ability to investigate, understand and make the substantive social decisions that may come to them. It is the interaction of these limitations with the determinants of litigation that determines the institutional ability of the CJEU.¹⁰ For example, domestic courts are routinely prompted by savvy litigants to take account of and interpret free movement European law in otherwise mundane litigation. This occurs naturally, as these litigants attempt to use European law to their benefit. Considering the institutional ability of the adjudicative process is of the utmost importance when deciding those cases, because decisions about the scope of directly effective EU law provisions are comparative institutional assessments, in the sense that they allocate the competence to decide on the desirability of national legislation to national courts – and in last resort to the CJEU – instead of to national legislatures. What is more, the ease by means of which these litigants can refer to European law in situations where a potential gain might be obtained depends on the Court's own case-law.

Accordingly, the Court should not only be concerned with substantive questions, but also with the amount and complexity of litigation which reaches it, taking into account the limitations deriving from its physical capacity and its ability to correctly decide large amounts of cases; and these institutional constraints should in turn be compared with the other institutional options available. Avoiding these questions does not make them go away, but merely hides them, preventing the issues arising from them from being properly addressed and allowing them to effectively build up. This will now be demonstrated by reference to developments concerning the substantive scope of the market freedoms.

III. THE SCOPE OF THE MARKET FREEDOMS

The market freedoms are traditionally considered to have an identity of aim: to contribute to the completion and functioning of the internal market through the elimination of obstacles to economic free movement between Member-States and the creation of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.¹¹ This is the primary normative underpinning of the Court's case-law, but it still leaves a number of questions to be addressed. When Art. 3 (3) Treaty of the European Union ("TEU") sets about the

¹⁰ Neil K. Komesar, *Law's limits: the rule of law and the supply and demand of rights* (Cambridge University Press, Cambridge 2001) 38; Mitchel Lasser, *Judicial transformations: the rights revolution in the courts of Europe* (Oxford University Press, Oxford 2009) 204-205.

¹¹ See Art. 26 TFEU. See also Case 355/85 *Driancourt v Cognet* [1986] E.C.R. 3231, and Case 98/86 *Mathot* [1987] E.C.R. 809.

creation of an internal market which is supposed to contribute, simultaneously, to balanced economic growth and price stability, a highly competitive social market economy, a high level of protection and improvement of the quality of the environment, social justice, *inter alia*, it should be clear that, apart from the different meanings which can be attributed to expressions such as a “competitive social market economy”, the exclusive pursuit of a goal, such as economic growth, would be to the detriment of other listed goals such as social justice or protection of the environment.¹² What is more, the different normative goals which fit into the internal market have evolved since the Union’s inception in 1957; of particular importance in this respect is the introduction and development of European Citizenship, which impact on the normative understanding of the market freedoms is still unclear but has been reflected in concerns about reverse discrimination and fundamental rights’ protection expressed in the legal literature and in Advocates General’s Opinions.¹³

The following sections will show how tensions between these differing normative underpinnings have led to developments in the case-law concerning the scope of the market freedoms, and how institutional considerations are relevant to these and future developments. For these purposes, the Court’s case-law will be analytically divided into specific requirements which must be fulfilled in turn for a situation to fall within the scope of the market freedoms:¹⁴

- the existence of a cross-border element;
- the economic aim of the exercise of the free movement right;
- the existence of a specific hindrance to the pursuit of cross-border movement with an economic aim.

1. *Cross-Border Elements*

This section will begin by describing the origins of the “purely internal situations” doctrine, which started from a debate in the field of private international law on whether the better way to distinguish between internal and international situations was through a geographical or a

¹² K. Mortelmans, ‘The common market, the internal market and the single market, what’s in a market?’ (1998) 35 CML Rev. 101, 118. This tension can be seen in the process and discussions started by the Commission’s Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, on “A Single Market for 21st Century Europe”, COM(2007) 724.

¹³ See in particular Advocate General Sharpston’s Opinion in Case C-34/09 *Zambrano* of 30 September 2010, still unpublished.

¹⁴ A similar structure can be found in Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, Alphen aan den Rijn 2009) 10.

juridical criterion. It will then be described how, having initially chosen the geographical criterion, the Court has recently relaxed its application and thereby eroded the application of this doctrine. Finally, an attempt will be made to understand this erosion.

a. Origins of the Purely Internal Situations Doctrine

From a purely normative perspective, it could be argued that obstacles to movement within Member-States could also be obstacles to the creation of an internal market. The Court could have legitimately decided that situations without a cross-border element fell within the scope of the market freedoms, depending on the conception of “internal market” adopted. Against this, the letter of the Treaty on the Functioning of the European Union (“TFEU”), with the exception of the provisions on free movement of workers, points towards only cross-border situations being subject to EU law¹⁵, and the pluralistic element of EU integration may be construed as leaving regulatory autonomy to the Member-States in situations not falling within the scope and purposes of EU law¹⁶, and as such requiring purely internal situations to fall outside the scope of the market freedoms.

These different options were reflected in *Saunders*¹⁷ in the different solutions proposed by the Advocate General and the Court. Advocate General Warner held that: “*The true question is not whether the case has any connection with another Member State, but whether and, if so, to what extent Community law confers rights on a person.*” From this perspective, what would matter was not whether the factual situation was circumscribed to a single Member-State but whether the national measure infringed the substance of rights conferred by the free movement provisions. The Court, however, decided otherwise, holding that the free movement of workers did not have the goal of restricting the power of Member-States to lay down rules in purely internal situations. The different approaches identified above are reminiscent of two criteria used in private international law to distinguish between international and internal situations: a “geographical” criterion,

¹⁵ See, for goods, Art. 28, 30, 34 and 35 TFEU, which all include prohibitions *between Member-States* on custom duties on imports and exports and all charges having equivalent effect; on establishment and services, which prohibit restrictions on such freedoms on nationals *of a Member-State in the territory of another Member-State*, see Art. 49 and 56 TFEU; and on capital, Art. 63 TFEU prohibits all restrictions on its free movement *between Member-States* (and also third-countries). Naturally, at the time the relevant provisions were part of the Treaty establishing the European Economic Community (EEC Treaty).

¹⁶ Tryfonidou (n 14) 9.

¹⁷ Case 175/78 *Saunders* [1979] E.C.R. 1129, following a lead from Case 115/78 *Knoors* [1979] E.C.R. 399.

focusing on where the facts of the case take place, and a “juridical” one, which looks into whether more than one legal system is connected to the case.¹⁸ The procedural implications of this were neatly encapsulated by Advocate General Geelhoed:

[...] the Treaty provisions concerning free movement (of persons and goods) do not apply to activities all of the relevant aspects of which are confined to one Member-State. [...] The main question is this: is it the facts in the main proceedings that determine whether the Court must answer the questions referred to it for a preliminary ruling, or is it the nature and substance of the national measure? If it is the facts in the main proceedings that are decisive, the Court clearly will not answer the question where the main proceedings have no cross-border elements. [...] If it is the substance of the national measure that is decisive, the Court should consider how far the national legislation may have an external effect. Only if there is no - potential - external effect should the Court refrain from answering the question referred to it.¹⁹

Following *Saunders*, the Court adopted a unitary approach to all the freedoms, favouring the geographical approach. The canonical formulations for this were that the free movement provisions do not apply to activities which have no factor linking them with any of the situations governed by EU law and/or that are confined in all aspects within a single Member-State.²⁰

b. Relaxing the Geographical Requirement

Some recent cases have arguably moved away from this unitary approach, particularly in what concerns the free movement of products (goods and

¹⁸ Hans Ulrich Jessurun d'Oliveira, 'Is Reverse Discrimination Still Permissible under the Single European Act?' in *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Kluwer, Dordrecht 1990) 73-74.

¹⁹ Opinion in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] E.C.R. I-2157, para. 79-82.

²⁰ d'Oliveira, 73-74, Tryfonidou, 30-31. See for goods *Mathot*, Case C-60/91 *Morais* [1992] E.C.R. I-2085; for establishment, Case C-198/89 *Tourist Guides Greece* [1991] E.C.R. I-00727, para. 9, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171; for services, Case 20/87 *Gauchard* [1987] E.C.R. 4879, Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] E.C.R. I-3537, Case C-152/94 *Buynder* [1995] E.C.R. I-3981; for capital, Case C-513/03 *van Hilten-van der Heijden* [2006] E.C.R. I-10653.

services). In *Lancry*²¹ the Court held that the prohibition of custom duties set forth in Article 28 TFEU (ex-Art 23 of the Treaty establishing the European Community (“TEC”)) does not apply only to duties imposed on goods that have moved from one State to another, but also to customs duties imposed on goods crossing the internal frontiers of a Member-State, at least inasmuch as they could also apply to imported goods – which distinction from national goods, in light of the prohibition of border controls and the conclusion of the internal market, was seen to be practically impossible.²² This was further developed in *Jersey Produce*²³, where the Court held that even though an internal customs duty applied only to the export of potatoes from Jersey to the United Kingdom:

that does not rule out the possibility that such potatoes, once within the United Kingdom, might then be re-exported to other Member-States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member-States.²⁴

Hence, the principle appears to be that whenever it is impossible to identify whether potential imports or exports are to be affected by a custom duty, such a duty will infringe Union law, even where it applies to products which are in a purely internal situation.²⁵ This approach appears to have been transposed into Art. 34 TFEU (ex-Art 28 TEC) by *Pistre*.²⁶ The facts of the case concerned an appeal brought by French nationals for selling goods produced in France under the description “montagne”. The use of this description was allowed only in relation to products prepared in French territory after the producer had obtained an authorisation from the French authorities. In the case at hand, all the relevant legislation was complied with, but no authorisation had been obtained. Choosing not to look into the specific facts of the case, the Court held that:

Article 30 cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single

²¹ Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* [1994] E.C.R. I-3957. Confirmed in Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027.

²² Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 CMLR 407, 431, Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 E.L.Rev. 690, 706.

²³ Case C-293/02 *Jersey Produce* [2005] E.C.R. I-9543

²⁴ *Ibid.*, para. 65.

²⁵ Tryfonidou (n 14) 75.

²⁶ Joined Cases C-321/94 to C-324/94 *Pistre* [1997] E.C.R. I-2343.

Member-State. In such a situation, the application of the national measure may *also have effects on the free movement of goods between Member-States*, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods. In such circumstances, the application of the measure, even if restricted to domestic producers, in itself creates and maintains a difference of treatment between those two categories of goods, hindering, at least potentially, intra-Community trade.²⁷ [*emphasis added*]

In itself, this statement could be read as applying the juridical approach, looking not into the facts of the case but into the substance of the national measure and its potential external effects.²⁸ On the other hand, the Court went on to note that since it was “*accepted that the domestic legislation in question could be applied to products imported from other Member-States, it follows, first, that it constitutes an obstacle to intra-Community trade*”, which seems to imply that the free movement of goods merely protects imported goods and that the geographic criterion still stood.

This was clarified in *Guimont*²⁹, where the Court distinguished *Pistre* as applying the juridical approach only to discriminatory rules, and stated that on what concerns indistinctly applicable rules: “*it is clear from the Court's case-law that such a rule falls under Article 30 of the Treaty only in so far as it applies to situations that are linked to the importation of goods in intra-Community trade*”. However, the Court went on to state that a preliminary reference request from a national court will only be refused if it is quite obvious that the interpretation of Union law sought bears no relation to the actual nature of the case or to the subject-matter of the main action, and since it was possible that a reply might be useful if national law were to require that the rights which a foreign producer would derive from Community law must also be enjoyed by national producers – thereby preventing reverse discrimination – , the Court would still look at the rule.³⁰ Similarly, in *PreussenElektra* the Court essentially dismissed out-of-hand any argument that a situation had no cross-border element by stating that it was for the referring court to determine whether the question was relevant and stating that “*it is not obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose*.”³¹ This so-called *Guimont* case-law has been progressively adopted under capital³², services,³³

²⁷ Ibid., paras 44-45.

²⁸ See, in this sense, Tryfonidou (n 14) 71.

²⁹ Case C-448/98 *Guimont* [2000] E.C.R. I-10663.

³⁰ Ibid., paras 20-23.

³¹ Case C-379/98 *PreussenElektra* [2001] E.C.R. I-2099, para. 52.

³² *Reisch* (n 19).

establishment³⁴, and it appears that it might also be applicable for workers³⁵. Thus, the Court seems to be moving away from its traditional geographical requirements of cross-border elements, and to be now willing to review measures applying to purely internal situations as long as the national referring courts consider the question to be relevant.

A parallel development away from the canonical understanding of the purely internal situations doctrine is also taking place through the extension of the geographical criterion itself, particularly in the field of free movement of persons. It is settled law that a situation will have a link with free movement law if it involves a potential, but not a merely hypothetical, exercise of a market freedom.³⁶ The distinction between what is a hypothetical or potential exercise of a market freedom is not exactly clear, however, and the Court has taken advantage of this to expand the scope of the free movement of persons by increasing the number of situations deemed to have potential links with EU law.³⁷ Even as the Court has reiterated that the free provision of services does not apply to purely hypothetical situations, the Court recently set forth that there is no need to prove the existence of a previously determined recipient as long as the recipient is determinable³⁸: the existence of either virtual or merely possible future recipients suffices.³⁹ In effect, the case-law no longer insists on a specific exercise of inter-State movement, as long as a potential effect on the intra-State provision of services can be found.⁴⁰ Like in *Pistre*, even though all the facts of the case may be located within a Member-State, a situation might still fall within the scope of the market

³³ Case C-6/01 *Anomar* [2003] E.C.R. I-8261. See Stefan Enchelmaier, 'Always at your service (within limits)' (2011) 36 E.L.Rev. 615, 617.

³⁴ Case C-250/03 *Mauri* [2005] E.C.R. I-1267.

³⁵ See Advocate General Léger's Opinion in Case C-152/03 *Ritter-Coulais* [2006] E.C.R. I-1711, footnote 47.

³⁶ See for the free movement of workers Case 180/83 *Moser* [1984] E.C.R. 2539, para. 18; Case C-41/90 *Höfner and Elser* [1991] E.C.R. I-1979, para. 39. On the application of this principle to all free movement of persons provisions, see Case C-299/95 *Kremzow* [1997] E.C.R. I-2629.

³⁷ Niamh Nic Shuibhne, 'Free Movement of persons and the wholly internal rule: time to move on?' (2002) 39 CML Rev. 731, 736.

³⁸ Vassilis Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 CML Rev. 43, 58. See Case C-384/93 *Alpine Investments* [1995] E.C.R. I-1141, Joined Cases C-51/96 and C-191/97 *Delière* [2000] E.C.R. I-2549, Case C-405/98 *Gourmet International* E.C.R. I-1795, Case C-355/00 *Freskot* [2003] E.C.R. I-5263.

³⁹ *Alpine*, Case C-36/02 *Omega* [2004] E.C.R. I-9609, Case C-215/03 *Oulane* [2005] E.C.R. I-01215. See Vassilis Hatzopoulos and Thien Uyen Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005' (2006) 43 CML Rev. 923, 926.

⁴⁰ Tryfonidou (n 14) 85; Enchelmaier (n 33) 618.

freedoms.⁴¹

c. Understanding the Erosion of the Purely Internal Doctrine

Taken together, all these developments point towards the Court extending the kind and type of cases it is willing to review. The distinction between juridical and geographical approaches, which heuristic value had always hinged on the Court tacitly endorsing it, lost much of its explanatory power in this scenario. A question about the *degree* of (geographical) cross-border elements required may, through the manipulation of whether a situation is potentially or hypothetically concerned with cross-border movement, become a question on whether a situation has a sufficient connection with the free movement provision; and similarly, a question about whether the situation falls within the scope of a freedom can easily be framed in geographical terms. At the same time, the *Guimont* doctrine allows the Court to review national measures even when it accepts that a situation is purely internal.

What justifies this erosion of the purely internal doctrine? It should be noted that, for all the references to geographical and juridical criteria in the literature, the Court never did provide a coherent normative theory for this doctrine to begin with. The original concern seemed to be with the maintenance of an area of Member-State autonomy, but this might have been overrun by new normative concerns: prior to the developments described above, legal commentators started to submit arguments against reverse discrimination⁴² on the basis of the adoption and development of European Citizenship, and the protection of fundamental rights.⁴³ A similar argument can be seen in the Court's justification of its *Guimont* case-law, which is that a decision may still be useful if:

national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member-State would derive from Community law in the same situation.⁴⁴

Nonetheless, the Court never properly discussed how to balance the relevant normative concerns at stake. Academic contributions to the

⁴¹ Compare Case C-108/98 *RI.SAN*. [1999] E.C.R. I-5219 and Case C-410/04 *ANAV* [2006] E.C.R. I-3303.

⁴² These are situations where those not encompassed by the free movement provisions – namely those involved in purely internal situations – are left worse-off than those who do fall within their scope.

⁴³ Nic Shuibhne, 731, Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe' (2008) 35 *LIEI* 43.

⁴⁴ *Guimont* (n 29) para. 23.

subject made their own normative contributions, but tend to not consider the institutional realities of judicial decision-making by the CJEU, focusing instead on the undesirable and unjust results of reverse discrimination. But taking into account these institutional considerations allows us to bring to the forefront an important distinction: the purely internal doctrine comports both procedural and substantial implications.

From a procedural standpoint, the purely internal rule is a gatekeeper to the preliminary reference mechanism: if the case under consideration by the national court concerned a purely internal situation, the Court would not pursue any assessment of the relevant measures. Nonetheless, this refusal on the part of the Court to pursue assessments under the preliminary reference mechanism had no implication on the substantive status of a measure under EU law: in effect, that measure could still be subject to review under, say, an infringement procedure brought by the Commission against a Member-State or by a litigant whose situation had a cross-border element. From a substantive perspective, the implications of this doctrine are that the free movement rules have no effect on situations the facts and effects of which are confined within a single Member-State, even if such a measure would fall within their scope on what concerns situations with a cross-border element.⁴⁵ What this means, in turn, is that the same national measure is sometimes legal, sometimes illegal, depending on the underlying factual situation in which it is applied. The Member-State is merely required not to apply the relevant measure in cross-border situations, while it is allowed to apply it in purely internal situations.⁴⁶

This distinction is important to understand the developments in the case-law. Under the *Guimont* case-law the Court does not seem to control whether national law prevents reverse discrimination or not before assessing national measures; it doesn't even require the national court to actually show that its national law prohibits reverse discrimination. Hence the risk of delivering purely theoretical rulings is real.⁴⁷ The implications and reasoning of the *Guimont* case-law are, from a procedural perspective,

⁴⁵ See on goods, Joined Cases 314/81 to 316/81 and 83/82 *Waterkeyn* [1982] E.C.R. 4337; Case 286/81 *Oosthoek's* [1982] E.C.R. 4575; on services, see Case 52/79 *Debaux* [1980] E.C.R. 833, *Höfner and Elser* (n 36); on workers, see Case C-332/90 *Steen* [1992] E.C.R. I-341, Case C-379/92 *Peralta* [1994] E.C.R. I-3453, Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] E.C.R. I-1683; on establishment, see *Nino* (n 20). There is still no case-law on capital that I'm aware of.

⁴⁶ This is particularly clear in Case 407/85 *Drei Glocken* [1988] E.C.R. 4233. See also Ritter (n 22) 691. It should be noted that it is this substantial effect which leads to reverse discrimination.

⁴⁷ See Advocate General Tizzano's Opinion in *Anomar* (n 33) para. 23. Critical of this, Ritter (n 22) 700.

akin to the Court's case-law on the extent of its jurisdiction in preliminary reference cases. The Court was initially very liberal in this area, holding that the facts were a matter for national courts, and that the Court was not empowered to investigate the facts of the case or question the grounds or purpose of the request for interpretation.⁴⁸ Nonetheless, the Court eventually asserted control over its docket in the *Foglia*⁴⁹ decisions, becoming the ultimate decider of its own jurisdiction. In particular, the Court held that a genuine dispute was required and that the Court had no jurisdiction to deliver "advisory opinions on general or hypothetical questions". Ever since, the Court has refused to answer hypothetical questions, which might be justified as preventing a waste of judicial resources.⁵⁰ The *Guimont* approach to the purely internal doctrine is a limited return to the original, pre-*Foglia*, case-law on the Court's jurisdiction in preliminary reference cases: it effectively opens the door to test-cases in situations without any direct link with EU law which, if successful, will put the Member-States in the "shadow of the law" and under pressure to amend national rules; it increases the pool of litigants and, potentially, the workload of the Court, and thereby risks increasing the level of control the Court exercises on national regulatory autonomy as well. Nonetheless, it does not *per se* lead to a substantive extension of the scope of the freedoms.

Substantively, the Court has extended the scope of the market freedoms not only explicitly in what concerns custom duties and discriminatory infringements to the free movement of goods, but implicitly through an increase in the number of situations which are held to have a potential link with EU law. The main issue is that there is a very thin line between merely potential situations and test cases, as a measure applicable to an internal situation can hypothetically also apply to future cross-border situations.⁵¹ This is valid not only for services, where this line of cases had its genesis, but also for other freedoms: companies might potentially want to expand to another country, workers seek jobs abroad, and goods may potentially compete in another market. After all, the *Dassonville* formula

⁴⁸ See, for example, Case 6/64 *Costa v ENEL* [1964] E.C.R. 585, Case 35/76 *Simmenthal* [1976] E.C.R. 1871.

⁴⁹ Case 104/79. *Foglia I* [1980] E.C.R. 745, Case 244/80 *Foglia II* [1981] E.C.R. 3045.

⁵⁰ Please note that this is not the only reason for the Court to refuse to pass judgement: this may also occur when the questions have no relation to the facts or subject-matter of the main action - Case C-18/93 *Corsica Ferries Italia* [1994] E.C.R. I-1783 - when the questions are not articulated clearly enough for the Court to give any meaningful response - Case C-318/00 *Bacardi-Martini* [2003] E.C.R. I-905 - and when the facts are insufficiently clear for the Court to be able to apply the relevant legal rules - Case C-157/92 *Banchero* [1993] E.C.R. I-1085.

⁵¹ On all of the above, see P. P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press, Oxford 2008) 482-493.

for goods relates to “*actual and potential*” effects. The problem this raises is that, as has been said, in an internal market the existence of a “potential” intra-Community element is inherent.⁵² Particularly in what concerns services this is worrying, as due to the breadth of subjects falling under it, and the application to both active and passive actors, few (temporary) migrants are excluded from its protection.⁵³

This could be controlled, or at least justified, if there was a clear normative basis for these developments, but this seems to be absent. The Court has avoided a careful consideration of what the relevant balance between protecting State autonomy and preventing reverse discrimination might be. Reverse discrimination touches on how the limitations on EU law deriving from subsidiarity, the EU’s limited competences and the maintenance of an area of State autonomy is to relate to the expansionary pull of European citizenship, but this is not addressed in the case-law. It is true that courts will usually decide cases on the basis of the particular facts of the case without needing to engage with the large-scale societal questions underlying it: they may enlist silence as a device for producing convergence despite disagreement and uncertainty by adopting an incompletely theorised outcome. This mechanism is an important source of social stability by allowing the participants to be clear on a result without agreeing on a more general theory or value that accounts for it, and is well-suited to a pluralist society.⁵⁴ But even without having the Court engage in large-scale theorising, better low-level theorisation seems to be in order. The absence of debate or theorisation on these normative issues leads to a lack of coherence in the development of the case-law on purely internal situations and to the potential extension of the case-law on services and custom duties to include virtually any situation. Simultaneously, the Court also seems to ignore the institutional implications of its decisions, with the result that both procedural and substantive approaches relax the requirements for submitting national measures to review by the Court, without any consideration for the risks in opening the floodgates of litigation or the institutional allocation of competences between the EU and the Member-States. Even when there is theorisation, as in the legal literature, it ignores the institutional considerations that permeate the normative debate. Normative claims contain implicit assumptions as to which entity is best placed to further them – for example, normative claims that the purely internal doctrine should be eliminated implicitly call for an expansion of EU powers, and

⁵² Eleanor Spaventa, *Free Movement of Persons in the European Union* (Kluwer Law International, 2007) 153.

⁵³ Catherine Barnard, *The Substantive Law of the EU* (Second edn, Oxford University Press, Oxford 2007) 335.

⁵⁴ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (OUP, Oxford 1996) 5, 44.

consider that the interests of nationals of a Member-State are, in the case of reverse discrimination, better protected by the CJEU than by the Member-States themselves.

Taking into account the interaction of “substantive” and “institutional” concerns has both normative and descriptive power. This can be demonstrated by reference to the different strands in the case-law – one procedural, the other substantive. Each strand has different institutional consequences relevant to the debate on more “substantive” normative questions: while the extension of the material scope of the market freedoms leads to the Court dealing with reverse discrimination itself, the *Guimont* case-law leaves this question for Member-States’ courts and governments. The Court effectively uses the purely internal situation strategically as a tool for institutional choice, deciding which cases it wants to deal with and those it delegates to national courts or legislatures. Both can be seen as means of dealing with reverse discrimination, but the existence of these different institutional options changes the configuration of the relevant “substantive” normative debate itself, for example on questions of how to better protect and balance State autonomy against other normative concerns. “Substantive” and “institutional” normative considerations are, in this context, autonomous but inseparable because closely intertwined.

2. *The Economic Aim of Cross-Border Movement*

The market freedoms are instrumental to the completion and functioning of the internal market through the elimination of obstacles to economic free movement. As such, they have an economic aim which is reflected in their scope.⁵⁵ This characterisation is under-theorised, though, as there are different concepts of economic activity. While some conceptualizations focus strictly on the production of goods and services, others add to this their distribution and consumption. Welfare definitions of economic activity, on the other hand, focus on the production and distribution of goods and services which are provided against measurable amounts of money or other material requirements of well-being.⁵⁶

These differing conceptualizations are reflected in EU law, where both the

⁵⁵ It should be noted that for freedoms implying the free movement of persons the situation must also fall within the scope of the freedoms *ratione personae*, i.e. the persons moving must be nationals –or be related to nationals – of a Member-State.

⁵⁶ Alfred Marshall, *Principles of Economics: An Introductory Volume* (8th edn, Macmillan, London 1949); A. C. Pigou, *The Economics of Welfare* (4th edn, Macmillan, London 1962).

Court and the Commission seem to admit the existence of different concepts of economic activity depending on the relevant areas of law.⁵⁷ EU competition law can only be applied to undertakings, which, according to the case-law, include every entity engaged in economic activity, regardless of its legal status.⁵⁸ An activity is deemed to be economic when there is the potential for the provision of goods or services and to make a profit under market conditions, unless that activity is deemed to be in the public interest or pursued in the exercise of official authority. In other words, the question seems to be whether a for-profit entity could respond to market demand.⁵⁹ However, only the offering of products seems to be relevant; demand is not deemed to be an economic activity, at least in what concerns the purchase of goods on the market for use in the provision of State services.⁶⁰

The concept of economic activity for the purpose of the market freedoms is somewhat different: it focuses on both the provision *and demand* of goods or services against some kind of remuneration.⁶¹ Goods are generally accepted to be material objects which can be valued in money and either form the subject of, or move across frontiers for the purposes of, commercial transactions.⁶² Establishment applies to both physical and legal persons who are engaged in self-employed activities, meaning the actual

⁵⁷ See Case C-519/04 P *Meca-Medina* [2006] E.C.R. I-6991, para. 33. See also Advocate General Maduro's Opinion in Case C-205/03 P *FENIN* [2006] E.C.R. I-6295, para. 51; and Advocate General Kokott's Opinion in Case C-284/04 *T-Mobile Austria* E.C.R. I-05189, para. 61. Similarly, see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the Communication on 'A single market for 21st century Europe' Services of general interest, including social services of general interest: a new European commitment* (COM 2007 725 Final p 5).

⁵⁸ *Höfner and Elser* (n 36) para. 21.

⁵⁹ See Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] E.C.R. I-6451, para. 75, Case C-364/92 *Eurocontrol* [1994] E.C.R. I-0043, *Meca-Medina* (n 57) para. 41 and Advocate General Maduro Opinion in *FENIN* (n 57) para. 13-14. See also N Dunne, 'Knowing When To See It: State Activities, Economic Activities, and the Concept of Undertaking' (2010) 16 *Columbia Journal of European Law* 427, 436.

⁶⁰ Marck Furse, *Competition Law* (OUP, Oxford 2008), 22. See *FENIN* (n 57).

⁶¹ Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in O. Odudu (ed) *The Outer Limits of European Union Law* (Hart Publishing, Oxford 2009) 230-231. It should be noticed that remuneration is not a necessary element in competition law: see Case T-155/04 *Selex* [2006] E.C.R. II-4797, para. 77.

⁶² Jukka Snell, *Goods and services in EC law: a study of the relationship between the freedoms* (Oxford University Press, Oxford 2002) 4-5. See Case 7/68 *Commission v Italy* [1968] E.C.R. 423 and Case C-2/90 *Walloon Waste* [1992] ECR I-4431.

pursuit of an economic activity with the purpose of obtaining a profit⁶³; accordingly, the right of establishment seems not to apply to non-profits.⁶⁴ Free movement of capital follows the content of Article 1 of Directive 88/361 and the nomenclature of capital movements annexed thereto, which are all deemed to concern economic activities.⁶⁵ The situation for workers is slightly more nuanced, if very much settled law. As it stands, this freedom encompasses anyone who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration⁶⁶, regardless of the level of productivity or the origin of the funds from which the remuneration is paid.⁶⁷

This means that activities which are not remunerated but have profit-making potential fall within the scope of competition law but not free movement law, and vice-versa. For example, activities which are deemed to be in the public interest – such as the maintenance of air navigation safety and the protection of the environment⁶⁸ –, or which operate under the principle of solidarity – such as the payment of benefits out of social security schemes⁶⁹ – do not fall within the scope of competition law, as they are deemed not to be profit-making activities, even though they might fall within the scope of the free movement provisions inasmuch as there is remuneration. From an opposite perspective, an activity might be economic independently of the way in which it is financed, meaning that activities which are financed by the State without any remuneration – such as employment procurement by State agencies – might fall within the scope of competition law but not the free movement provisions.⁷⁰

Determining whether an activity is economic does not pose significant problems on most occasions, but when it is not clear whether an activity is economic or not, the lack of a proper normative underpinning of the case-law comes to the fore. For example, the concept of remuneration for services was traditionally held to be consideration for a service to be

⁶³ Case C-55/94 *Gebhard* [1995] E.C.R. I-4165, para. 25, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Art. 4 (5).

⁶⁴ Advocate General Fenelly's Opinion in Case C-70/95 *Sodemare* [1997] E.C.R. I-3395, para. 21.

⁶⁵ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

⁶⁶ Case 66/85 *Lawrie-Blum* [1986] E.C.R. 2121, para. 16-17; Case 344/87 *Bettray* [1989] E.C.R. I-1621, para. 12; Case C-337/97 *Meeusen* [1999] E.C.R. I-3289.

⁶⁷ *Bettray* (n 66) para. 15.

⁶⁸ Advocate General Maduro's Opinion in *FENIN* (n 57) para. 15.

⁶⁹ See *Pistre* (n 26).

⁷⁰ *Höfner and Elser* (n 36) paras 21-22.

normally agreed upon between providers and recipients of services.⁷¹ Even though it was from early on accepted that remuneration need not be paid by the service recipients themselves,⁷² the concept of remuneration has been recently extended beyond its former limits to cover payments that are only indirectly related to the service provided - in the sense that the remuneration does not need to be agreed between the parties, it needs not be provided by the service recipient and it can even be subject to subsequent reimbursement by a third party.⁷³ In applying this new concept of remuneration, the Court sometimes acts incoherently. For example, the provision of services in the area of public education is held not to be economic for the purposes of the Treaty because it is considered that the State is not seeking to engage in gainful activity and the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.⁷⁴ However, this reasoning is not applicable to the public provision of hospital health services in the scheme of insurance services providing benefits in-kind, even though similar arguments would seem to hold.⁷⁵ These inconsistencies cannot be explained away in the basis of normative arguments about what constitutes economic activity – even though they are evidence of an absence of due consideration of the relevant normative foundations.

A fuller picture of the case-law emerges once, in addition to taking into account normative indeterminacy, one considers the institutional consequences of an activity being deemed economic or not. The concept of “economic activity” serves as a limit to EU law, preserving for Member States an area of autonomy over non-economic areas.⁷⁶ But economic activity does not work merely as a device for the allocation of competences between the EU and the Member-States: it also operates as a device to determine whether the Court should be able to overrule Member-State choices or whether such overruling should only occur if the EU political process so decides. Nonetheless, institutional concerns are not explicitly

⁷¹ Case 263/86 *Humbel* [1988] E.C.R. 5365, para. 17; *Freskot* (n 38) para. 55.

⁷² Case 352/85 *Bond van Adverteerders* [1988] E.C.R. 2085

⁷³ Pedro Cabral, 'The internal market and the right to cross border medical care' (2004) 19 E.L.Rev. 673, 677; Hatzopoulos and Do (n 39) 946-947; Lorna Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, Aldershot 2004) 168-174.

⁷⁴ *Humbel* and Case C-109/92 *Wirth* [1993] E.C.R. I-6447.

⁷⁵ Case C-157/99 *Smits & Peerbooms* [2001] E.C.R. I-5473 and Case C-368/98 *Vanbraekel* [2001] E.C.R. I-5363. In both cases the Advocate Generals argued the situation did not fall within the freedom's scope. Interestingly, situations similar to *Smits & Peerbooms*, in that it concerns health services provided free of charge by hospitals, were held not to be economic for competition law purposes: see *FENIN* (n 57).

⁷⁶ Odudu (n 61) 226. Subject, naturally, to EU competences over specific non-economic areas.

considered in the case-law, and tend to be ignored by legal commentators. But they are very relevant in this context, and are implicit in claims that the flexible use of the concept of remuneration has led to arguments that the Court uses it pragmatically to get rid of cases it does not want to decide or to decide cases it would not have competence to do so beforehand.⁷⁷

In the absence of a careful consideration of the relevant normative and institutional underpinnings, decisions by the Court on whether an activity is economic or not constitute unprincipled - or at least unjustified - comparative institutional choices. This exemplifies how institutional considerations are necessary, because implicit, in any serious debate about what constitutes, or should constitute, an economic activity for the purposes of EU free movement law.

3. *Hindrances to cross-border movement with an economic aim*

The simple exercise of the right of free movement within the Community is not in itself sufficient to bring a particular set of circumstances within the scope of Community Law; there must be some connecting factor between the exercise of the right of free movement and the right relied on by the individual.⁷⁸

This succinct formulation of the orthodox case-law requires that for a restriction to a free movement right to be found there must be a link between the economic aim and the cross-border element.⁷⁹ The scope of the market freedoms requires that the rights granted by the Treaty be exercised in a cross-border situation for an economic purpose. Nonetheless, the Court seems to be doing its utmost to get as far away as possible from this principle without expressly reneging it, at least in what concerns the free movement of individuals.

Arguably the origins of this case-law can be found in *Cowan*,⁸⁰ a case concerning a national measure making the award of State compensation

⁷⁷ See also the criticism in Spaventa (n 52) 54-58, Vassilis Hatzopoulos, 'Killing National Health and Insurance Systems but *Healing* Patients? The European Market for Healthcare Services after the Judgements of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 CML Rev. 683, 693-4.

⁷⁸ Case C-370/90 *Singh* [1992] E.C.R. I-4265, para. 5 of Advocate General Tesouro's Opinion.

⁷⁹ This link was an ingrained and generally accepted element of the concept of restriction to the free movement provisions, applying independently of the much more contentious issue of whether restrictions should concern only discriminatory or also indistinctly applicable measures, an issue which will not be addressed here.

⁸⁰ Case 186/87 *Cowan* [1989] E.C.R. 195

for harm caused in France to the victim of an assault resulting in physical injury subject to the condition that the victim holds a residence permit or is a national of a country which has entered into a reciprocal agreement with France. As the French State argued, this requirement posed no obstacle to economic free movement. Nonetheless, the Court considered this rule to be contrary to the free provision of services. It held that there was a sufficient cross-border element because the situation concerned tourists, i.e., service recipients, who had travelled across State borders. One way to make sense of this case would be to consider that it did not concern market freedoms at all, but instead granted an autonomous status to the prohibition of discrimination on grounds of nationality. This view could be reinforced by reference to *Bickel and Franz*⁸¹, a case concerning a refusal to grant to German-speaking foreigners in Italy a right to use their own language in interactions with the judicial and administrative authorities based in the Bolzano province when such a right was granted to German-speaking Italians. The Court decided that such a refusal was prohibited by the general prohibition of discrimination arising from Art. 18 TFEU (ex-Art 12 TEC).⁸² However, a number of other cases where the link between economic aim and cross-border elements was dubious cannot be explained by reference to the autonomy and blanket application of a general prohibition of discrimination on grounds of nationality.⁸³ The paradigmatic example of this is *Carpenter*⁸⁴. Mr Carpenter was a British national who married in the UK a Philippines' national who had overstayed her allowed leave. The British authorities ordered her deportation, but the Court, on the grounds that Mr Carpenter conducted a business which provided services to advertisers established in other Member-States and occasionally travelled there for business purposes, found a link with Community law and went on to hold that the deportation of Ms Carpenter from Mr Carpenter's country of origin, where they resided, would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercised a market freedom. This conclusion is problematic: after all, the choice was never between Mr Carpenter not exercising his freedom to provide services and

⁸¹ Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637.

⁸² The question here is whether there was a link with EU law to start with. While the Court ignored the issue, Advocate General Jacobs in his Opinion tried to establish such a link by reference to European Citizenship.

⁸³ See *Singh* and Case C-291/05 *Eind* [2007] E.C.R. I-10719. See also Miguel Poiarés Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing, Oxford 2000), 124; Anthony Arnall, Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood's European Union law* (5th edn Sweet & Maxwell, London 2006) 761.

⁸⁴ Case C-60/00 *Carpenter* [2002] E.C.R. I-6279.

maintaining the right to reside with his wife as opposed to exercising that freedom and, as a result of that, losing that right.⁸⁵ The main problem with the concept of restriction used is that even though in this case a cross-border element could be found, such restriction was in no way related to the economic purpose of the freedom.

This lack of relationship between economic aim and free movement is also present in the Court's case-law on family reunification. In these cases the question was whether third-country nationals who were relatives of EU nationals who had exercised their free movement right to move into a host-State should be allowed to join them directly from outside the Community in that Member-State, without previously having been lawfully resident in that or another Member-State.⁸⁶ The argument against this was that the aim of the granting of family reunification rights was to enable Member-State nationals to move freely between Member-States. An impediment to that movement would only arise if the relatives of a EU national who previously resided lawfully with them in the territory of a Member-State would, as a result of the EU national's movement to another Member-State, lose the right to reside with him; and this would only occur if the family members were already lawfully residing with the EU national before he moved to another Member-State.⁸⁷ Accordingly:

it is the family situation as it exists at the time the Community national decides to go to another Member-State which should be taken into account. [National immigration rules should not restrict the right of] a national who has already exercised his rights to free movement and apparently has not been dissuaded from using that right for reasons related to the non-admission of third-country-national family members.⁸⁸

This was the *rationale* behind old cases such as *Morson*⁸⁹ and more recent ones such as *Akrich*⁹⁰. However, in *Jia*⁹¹ and particularly in *Metock*⁹² the

⁸⁵ Woods (n 73) 222-224; Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 ELJ 634, 638.

⁸⁶ This situation was effectively not addressed by either Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services or 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.

⁸⁷ This is what Tryfonidou calls the "moderate" approach. See (n 82) 637-638.

⁸⁸ Advocate General Geelhoed's Opinion in Case C-1/05 *Jia* [2007] E.C.R. I-001, para. 70.

⁸⁹ Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723.

⁹⁰ Case C-109/01 *Akrich* [2003] E.C.R. I-9607.

⁹¹ *Jia* (n 88).

Court chose to disregard this argument, holding that the relevant point was whether the third-country national was a family member of the EU national. Whether the refusal of the extension of the claimed family reunification rights would have impeded the exercise of the free movement right or not was deemed to be irrelevant.⁹³

Another line of cases where there appears to be no link between the cross-border element and the economic *telos* of the Treaty provisions concerns changes in the State of residence by persons who continue to pursue their economic activities in their States of origin. This line of cases includes workers or self-employed persons who have moved their residence to another Member-State but continue to pursue their economic activities in their home State⁹⁴ or situations where a person controlling a number of undertakings in his home-State moves into another State without any economic intent⁹⁵. In these cases, even though the movement cannot be said to relate to access to the relevant markets in another Member-State, the Court still held that their situation fell within the scope of the market freedoms.⁹⁶

In all these cases, there is cross-border movement and the EU national is economically active, but there is no link between these two elements. It appears that the *type* of movement involved is not significant and even those who move *back* to their State of nationality and those who exercise merely temporary short-term movements to other Member-States without any economic purpose can rely on EU law for requiring Member-States (including their own Member-State) to respect their rights.⁹⁷ All these cases concern the free movement of persons, in particular of individuals. It is plausible, therefore, that normative considerations on the special status of individuals in the EU underlie this case-law. The *rationale* behind this can perhaps be traced to the influence European Citizenship has had on the market freedoms: much of the case-law can be rationalised by

⁹² Case C-127/08 *Metock* ECR I-6241.

⁹³ Alina Tryfonidou, 'Jia or "Carpenter II": The Edge of Reason' (2007) 32 E.L.Rev. 908, 913-915.

⁹⁴ *Ritter-Coulais, Government of Communauté française and Gouvernement wallon*, Case C-152/05 *Commission v Germany* [2008] E.C.R. I-00039, Case C-527/06 *Renneberg* [2008] E.C.R. I-7735. Examples of traditional case-law can be found in Case C-112/91 *Werner* [1993] E.C.R. I-00429, Case C-293/03 *Gregorio My* [2004] E.C.R. I-12013.

⁹⁵ Case C-470/04 *N* [2006] E.C.R. I-7409, Case C-464/05 *Geurts* [2007] E.C.R. I-9325.

⁹⁶ Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CML Rev. 1591, 1596-1604.

⁹⁷ Christophe Schiltz, 'Akrich: A clear delimitation without limits' (2005) 12 MJ 241, 252.

reference to a preoccupation with creating a meaningful status for EU citizens, centred around the idea of fundamental rights, and in particular the fundamental right to a family life, rather than being connected to the internal market. This rationalisation is effectively anchored in a growing body of literature, which starting from the observation that a unitary approach to the free movement of persons appears to have been adopted in the Court's language⁹⁸, holds that the different Treaty provisions on the economic free movement of people are complementary to a more general freedom for the movement of natural and legal persons.⁹⁹ This view argues that persons are not viewed merely as a source of labour by the EU, but as human beings; that the free movement of individuals has a social element which distinguishes it from the other market freedoms; and that the Treaty itself views the free movement of persons as more than a merely economic freedom.¹⁰⁰ In effect, while the free movement of persons concerns economic actors, the free movement of goods has traditionally been read as not prohibiting obstacles to the free movement of traders but merely to the free movement of goods themselves. A similar argument can be made for capital.¹⁰¹ Hence, it is argued that the free movement of persons reflects fundamental rights and goes beyond the aim of creating and maintaining a common market, as opposed to the other freedoms which merely grant market or economic rights not deserving the same level of protection.¹⁰² This has given rise to some Authors arguing that European Citizenship may normatively justify extending the scope of the free movement of persons beyond discrimination into a rule of reason¹⁰³, or extending the scope of European law to purely internal situations, thereby eliminating reverse discrimination altogether and ensuring true equality

⁹⁸ Hatzopoulos (n 38) 70.

⁹⁹ Dieter H. Scheuing, 'Freizügigkeit als Unionsbürgerrecht' [2003] EuR 744, 753; Stephen Weatherill, 'Discrimination on grounds of nationality in sport' (1989) 9 YEL 55, 59; Snell (n 62) 9; Patrick Dollat, *Libre circulation des personnes et citoyenneté : enjeux et perspectives* (Bruylant, Bruxelles, Belgique 1998) 26. Arguing that services should be treated differently from establishment and workers, as the former can be regulated by the home-State and requires a lesser degree of integration in the host-State, see Luigi Daniele, 'Non-discriminatory restrictions to the free movement of persons' (1997) 22 E.L.Rev. 191, 195-198.

¹⁰⁰ Arnulf, Wyatt and Dashwood, 705-707; Jukka Snell, 'And Then There Were Two: Products and Citizens in Community Law' in T Tridimas (ed) *European Law for the Twenty-First Century* (Hart Publishing, Oxford 2004) 69-70.

¹⁰¹ Alina Tryfonidou, 'Further steps on the road to convergence among the market freedoms' (2010) 35 E.L.Rev. 36, 38-39.

¹⁰² Chris Hilson, 'Discrimination in Community free movement law' (1999) 24 European Law Review 445, 453; Peter Oliver and Stefan Enchelmaier, 'Free movement of goods: recent developments in the case law' (2007) 44 CML Rev. 649, 666.

¹⁰³ Spaventa (n 52) 143-148.

between individuals through Union law¹⁰⁴. It has also been argued that European Citizenship has had an impact on the case law on family reunification rights and even personal identity in what concerns names, with the Court reading the free movement provisions as protecting the human rights of any free moving EU citizen,¹⁰⁵ and some go as far as to argue for a transposition of solidarity from the national to the European level¹⁰⁶.

If this is indeed the reason behind the developments in the case-law, it implies that the normative underpinning of the market freedoms ceases to be merely to protect the right to move for the purpose of taking up an economic activity, and that these freedoms now protect the rights of all economically active persons whose situation has a cross-border dimension. If so, the scope of the market freedoms may have moved on to cover the situations of all economically active Union citizens, provided that the situation involves a cross-border element and regardless of whether the restriction is related to the economic activity pursued.

This would be a major development in EU law; but apart from the absence of a properly theorised analysis of the balancing of the relevant normative concerns at play, there is also no consideration of the very serious institutional implications of such a turn, a characteristic shared by most of the academic literature, which is much more concerned with analysing these cases from a purely “substantive” perspective. But alongside the development of minimally coherent normative underpinnings for the case-law, taking into account institutional considerations should be paramount. *Carpenter* exemplifies how decoupling the economic aim of the freedoms from their cross-border element leads to stretching the market freedoms to breaking point. As we have seen above, both the economic aim and the cross-border element are susceptible to being stretched: what an economic activity is can be contentious; what the relevant cross-border element is can be somewhat arbitrary. But the relaxation of the link between them has effectively lifted one of the major restrictions on the scope of the market freedoms. This expansionary effect on the market freedoms allows

¹⁰⁴ Eleanor Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects' (2008) 45 CML Rev. 13, 36-39 for purely internal situation; 41 for indirect review.

¹⁰⁵ Ibid., 39-44. This can reflect the idea that the basic common values of European States lie in respect for human rights, which hence should be protected by the Court: see Advocate General Jacob's Opinion in Case C-168/91 *Konstantinidis* [1993] E.C.R. I-1191; Peter Neussl, 'European Citizenship and Human Rights: An Interactive European Concept' (1997) 24 LIEI 47.

¹⁰⁶ Alexander Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32 E.L.Rev. 787, 789.

litigants to use the Court to challenge Member-States' national measures which result from *prima facie* legitimate democratic processes. It means that the Court has decided to double-guess Member-States' decisions in areas outside the traditional scope of EU law without any consideration as to why it would be better suited to pursue such an assessment to begin with.

Normative claims defending this case-law on the basis of the development of European Citizenship and fundamental rights protection are, implicitly, calls for a greater role of courts and, eventually, the EU political process to the detriment of the Member-States' political processes. As above, institutional questions are dressed up in "substantive" normative clothes. But the normative claims themselves – that European Citizenship allows for the expansion of the market freedoms and the protection of fundamental rights at EU level should prevail over the mechanisms of protection at national level – only make sense in the current institutional setting of the EU. Again, like Siamese twins, "substantive" normative claims contain institutional elements and institutional arguments reflect "substantive" normative goals.

IV. BETWEEN NORMATIVE FLUIDITY AND INSTITUTIONAL CONSIDERATIONS

All the methodological steps identified above – the cross-border element, the economic aim, and the relationship between them – have been subject to pressures due to mutations in their normative underpinnings. These mutations have gone hand-in-hand with evolutions in the European project, and particularly with non-economic developments, such as the appearance of concerns with reverse discrimination, the adoption and development of European Citizenship¹⁰⁷ and the increasing importance of protecting fundamental rights. This might be further justified in light of the recent amendments to the TEU, which further extends the scope of the Union beyond the economic realm and emphasises the protection of human rights (Art. 2 TEU), grants the Charter of Fundamental Rights the same legal value as the Treaties (Art. 6 TEU) and protects the equality of European citizens before the Union (Art. 9 TEU). But the developments

¹⁰⁷ Of which the recent decision in *Zambrano* (n 13) arguably makes the purely internal situation doctrine irrelevant for at least some areas of European Citizenship – see Kay Hailbronner and Daniel Thym, 'Zambrano Case Opinion' (2011) 48 CML Rev. 1253, Peter Van Elswege, 'Shifting the Boundaries? European Citizenship and the Scope of Application of EU Law' (2011) 38 LIEI 263, and Alicia Hinarejos, 'Extending citizenship and the scope of EU law' (2011) 70 C.L.J. 309. This may lead to potentially similar developments for the market freedoms, as a result of systemic arguments put forth by litigants before the courts.

in the case-law are also a result of how lightly theorised the normative assumptions underlying it were to begin with, thereby increasing the odds of the Court developing its case-law in a manner which goes beyond its initial underlying normative scope and continuously expanding the scope of the market freedoms as a result of pressures by self-interested litigants. This light theorisation enables new normative pressures to produce major effects, but also, and more importantly, to do so without any previous consideration of how old and new normative concerns should interact or to the consequences of the adoption of a given course.

Of particular concern, in this regard, is the Court's obliviousness to the institutional questions and consequences hidden beneath its case-law. In effect, one of the consequences of a measure falling within the scope of the market freedoms or European citizenship is that such a measure is now subject to review under EU law standards, including as to its adequacy under EU's fundamental rights' standards. As Advocate General Sharpston put it:

According to the Court's settled case-law, EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law. All measures enacted by the institutions are therefore subject to scrutiny as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. This aspect is obviously delicate, as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR.¹⁰⁸

To grasp the importance of appropriately delimiting the scope of the market freedoms, one need only think of the consequences of a person buying a book from another State via Amazon, or having enjoyed a holiday in another Member-State 15 years ago, or even watching a foreign television channel in his home State: could she/he claim a Union protection of her/his fundamental rights in a case similar to that of Mr Carpenter on the grounds that she/he was once part to an economic relationship with a cross-border element?¹⁰⁹ At present, we are all potential recipients of services within the meaning of Article 56 TFEU (ex-Art. 49 TEC); does it effectively suffice that someone had once benefited from a market freedom to forever benefit of all the rights which might arise from

¹⁰⁸ Opinion in *Zambrano* (n 13) para. 156.

¹⁰⁹ A point already raised by R Lane and N Nic Shuibhne, 'Angonese Case Note' (2000) 37 CML Rev. 1237, 1242.

EU law, regardless of the existence of a relationship between that law and the situation at hand? If no limits were established, the EU's protection of fundamental rights would no longer be incidental and subsidiary. National balancing of fundamental rights would be replaced by EU value-choices whenever a situation fell within the EU's limited scope of competences as a result of the primacy of EU law: the EU could end up monopolising the protection of fundamental rights in Europe.

The consequences of this are mainly institutional, as the protection of human rights is a characteristic of all Member-States and there is already a European Court on Human Rights. Even from a substantive perspective, the results of this case-law are mainly the replacement of one fundamental rights' balancing – that of the Member-State – for another – the CJEU's. It is, in effect, a question of comparative institutional choice. Simultaneously, the Court may well expect to find itself before cases brought by agents trying to maximise the opening that the Court has granted them in *Carpenter* and related cases. Even if these developments had been merely kick-started by accident, as a result of work pressure or lack of communication between different chambers, path dependence and lock-in are still bound to kick in. And the lack of proper reasoning in the case-law and continuous under-theorisation of its normative underpinnings will make life easier for such agents, making the law ever more incoherent and normatively at drift. The Court would eventually likely be faced with a question it probably did not envision, and in all likelihood actively hopes to avoid¹¹⁰: does it have the conditions and the will to become the court of last resort for all measures adopted by any public body within the EU potentially affecting fundamental rights? Questions of capability, ability and legitimacy of the Court – all of them ultimately institutional questions – would finally have to come to the forefront of the discussion.

In short, it should be recognised that the Court's case-law is a result of the interaction between different, and sometimes conflicting, normative goals – European integration, the removal of obstacles to free movement, the protection of areas of Member-State autonomy, the defence of fundamental rights – mediated through the existent institutional setting. Decisions about the scope of the free movement provisions of necessity imply assessments of comparative institutional choice – through direct effect, free movement rules re-allocate Member-State competences to the EU, and place areas which were under the exclusive remit of the EU's

¹¹⁰ As the *Guimont* (n 29) case law points out, the Court is aware of its limitations, actively delegating on national courts the task to deal with reverse discrimination. On the other hand, as the recent Lisbon decision by the German Constitutional Court indicates, national courts themselves may react against this case-law by the Court, leading to a situation of serious institutional conflict.

political process under control by the courts. It is thereby crucial not only that greater attention be paid to the “pure” normative goals underlying the case-law, but also to the institutional questions of choice and ability which are always also present.

V. CONCLUSION

Legitimate concerns with the undesirable and unjust results of reverse discrimination, together with the justice of specific decision and the protection of fundamental rights provide normative grounds which, when taken together with considerations of strategic behaviour by the Court, and the influence of European Citizenship in construing the market freedoms, appear to lie behind much of the case-law analysed above. Nonetheless, institutional realities mean that this expansionary trend might gain traction independently of the original normative reasons which gave rise to its original development; if not checked, this may eventually lead to the Court being seen as a fundamental rights’ last body of appeal for all measures adopted within the EU-area, creating problems for the Court in its ability to deal with the concomitant workload and conflicts with other decision-making bodies.

To address this, it must be recognized that the Court’s case-law is a result of the interaction between different, and sometimes conflicting, normative goals mediated through the existent institutional setting. Better reasoning and theorization of the relevant substantive normative underpinnings is undoubtedly in order; but this also requires that institutional considerations be recognised as normative concerns of equal importance for the Court of Justice’s decision-making process. In the end, the absence of consideration of institutional realities and implications does not eliminate them, as they are present in “pure” normative claims but also inform and are informed by them in a feedback loop reminiscent of a Mobius strip. It merely prevents a properly reasoned consideration of the relevant normative and institutional choices which the CJEU has to make in its case-law.

THE ‘RETAINED POWERS’ FORMULA IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE: EU LAW AS TOTAL LAW?

Loïc Azoulay*

The case-law of the European Court of Justice is full of standard formulas. This article analyses one such formula, the so-called ‘formula on retained powers’ according to which the scope of application of EU law extends to subject areas over which Member States are supposed to have retained powers. It attempts to trace it back through the line of ECJ decisions, to analyse the specific components and arguments encapsulated in it, and to identify its justifications and effects. It is argued that the recurrence of this judicial formula amounts to the emergence of a new doctrine in EU law called the ‘total law doctrine’ based on both the recognition of the essential own capacities of the Member States within the integrated European space and on the requirement to include certain under-protected interests and situations in the manner national authorities usually use to think and to act.

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I. INTRODUCTION

It is almost an adage. The expression has become commonplace in EU law. When confronted with a controversial issue of applicability, the Court usually refers to a single formula – or to a slight alteration of it –, set out thus:

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Whilst it is not in dispute that EU law does not detract from the powers of the Member States [recognized in particular in the areas of direct taxation, social protection, education, attribution of nationality, civil status of persons], the fact remains that, when exercising those powers, the Member States must comply with EU law.¹

Such State powers are occasionally labelled ‘retained powers’ by the Court or, less frequently, ‘areas of reserved competence’.² For this reason, I call this expression the ‘formula on retained powers’. Notice, however, that in the French language, the working language of the Court, the formula is asserted in terms of ‘*compétence/competence*’ rather than in terms of ‘*pouvoirs/powers*’.³

Literally this formula means that the scope of application of EU law extends beyond the subject areas over which the EU has been given jurisdiction. By dissociating the *existence* of state powers from the *exercise* of such powers, the Court legitimizes the application of EU law in any domain that is not a priori within the Union’s scope of intervention.⁴ Should any sector not feature on the list of exclusive or shared powers attributed to the Union under the Treaty, it does not follow that the application of EU law shall be excluded from that sector.⁵ As a result, the applicability of EU law particularly of specific provisions enshrined in primary law (freedoms of movement and general principles of EU law) appears to be indifferent to the constitutional attribution of powers.⁶ The scope of EU law may reach far beyond the limits of the legislative powers

¹ See e.g. Case C-73/08, *Bressol* [2010] § 28. And see the list of cases mentioned in notes 49 and 50.

² See e.g. Case C-279/93 *Schumacker* [1995] § 21 and Case C-281/06, *Jundt* [2007] § 85.

³ In the *Schumacker* case, the central passage reads: ‘*Il convient de constater que si, en l’état actuel du droit communautaire, la matière des impôts directs ne relève pas en tant que telle du domaine de la compétence de la Communauté, il n’en reste pas moins que les États membres doivent exercer leurs compétences retenues dans le respect du droit communautaire*’. In the *Bressol* case, it reads ‘*il convient de rappeler que si le droit de l’Union ne porte pas atteinte à la compétence des États membres en ce qui concerne l’organisation de leurs systèmes éducatifs et de la formation professionnelle – en vertu des articles 165, paragraphe 1, et 166, paragraphe 1, TFUE –, il demeure toutefois que, dans l’exercice de cette compétence, ces États doivent respecter le droit de l’Union et, notamment, les dispositions relatives à la liberté de circuler et de séjourner sur le territoire des États membres*’.

⁴ Except perhaps in relation to Article 346 TFEU (essential interests of state security). In relation to Art. 345 (the system of property ownership), see Case C-302/97, *Konle* [1999] § 38.

⁵ The list of exclusive and shared competences conferred upon the Union is in articles 3 and 4 TFEU.

⁶ See S. Weatherill, ‘Competence and Legitimacy’ in C. Barnard & O. Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing, Oxford, 2009).

bestowed on EU institutions. It is a phenomenon that K. Lenaerts has identified and coined '*the framing of national laws by EU law*'.⁷ As a translation from the French expression '*encadrement des droits nationaux*', it is used in the combined senses of 'limiting', 'containing', 'ring-fencing'.⁸

The surprising thing is that while the effects of such case-law upset some specialists of the branches of national law that are so affected (especially tax law, private international law and social protection law specialists), its source is rarely examined. It may be that the formula says nothing that the generalists of EU law do not already know: EU law, in some of its provisions, has a practically unlimited field of application. This is the result of a well-established case law particularly in the area of the freedom of movement. Provisions on freedom of movement are 'non-specific' in scope⁹ and it is settled case-law that the strict possibility to derogate from them does not amount '*to reserve certain matters to the exclusive jurisdiction of the Member States*'.¹⁰ The Court has rejected the idea that State derogations enshrine 'reservations of sovereignty'. In addition, it is established precedent that the exercise of the Member States 'exclusive' competence in the area of criminal law is subject to the 'limits' laid down by Community law.¹¹ Accordingly, it has been long and rightly stated that '*There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community*'.¹²

In view of this, one may wonder whether the retained powers formula, incorporated in the Court's case law in the mid 1990s, is not essentially rhetorical in its scope. But let us not conclude too hastily. For, if not its content, the context in which the formula is currently expressed is new. The overabundance of provisions limiting the Union's competences in the treaties is one of the most obvious marks left by the Lisbon Treaty. The

⁷ K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 Fordham International Law Journal 1338.

⁸ See K. Lenaerts, 'L'encadrement par le droit de l'Union européenne des compétences des Etats membres' in *Mélanges en l'honneur du Professeur Jean Paul Jacqué* (Paris, Dalloz, 2010).

⁹ See, the opinion of A.G. Kokott in *Tas-Hagen and Tas* (Case C-192/05 [2006]), § 34. See also K. Lenaerts, 'Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de la préemption', in P. Demaret (ed), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Story Scientia, Brussels, 1987).

¹⁰ See e.g. Case 72/83 *Campus Oil* [1984] § 32.

¹¹ Case 203/80, *Casati* [1981] § 22; Case C-387/93, *Banchero* [1995] § 58. For discussion, see V. Michel, *Recherches sur les compétences de la Communauté* (L'Harmattan, Paris, 2003).

¹² K. Lenaerts, 'Constitutionalism and the many faces of federalism' (1990) 38 American Journal of Comparative Law 205, 220.

new Treaties assert that ‘the Union shall act *only* within the limits of the competences conferred upon it by the Member States’,¹³ that ‘competences *not conferred* upon the Union in the Treaties remain with the Member States’,¹⁴ that proposals for the amendment of the Treaties ‘may serve either to increase or to *reduce* the competences conferred on the Union’,¹⁵ or that ‘[t]he Charter *does not extend* the field of application of Union law *beyond* the power of the Union’¹⁶. All of this come down to putting out one and the same message: *the bounds of the scope of EU law are strict; they should correspond strictly to the competences attributed to the EU*. True, from a purely formal point of view, only Article 51(2) of the Charter specifically relates the scope of application of EU law to Union powers. However, it is submitted that Member States when drafting the treaties do not think in terms of scope of application. They think in terms of ‘allocation of competences’, and by repeatedly limiting the competences allocated to the Union and underlying these limits they intend to limit the interference of EU law with the areas of ‘retained powers’, that is areas which do not pertain to shared or exclusive Union’s competences. Notice that even the ‘internal market’ consisting of the provisions on free movement is referred to as a field of competence in Article 4 of the Treaty on the Functioning of the European Union. As a field of shared competence, it too is supposed to have inherent limits.

The Court’s formula reads like a denial of the message enacted by the Member States as ‘Masters of the treaties’. Far from containing the scope of EU law, it serves as a vehicle for the *totalization* of the process of integration. It seems that there are no longer any reserved domains that are not subject to the ‘reservation’ that, in exercising their powers, Member States must abide by EU law.¹⁷ This article will first trace back the roots of the formula in the past case-law (II). It will then attempt to analyse the argument encapsulated in it (III). This will be done by comparing the argument to another more traditional one at work in the case-law of the Court. Finally I will try to discuss the distinctiveness of this argument by investigating its possible justifications and implications (IV).

II. FROM ‘PARTIAL’ TO ‘TOTAL INTEGRATION’

It has taken some time before the Court worked out the formula on

¹³ Art. 5 (2) TEU.

¹⁴ Art. 4 (1) TEU.

¹⁵ Art. 48 (2) TEU.

¹⁶ Art. 51 (2) Charter of Fundamental Rights of the European Union.

¹⁷ This reservation was formulated notably in *Micheletti* (Case C-369/90, § 10) on state power with respect to nationality and reiterated in Case C-135/08, *Rottmann* [2010] § 47.

retained powers. From the *Steenkolenmijnen* case of 1961 to the *Schumacker* case of 1995, there has been a clear yet twisted progression: the formula first developed and then petered out into scattered references before re-emerging as a general rule of adjudication. Under this formula, the Court now classifies anything that does not naturally fall within the EU's area of intervention. Notice that in the same period there has been a shift away from an EC law tending towards the complete unification of national markets in certain 'decisive but limited' sectors, towards a more flexible system of EU law but that extends to those sectors supposedly 'reserved' for Member States.

I. *Partial Integration and Exclusive Authority*

The *Steenkolenmijnen* decision is one of the earliest decisions issued by the Court under the European Coal and Steel Community treaty. An association of Dutch undertakings had asked the Court to recognize that Germany had violated the ECSC Treaty by paying a bonus for mineworkers out of public funds.¹⁸ This bonus caused an outflow of labour to Germany from neighbouring Dutch companies, which saw it as a manifest infringement of the conditions for fair and undistorted competition in the common market for coal and steel. Under article 4 of the ECSC Treaty, payment of any state aid or subsidy to companies to the detriment of competition is prohibited. To enforce this prohibition, the Community's institutions have been granted an exclusive power of sanction:

in the Community field, namely in respect of everything that pertains to the pursuit of the common objectives within the common market, the institutions of the Community have been endowed with exclusive authority.¹⁹

However, this authority is only relative. In '*those sectors of the economy of the Member States which do not come within the province of the Community*', the Member States continue to exercise '*residual powers*'.²⁰ This is true of 'their social policy' and 'over a wide area of their fiscal policy'. This is the result of '*the partial nature of the integration effected by the Treaty*'. Partial integration raises a specific problem, the problem of boundaries: for while there are two separate domains, the two exclusive authorities governing them are

¹⁸ Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the European Coal and Steel Community* [1961].

¹⁹ The Court again emphasizes 'the exclusive character of the Community's jurisdiction within the Community' further on (ECR. p. 22).

²⁰ Note that the French original version reads '*pouvoirs retenus*' (retained powers) translated ex-post in English '*residual powers*'.

exercised within a single territory and with respect to the same addressees. It may be consequently that, in exercising their retained powers over taxation, Member States affect the conditions of competition protected by the Community in the coal and steel industries.

To this problem, the Court came up with a nuanced response. For one part, it ruled that

the jurisdiction of the Community [may] impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.

The Community should be able to act to effectively pursue the purpose of constructing a common market laid down by the Member States in the Treaty.²¹ However, only limited prerogatives are conferred thereby. The Court refused to extend to these domains the sanction power the Community enjoys within its 'own domain'. The Treaty only grants the High Authority in such instances '*a limited power of recommendation*', for '*remedying*' infringements of competition, to try to '*correct or mitigate*' their effects. This may be insufficient to remove these infringements of competition which '*conflict with the general purpose of the Treaty*'; but that is '*the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain*'. This is what the Treaty seeks. From the outset, the Court experienced European integration in terms of an insuperable contradiction. How could one account both for the specialization of spheres, the Community sphere and the national sphere, and for the assumption of an open-ended and unspecific general purpose such as the '*existence of the common market*'? Two options were implicitly rejected by the Court: the idea of strict parallel competences and the principle of the absolute superiority of Community competence. There remained the hypothesis of 'the necessary impingement of the Community competence'.

The Court extended this approach to the domains covered by the European Economic Community treaty in the *Commission v. French Republic* judgment of 10 December 1969.²² France was accused of maintaining a rate of preferential rediscount for French exporters. The French government argued that this decision had been taken in a sphere (the monetary sphere) in which the Member States were exclusively competent. The Court

²¹ Notice how close this line of argument is to the one the Court uses in *AETR* to justify recognition of implicit competences in the Community (Case 22/70 [1971]). For an analysis of the argument of implicit competences, see G. Tusseau, *Les normes d'habilitation* (Dalloz, Paris, 2006).

²² Joined Cases 6 and 11/69 *Commission v. France* [1969]

readily granted this: for sure such policy was a form of ‘*exercise of their reserved powers*’. States had jurisdiction to issue, manage, and defend their currencies.²³ And yet, in this same sphere, there are general rules compelling states to coordinate their economic policies and to treat their policies on foreign exchange as a matter of ‘*common concern*’ (§14). Being the expression of a fundamental requirement of ‘*solidarity*’ within the Community, these rules apply beyond the sphere of restrictive powers attributed to Community institutions. That suffices to conclude that ‘*the exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty*’. While European integration is partial insofar as the attributions of Community institutions are limited, it does wholly commit the State. The Court suggests the idea of certain ‘total obligations’. Membership of the Community implies that governments undertake to cooperate in a spirit of loyalty and solidarity, even in policies that come within the scope of their retained powers. Now, that means in particular complying with the EEC obligation not to grant aid without first being so authorized by the Commission. Notice that in this case the exclusive powers of the Community are entirely protected and not ‘lightened’ as in the ECSC case. Moreover, in the EC/EU law on state aid, the Court has nowadays relinquished all references to retained powers. In such cases, it simply states that ‘*rules relating to tax are not excluded from the scope of Article 87 EC*’.²⁴ Even so, the theory of the two spheres has not vanished. It reemerges, although in another form, in the domain of the freedom of movement.

2. *Total integration and the Capacity to be Affected*

The *Casagrande* decision issued in 1974 is not a proper extension of this first approach, but it constitutes an interesting step towards totalization, mirroring the formula finally reached.²⁵ This case concerned the refusal to award an educational grant for the child of an Italian worker who was resident in Germany. Article 12 of the EC Regulation on the free movement of workers within the Community provides that, in order to promote their integration, the children of migrant workers’ families shall be admitted to educational courses under the same conditions as the nationals of the host state. Now, the German authorities argued that access was one thing, aid another; the latter being part of the general education policy and within the exclusive power of Member States. To this argument, the Court retorted:

²³ The exclusive competence of States in the monetary sphere was recognized by the Court in a series of subsequent judgments: Case 95/81 *Commission v. Italy* [1982]; Case 57/86 *Greece v. Commission* [1988], Case 127/87 *Commission v. Greece* [1988].

²⁴ Case C-182/03, *Belgium and Forum 187 ASBL v. Commission* [2006] § 81.

²⁵ Case 9/74, *Casagrande* [1974].

Although educational and training policy is not as such included in the spheres which the treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training; Chapters 1 and 2 of Title III of Part Two of the Treaty in particular contain several provisions the application of which could affect this policy.²⁶

In this paragraph, the specific provision it is referred to is the rule of non-discrimination between nationals and migrant worker family members. Non-discrimination is raised to both an objective of the Community and a basis for the exercise of Community competence which is to apply as broadly as possible. This justifies the extension of the rule of non-discrimination to a matter (measures intended to facilitate educational attendance) considered as closely related to the one covered by the EC regulation.

Casagrande is remarkable in that it outlines a distinction that currently governs the reasoning of the ECJ: the distinction between the *exercise* of competence and the *existence* of competence. In their existence, competences may occupy separate spheres; but in their exercise, they come together, and the application of EU law may '*affect*' any national policy (§6). The reference to '*affecting*' mirrors the '*impingement of competence*' stated in the *Steenkolenmijnen* case. However, this formulation is still a long way from the consolidated formula to which the Court currently adheres. This formula was cast for the first time in 1995 in the *Schumacker* case in reference to direct taxation: '*Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law*'.²⁷ Compared with *Casagrande*, this expression works as a chiasma. First, where the Court referred in 1974 to '*the competence of Community institutions*', it now refers to the '*powers retained by the Member States*'. Second, the problem is not captured in terms of '*powers transferred to the Community*' but in terms of powers exercised by the Member States. Thirdly, the Court doesn't wonder about the '*effect of the Treaty on national policy*' but rather about the '*effect*' certain national measures may have on the sphere governed by the Treaty

²⁶ For a similar formulation, see Case 65/81, *Reina* [1982], § 15 (demographic policy); Case 152/82, *Forcheri* [1983], § 17 (educational and training policy).

²⁷ Case C-279/93, *Schumacker* [1995], § 21.

provisions.²⁸ The outcome of this transformation is that the language of ‘competence’ is henceforth associated with the Member States, while the language of the ‘rule’ is associated with the Union. This is not just wordplay. The focus has changed. Instead of focusing on the extension of EU law, the problem becomes one of limiting the exercise of competences belonging entirely and legitimately to the Member States. The new formula means that in any power unilaterally exercised by a Member State, there is not just a capacity to act but also a capacity to be affected by EU law.

In reality, this formulation was elaborated a little earlier in a 1991 judgment, *Commission v. United Kingdom*.²⁹ In this judgment, the Court refers to a line of cases dating back to the 1969 judgment.³⁰ Relying on earlier formulations, it introduces the expression that ‘*powers retained by the Member States must be exercised consistently with Community law*’. To this it adds the distinction between the ‘existence and exercise’ of competence. The full sequence reads:

as Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member State must comply with the rules of Community law.

It is not unimportant that this sequence was introduced in answer to an argument by the defendant government that the matter at hand (granting of nationality to ships) comes within ‘the competence of each State under public international law’. The flag flown on the high seas is one of the rare spheres in which international law lays down a principle of exclusivity for the state.³¹ The power to determine the conditions for attributing nationality to ships flying its flag is a power that belongs to a state and to one state alone. The Court’s interpretation consists in deriving from this principle of exclusivity with respect to other states a rule as to the distribution of powers between the Member State and the EU. As a result, ‘exclusive competence’ is interpreted as meaning that the Member State is legitimately in a position to act wherever the EU fails to do so.³² The

²⁸ See Case C-120/95, *Decker* [1998], § 24.

²⁹ Case C-246/89, *Commission v. United Kingdom* [1991].

³⁰ The Court cites judgments re-iterating the solution and formulation of the 1969 decisions, all in the monetary sphere (see note 23).

³¹ See J. Combacau, ‘Conclusions générales’, in *SFDI, Les compétences de l’Etat en droit international*, (Pedone, Paris, 2006) 315.

³² On the origin and the different meanings of ‘exclusive competence’ in public international law, see J. Basdevant, ‘Règles générales du droit de la paix’, *Recueil des*

Court responds to the concern of the government to oppose any interference from foreign or supranational organs in his 'reserved' sphere. But, in including this competence in the framework of a division of powers between the Member State and the EU, the Court is in the position to recall the Member States the obligations they take on under the Treaty. The exclusivity recognized by international law is echoed by the obligations derived from Community law, which the Court takes it upon itself to protect.

III. THE ARGUMENT FROM TOTALIZATION

The retained powers formula was stabilized from the mid 1990s and possibly ready to extend the empire of EU law to wholly new sectors. And that would probably have been the case, had another more straightforward argument not been developed by the Court. The argument from Constitutionalization has long barred the way to the argument from Totalization.

I. *The 'Constitutionalization' of EU Law as a Compelling Argument*

In a short paper entitled 'Fédéralisme et intégration' published in 1973, P. Pescatore pointed out that the argument that had arisen from the *Steenkolenmijnen* decision was already outdated.³³ The *Van Gend en Loos* and *Costa v. Enel* judgments contributing to the 'constitutionalization of the Community legal order' had supposedly made this very 'first approach' obsolete. In recognizing that, by virtue of the Community Treaties, the Member States limited 'their sovereign rights' and created rights directly for individuals, the Court unleashed new potential. It conferred on individuals the capacity to go to the national courts to force states to comply with their obligations under the Treaty. Arguably, the mechanism of assertion of individual rights has superseded questions relating to the delimitation of competences. EC/EU rights are functionally broad in scope and not sector-specific. Their application is supposedly triggered by any cross-border situation that relates to the establishment of the common/internal market. Therefore, the expansion of the scope of EU law can easily find a justification in the principle of effectiveness of these rights and of their protection. Moreover, state justifications for derogation from EU 'constitutional' law based on the protection of core national competences are banned by the Court. In short, invocation of EU subjective rights is largely indifferent to the delineation of competences

cours de l'Académie de droit international (1936), t. 58, IV, (Sijthoff, Leiden, 1968), not. Chap. VII.

³³ 'Fédéralisme et intégration: Remarques liminaires' (1973), reprod. in *Etudes de droit communautaire européen 1962-2007* (Bruylant, Bruxelles, 2008) 450.

between the EU and its Member States.

A good illustration of this is a judgment which was delivered in the same year as Schumacker but is much better known. The *Bosman* case pertains to relations between Community law and professional sport.³⁴ One of the issues it raises is whether this sector can escape the hold of the treaty rules on the free movement of workers. The Court acknowledges the fact that sport is a special domain that cannot be confused with ‘commercial activities’ normally subject to the EC Treaty. Accordingly, it points out the ‘considerable social importance of sporting activities and in particular football in the Community’ (§106).³⁵ However, this specificity cannot, in its view, count as a restriction of the application of the Treaty: ‘Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty’.³⁶ To determine whether an activity falls within the ambit of the Treaty, it is not therefore any specific character it may have that matters; it suffices to establish a relationship between the activity and the accomplishment of the objectives of the EC Treaty, in particular the objective of establishing the common market.³⁷ The reason for including this activity in the sphere of EU law is that the organization of this activity (‘the exercise of sports’) may call into question one of the essential objectives of the Community. Therefore it may imperil one of the fundamental individual rights conferred by the Treaty, that of leaving one’s home country to pursue an economic activity in any other Member State. The applicability of Community law is assessed by the effects of sports measures on the establishment of the common market. But notice it is also by these effects that its application is generally assessed and a restriction to trade constituted. It follows, in the reasoning about applicability, that the judgment on the restriction to trade has already begun. It is therefore only at the stage of justification of a possible derogation that the particular features of state regulated activity shall be recognized.

The technique consists therefore in submitting a sphere that does not fall within the purview of the EU to the fundamental provisions of the Treaty

³⁴ ECJ, 15 December 1995, *Bosman*, Case C-415/93.

³⁵ See also the analogy with the field of culture suggested by the German government (§ 71).

³⁶ Case 36/74, *Walrave* [1974] § 4.

³⁷ Compare the characterization of an economic activity used by the Court in competition law. It has been consistently held that ‘any activity consisting in offering goods and services on a given market is an economic activity’ (Joined Cases C-180/98 to C-184/98, *Pavlov and Others* [2000]). See L. Idot, ‘Concurrence et libre circulation. Regards sur les derniers développements’ (2005) 3 *Revue des affaires européennes* 391-409.

by relying on the teleology included in the Treaty. All the national regulations that are liable to impinge on the objectives of economic integration will then come within the scope of application of EU 'constitutional' law (in particular the freedoms of movement). This technique has been used especially in areas in which considerations of social cohesion or public morality might seem to prevail over strictly market aspects. This has been true in the sphere of gambling, characterized by the Court as a field of economic activities but of a 'peculiar nature'.³⁸ This has led to an *expansionism* of EU law whose conditions of applicability are substantially broadened, tied sometimes to a form of *pluralism*, insofar as the specific activities may give rise to a special – more relaxed – regime of justification.³⁹

Relying on this case-law, one might think that national powers have been 'abolished'.⁴⁰ The problem of the allocation of powers seems to have been removed: freedoms of movement are liable to apply to any sphere so long as the political project which those freedoms serve – the establishment of the internal market – might be affected. How then could one explain the return of the retained powers formula in certain judgments at this same period of the history of case law? What does the formula bring that could not be settled by the invocation of EU rights? Perhaps nothing more than an answer to arguments that were not produced in the *Bosman* case because of the non-state character of the measures at issue in that case. The *Duphar* decision clearly points in that direction. Invited to rule on the provision of medicinal drugs to patients under a national social security system, the Court acknowledged for the first time that '*Community law does not detract from the powers of Member States to organize their social security systems*'.⁴¹ It added, however, that the regulation, being liable to '*affect*' the marketing of medicinal preparations, remained subject to the rules on the free movement of goods. At most, it was appropriate to take account of the 'special nature' of the activity. The solution in *Duphar* is akin to that in *Bosman*.⁴² As resumed by Advocate General Fennelly in a later case, the

³⁸ Case C-275/92, *Schindler* [1994]. On services for emitting and transmitting televised messages, see also Case 52/79, *Debauve* [1980] § 12.

³⁹ On gambling, see the highly conciliatory judgment, Case C-275/92, *Schindler* [1994]. After a line of more restrictive cases, the Court again loosened its analysis of restriction to trade in Case C-42/07, *Liga Portuguesa de Futebol* [2009].

⁴⁰ Such is indeed the conclusion of Denys Simon, *Le système juridique communautaire*, 3rd ed. (PUF, Paris, 2001) § 89.

⁴¹ Case 238/82, *Duphar* [1984] § 16.

⁴² The only difference is that, instead of involving the specific character of the activity in question at the justification stage, the Court makes a point of it in characterizing the restriction: 'in view of the special nature, in that respect, of the trade in pharmaceutical products, namely the fact that social security institutions are substituted for consumers as regards the responsibility for the payment of medical

application of national social security systems must respect ‘the exercise of the rights conferred by Community law’.⁴³ Observance of the retained powers of Member States is limited to ‘the inherently uncommercial act of solidarity’ that underpins such systems; but when EU objectives are affected, compliance with the provisions of the Treaty is mandatory.⁴⁴

According to this argument, any state regulation that is an obstacle to the pursuit of the objectives of economic integration is included within the sphere of EU law. Within this sphere, the provisions of EU law implementing the Treaty objectives ‘take precedence over any national rule which might conflict with them’.⁴⁵ At first glance, the *Schumacker* formula does not lead to a different outcome. The Member State that retains powers is simply acknowledged in these powers but still bound to comply with the rules of the Treaty. The express recognition of ‘retained powers’ to Member States does not seem to change anything in the structural relationships between EU law and Member States.

2. *The Development of the Argument from Totalization*

The opinion of Advocate General Tesouro in the *Kholl* and *Decker* cases points in a slightly different direction.⁴⁶ These are the first cases concerning the reimbursement of health care received by a Member State national in another Member State. Following the interpretation of Advocate General Fennelly in *Sodemare*, he considers that the case law of the Court with respect to retained powers ‘by no means implies that the social security sector constitutes an island beyond the reach of Community law’. However, he also suggests there is a need to take into account the duty to respect the State’s organizational capacities in the sphere of its ‘reserved powers’. According to the Advocate General, two kinds of requirements are involved in these cases: on the one hand ‘the survival of social security schemes’, which determines social cohesion in all European states, and on the other the ‘fundamental principle’ of prohibition of any discrimination on the grounds of nationality, the *raison d’être* of European integration. This is the core of the Argument from Totalization. It lies in a form of

expenses, legislation of the type in question cannot in itself be regarded as constituting a restriction on the freedom to import guaranteed by article 20 of the Treaty if certain conditions are satisfied’ (§ 20). A similar solution is reached in *Debauve* (Case 52/79 [1980] § 16) on TV services. These solutions are akin to the technique that was soon to be developed by the Court in *Keck and Mithouard* (Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993]).

⁴³ Opinion of AG Fennelly in *Sodemare* (Case C-70/95 [1997]), § 28.

⁴⁴ See also, on the organization of armed forces, Case C-285/98, *Kreil* [2000] § 15.

⁴⁵ Case 118/75, *Watson and Belmann* [1976] § 16.

⁴⁶ Opinion of AG Tesouro in *Decker* (Case C-120/95 [1998]) and *Kholl* (Case C-158/96 [1998]).

‘*dramatization*’.⁴⁷ Whenever a regulatory system pertaining to an ‘area of reserved competence’ is challenged before the Court, the question arises: How to safeguard the ‘essential functions’ of Member States without undermining the ‘core’ of EU integration? This indefinite oscillatory motion will repeat in the case law.⁴⁸ The political and social context of distrust towards further integration and federalization of Europe may have played a role in the emergence of such a change in formulations.

One question remains however: What is to be considered as ‘retained powers’? As developed in the case-law, this notion is multipurpose. It covers different situations. By this, the Court designates both and indifferently powers which are truly exclusively of the State’s competence (conditions for granting nationality, system of attribution of surnames),⁴⁹ spheres in which the EU has received competence but only limited powers to act – the road to harmonization of national laws being totally or partly prohibited (education, public health, social protection, social rights),⁵⁰ and a domain in which the EU has exercised the powers of harmonization that it possesses only in a piecemeal fashion (direct taxation).⁵¹ No specific

⁴⁷ I borrow this term from D. Ritleng, ‘Les Etats membres face aux entraves’ in L. Azoulai (ed), *L’entrave dans le droit du marché intérieur* (Bruylant, Bruxelles, 2011).

⁴⁸ The Court’s reasoning in *Rottmann* is an excellent example of this. The Court swings incessantly between the legitimacy of state action in the withdrawal of nationality and the need to allow for the fundamental status of the person in question as an EU citizen. This is resolved by the creation of a double test of proportionality imposed in decision making, one with respect to national law; the other with respect to EU law (Case C-135/08, *Rottmann* [2010] § 55).

⁴⁹ Case C-135/08, *Rottmann* [2010]; Case C-148/02, *Garcia Avello* [2003]; ECJ, Case C-353/06, *Grunkin Paul* [2008]; Case C-208/09, *Sayn-Wittgenstein* [2010]; Case C-391/09, *Runevič-Vardyn* [2011].

⁵⁰ On education: Case C-76/05, *Schwarz and Gootjes-Schwarz* [2007]; Case C-11/06, *Morgan* [2007]; Case C-73/08, *Bressol and others* [2010].

The sphere of health is unusual in that, for some specific aspects (safety art. 4(2) TFEU), it involves shared competence between the EU and the Member States, the EU legislator being authorized to act uniformly and restrictively, while, for other aspects, any harmonization is excluded (art. 168 TFEU): see Case C-372/04, *Watts* [2006].

The same is true of social security where certain ‘non essential aspects’ relating to the free movement of people may be the subject of joint action (art. 48 TFEU and, currently, art. 21 TFEU). On social security: Case C-158/96, *Kobll* [1998]; on welfare benefits: Case C-192/05, *Tas-Hagen* [2006]; Case C-499/06, *Nerkowska* [2008].

On social rights of workers: Case C-438/05, *Viking Line* [2007]; Case C-341/05, *Laval un Partneri* [2007].

⁵¹ The legal basis of rare texts adopted on direct taxation lies essentially in art. 115 TFEU, which provides for a unanimous vote of the Council ‘in accordance with a special legislative procedure’ (Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; Council

legal criterion accounts for such diversity. What brings these subject matters together is rather a certain idea of what the State can and should do in Europe. The Court comes close here to what in the Treaty is called without being defined the ‘essential State functions’⁵². These are the function of protecting of individuals – by granting nationality, attributing surnames, granting social rights; but also the function of integrating the members of the society and ensuring social cohesion – via education, health, social protection and redistribution. The so-called ‘retained powers’ are the collective goods the State is supposed to protect so as to ensure the social cohesion of its own population in its territory. That justifies that, in all these spheres, the State is vested with a unilateral power to act, excluding the intrusion of EU organs. Arguably, by recognizing retained powers, the Court recognizes that Member States have a primordial (rather than exclusive) power in the organization of a subject area that is considered to be essential to social integration. States are no longer reduced to powers potentially destructive for the establishment of the common market; they are recognized as autonomous political actors fulfilling their duties as guarantor of the cohesion of the European populations.⁵³

It remains to be seen whether that implies a difference of approach in the obligations incumbent upon the State. Traditionally, in EC/EU law, a state power exercised in economic or commercial matters, while the EU fails to act in a uniform manner, is suspect by nature. Not only because, exercised locally on the scale of the EU, it brings about compartmentalization; but also because it is exercised in conjunction with the other Member States regulating the same subject area in their territory and therefore brings about fragmentation. To prevent this competition from creating a double regulatory burden for the movement of goods and services within the EU,

Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States). In this sphere, the judgment formulating the principle of framing, followed in a long line of cases, is: Case C-279/93, *Schumacker* [1995].

⁵² Art. 4 (2) TEU.

⁵³ This may explain the Court’s reluctance to extend this formula to the existence of ‘private powers’. In *Viking Line*, it is indeed private powers that are at issue but, to answer the argument that EU law does not apply to the sphere of action of those powers (the exercise of social rights), the Court reiterates its formula and its reference to the State, by declaring that ‘even if, in the areas which fall outside the scope of the Community’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law’ (Case C-438/05, § 40).

the Court relied on the Treaty to delineate powers among Member States. That is the sense of the *Cassis de Dijon* case law.⁵⁴ By relying on the presumed equivalence of the applicable competing national regulations, a single State (generally, the State of origin of the good or service) is made responsible for determining whether the movement of the good or service is lawful. Can this technique be transposed to cases when the Court recognizes the Member State have a so-called 'retained power'? If such were the case, one would have to accept that, say, in the sensitive sphere of family law, the principle of the country of origin is to apply to cases of marriage between people of the same sex or to surrogate mothers, subject only to imperative considerations of public policy.⁵⁵ That was not the path followed until then. In spheres of 'retained powers', as in all socially sensitive areas, the Court seems inclined to exclude any presumption that national regulations are equivalent.⁵⁶ This accounts in particular for the *Grunkin Paul* judgment on the recognition of surnames.⁵⁷

In fact, the Argument from Totalization is a twofold argument. One side is the applicability of EU law to areas of retained powers. The other side of the coin is the recognition of the own essential duties of Member States. Strikingly, the language of competences is not limited to the stage of applicability of EU law. Soon after the emergence of the formula on 'retained powers', the Court started recognizing state justifications based on Member States' competences. The recognition of the State's '*sovereign powers*' in social protection and public health has been reflected in the fact that the maintenance of '*treatment capacity or medical competence on national territory*' may justify a derogation from the application of the Treaty.⁵⁸ Similarly, the retained power in matters of taxation has been mirrored in the recognition of the necessary '*preservation of the allocation of the power to impose*

⁵⁴ Case 120/78, *Rewe-Zentral* ('*Cassis de Dijon*') [1979]. See N. Bernard, 'La libre circulation des marchandises, des personnes et des services dans le traité CE sous l'angle de la compétence' (1998) *Cahiers de droit européen* 11.

⁵⁵ See on this point the analysis by K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 *Fordham International Law Journal* 1338, 1355 ff.

⁵⁶ By way of illustration see the judgment on gambling: Case C-42/07, *Liga Portuguesa de Futebol* [2009] § 69.

⁵⁷ Case C-353/06, *Grunkin Paul* [2008]. What Germany is criticized for in this case is not its refusal to apply an *equivalent* law, the Danish system of attribution of surnames; it is Germany's objecting to the possibility of recognizing a concrete situation that does not correspond to the interests defended by its own law. See for a similar analysis in the field of tax law M. Fallon, 'La jurisprudence européenne en matière de double imposition résultant de l'exercice parallèle des compétences fiscales: originalité et anomalies' in V. Deckers e.a. (dir.), *Les dialogues de la fiscalité - Anno 2010* (Bruxelles, Larcier, 2010) 301.

⁵⁸ Case C-372/04, *Watts* [2006] § 105.

taxes between Member States.⁵⁹ Furthermore, in the retained power of the Member State over the regulation of civil status and surnames, the Court has seen a form of defence of Member States' '*national identities*'.⁶⁰ Visibly, in all of these cases, the position of the State is no longer reduced to a position of defence of particular interests; it is re-established in its essential functions.⁶¹ In fact, to understand the sense of the transformation that has occurred regarding the system governing the relationships between the Member States and EU law, one must reverse the terms of the official formula.⁶² The Court includes in its case-law another, implicit, formula, which stands as follows: *If the areas of competence reserved to the Member States are subject to the fundamental principles of EU law, the fact remains that, in applying those principles, the Court must respect and have due regard to the freedom of each Member States in exercising its powers.*

What does it mean in actual practice? It is perhaps in the *Watts* case that the Court is clearest about the obligation imposed on Member States in domains of 'retained powers'.⁶³ When questioned about the compatibility of its case law with the 'exclusive' responsibility which the Treaty attributes to Member States for the organization of health services, that the Court explicitly acknowledges, the Court answers that its case-law is not to be construed as

imposing on the Member States an obligation to reimburse the cost of hospital treatment in other Member States without reference to any budgetary consideration but, on the contrary, are based on the need to balance the objective of the free movement of patients against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems.

The search for a right balance may lead States to '*make adjustments to their national systems of social security. It does not follow that this undermines their sovereign powers in the field*'. In other words, the structure of the national system must be reprogrammed so as to allow for the protection and the development of individual transnational situations within the EU. That

⁵⁹ Case C-446/03, *Marks & Spencer* [2005] § 45.

⁶⁰ Case C-208/09, *Sayn-Wittgenstein* [2010] § 92; Case C-391/09, *Runevič-Vardyn* [2011] § 86.

⁶¹ See D. Ritleng, 'Les Etats membres face aux entraves' in L. Azoulai (ed), *L'entrave dans le droit du marché intérieur* (Bruxelles, Bruylant, 2011).

⁶² This has been suggested by Alexandre Maitrot de la Motte in 'L'entrave fiscale' L. Azoulai (ed.), *L'entrave dans le droit du marché intérieur* (Bruxelles, Bruylant, forthcoming 2011).

⁶³ Case C-372/04, *Watts* [2006].

would be the true story behind all of this new rhetoric on retained powers: to ‘make adjustments’, ‘to have regard to all the circumstances of each specific case’.⁶⁴ In other words, to develop solutions based on equity – or call it *transnational equity* to make sense of the protection of interests lacking representation under purely national regulatory systems.

One may wonder, however, whether this distinction between the free choice of a system of regulation, which is to be safeguarded, and the implementation of that system in specific instances, which has to be adjusted and equitable, is a serious and sustainable one.⁶⁵ That would mean in practice that the national authority, without changing the national system, must be ready at any time to correct the application of the rule in the light of the ‘personal circumstances’ characterizing the case of the EU citizen in question.⁶⁶ That may seem very little. But, in reality, this apparently minor requirement is overarching. Even outside the scope of attributions of the Union, Member States are exposed to the encroachment of EU law that they cannot withstand other than by adapting their law.

IV. THE DISTINCTIVENESS OF THE TOTAL LAW DOCTRINE

The development of the Argument from Totalization of EU law is not only grounded on a strategy of expansion. It is based on a specific vision of the position and the posture of the State as member of the European Union. It amounts to the emergence of a real doctrine. However, the question remains as to how to justify such ‘jurisdiction of the Community to impinge on national sovereignty’ as the Court put it in its early case of 1961. To make these justifications clear will help us to pinpoint the possible implications of this case-law.

I. *Justifications*

To justify such an impingement, the Court first resorted to the ideas of necessity and purpose. The ‘effectiveness of the Treaty’ would be greatly diminished and its ‘purpose’ would be seriously compromised if the Community were not allowed to act beyond the narrow sphere of the

⁶⁴ Case C-157/99, *Geraets-Smits et Peerbrooms* [2001] § 104.

⁶⁵ For the distinction, see Opinion of AG Sharpston in *Grunkin Paul* (Case C-353/06 [2008]), § 49. See also § 34 of the judgement; Case C-73/08, *Bressol and others* [2010] § 29. For a tough critique of this distinction, see G. Davies, ‘The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare’ in M. Ross & Y. Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP, Oxford 2010).

⁶⁶ See for example Case C-372/04, *Watts* [2006]; Case C-499/06; *Nerkowska* [2008].

exclusive competences that were attributed to it.⁶⁷ In other words, if States could freely use their powers in the sphere of their retained powers, one could fear a fragmentation of the integration project, both materially and geographically. For want of any uniformity and universality in the application of rules on the freedom of circulation, the very project of establishing a single European market would be endangered:

The internal market would not have the comprehensive aim of providing an area without internal frontiers (Article 14(2) EC), but would be merely fragmentary as it would be limited to individual products and activities governed by specific rules of Community law.⁶⁸

In this justification, the only question is one of the effectiveness of the integration project. The meaning of the project is unstated. A purely instrumental justification would not be of much worth if it did not pursue further.

In *Commission v. France* 1969, as seen, the Court did indeed go further. It founded the impingement on '*the common concern of Member States*', '*[t]he solidarity, which is at the basis of these obligations as of the whole of the community system*'. The solidarity requirement reveals the existence of a commitment in favour of the creation of a Community that goes beyond the collection of States that make it up. The idea is that the Union has its own structure, separate from a simple collection of States. Being based on a '*transfer of sovereign rights*' it is akin to a political authority and implies for its members extended obligations of cooperation and solidarity.⁶⁹ Thereby, the encroachment of fundamental EU law is structurally justified. Notice that a similar structural argument is to be found in the case law of the US Supreme Court.⁷⁰ To justify the application and superiority of federal law, the Court refers to the 'coherent whole' that the federation constitutes.⁷¹ The power specific to each Member State is not denied. However, that

⁶⁷ Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority* [1961] ECR p. 46.

⁶⁸ Opinion of Advocate General Kokott in *Tas-Hagen and Tas* (Case C-192/05 [2006]), § 35.

⁶⁹ The first systematic description of this structure is in P. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoof, Leiden, 1974).

⁷⁰ In the famous case of *McCulloch v. Maryland* 17 U.S. 316 (1819), Justice Marshall writes in relation to the conflict of jurisdiction between the federal state and the federated state: 'The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a Government declared to be supreme, and those of a Government which, when in opposition to those laws, is not supreme'.

⁷¹ O. Beaud, *Théorie de la Fédération* (PUF, Paris, 2007) 191-2.

power exists only with respect to a ‘global system’ in which it is bound up.⁷² In the same vein, P. Pescatore stated that if the national authorities – and first among them the constitutional courts – must yield to the force of Community law, although they are supposed to preserve the powers reserved to the State, it is because ‘*each only controls a fragment of the total territory of the Community*’.⁷³ Acting only for a part of the EU’s citizens, national sovereigns potentially endanger the common interest of the Member States and of their citizens. Hence the necessity to yield to the power exercised by the Union. Union power is the realization of an ‘*idée d’œuvre commune*’ that is supposedly manifest in the Treaties.⁷⁴ This way the power retained by each State and its participation in a greater common whole can both be asserted together.

The third justification is the most elaborate. It is ethical in nature. It consists in contemplating the integration process not only as a project for economic unity or as a form of political solidarity but as an *ethos*: that is the occupation of a space – the European space, and the protection of individual situations within that space. The encroachment of EU law into areas of retained powers is justified by the need to impose the consideration of isolated interests in the Union, interests of those who circulate within the Union, who come from or are established in other Member States. Those interests that are naturally under-represented in the legislation of Member States constitute the ‘European’ situations *par excellence*.⁷⁵ In that context, the provisions on freedom of movement and non-discrimination operate as rules of conduct imposed on Member States. EU law forces the State authorities to rethink the way they act. The following passage in the *Rottmann* decision illustrates this point perfectly: ‘the fact that a matter falls within the competence of the Member States does not alter the fact that, *in situations covered by European Union law*, the national rules concerned must have due regard to the latter’.⁷⁶ Such situations are characterized through connecting factors elaborated on a factual basis. Connection to fundamental EU law generally relies on an element of transnationality in the situation at issue, but sometimes it

⁷² See in that connection K. Boskovits, *Le juge communautaire et l’articulation des compétences normatives entre la Communauté européenne et ses Etats membres*, (Sakkoulas/Bruylant, Athens/Brussels, 1999) 218.

⁷³ P. Pescatore, ‘La protection des droits ordinaires du ‘Citoyen Européen’ (2006), reprod. in *Etudes de droit communautaire européen 1962-2007* (Bruylant, Bruxelles, 2008) 935.

⁷⁴ P. Pescatore (n 69) 41.

⁷⁵ This has been thematized by C. Joerges & J. Neyer, “Deliberative Supranationalism” Revisited’, EUI Working Paper Law, 2006/20. See also C. Joerges, ‘Sur la légitimité d’européaniser le droit privé. Plaidoyer pour une approche procédurale’ (2004) *Revue Internationale de Droit Economique* 133.

⁷⁶ Case C-135/08, *Rottmann* [2010] § 41. Emphasis added

extends more broadly to forms of plurinationality⁷⁷ and ‘Europeanness’.⁷⁸ Such connection triggers a restructuration. The Court asks the State to reorganize its normative programmes so as to avoid the exclusion of ‘European’ situations and interests from the modes of apprehension of national law. Moreover, to compel the State to take account of these interests, the Court has developed an obligation to cooperate with the authorities of other Member States⁷⁹ and an obligation to take into consideration all the items of the situation involved.⁸⁰ These guarantees are designed to ensure the decision-making process at national level is more reflexive.

2. *Implications*

There seems to be nothing original in these three justifications. They may be used to justify authority of EU law in many other instances, irrespective of the nature of state powers. Should it be concluded that it is simply a rhetorical formula? To finally answer this question, let us consider the basic categories forged by legal scholarship in conceptualizing European law. The development of the EC/EU legal order is traditionally ordered around two fundamental themes. The first is the ‘refashioning of sovereignties’, that Pierre Pescatore first highlighted in his book on ‘The law of integration’. It consists in ‘a redistribution of functions’, that is, in developing the competence and normative powers of the Union, which exercises them autonomously, uniformly and bindingly. At the same time, Member States are to be prevented from infringing the action undertaken by the Union’s organs. To this effect, the Court has developed what is termed a ‘doctrine of pre-emption’.⁸¹ The second theme was brought out by Joseph Weiler. It is called ‘constitutionalization of EU law’ because it consists in deriving from the provisions of the Treaty general and substantive obligations, ‘constitutional rules’ that Member States are bound to abide by in all spheres in which they exercise their powers.⁸² This

⁷⁷ Case C-148/02, *Garcia Avello* [2003].

⁷⁸ In some case, connection may occur regardless of any form of extraneity because the very status of EU citizen is called into question: Case C-135/08, *Rottmann* [2010], Case C-135/08; Case C-34/09, *Ruiz Zambrano* [2011].

⁷⁹ See, for example, Case C-279/93, *Schumacker* [1995] § 45.

⁸⁰ See, for example, Case C-372/04, *Watts* [2006] § 116.

⁸¹ On preemption in EU law see recently R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford University Press, Oxford, 2009); and see K. Boskovits, *Le juge communautaire et l’articulation des compétences normatives entre la Communauté européenne et ses Etats membres* (Sakkoulas/Bruylant, Athens/Brussels, 1999) 287 ff.

⁸² On the constitutionalization of EU law, see J.H.H. Weiler, *The Constitution of Europe. ‘Do the New Clothes Have an Emperor?’ And Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), 19 ff.

development is complementary to the first one. It generates subjective rights that can be invoked in national courts even in cases where the Union is unable to act through the powers attributed to it. Those are the two aspects, one structural, the other normative, of European legal integration. Both were shaped by the Court's case law in the first fifty years of integration.

The doctrine on retained powers roughly recalls the doctrine of pre-emption first forged by the US Supreme Court. Among the various forms this judicial doctrine took on, one has been called 'obstacle preemption' or 'conflict preemption'.⁸³ This consists in considering that the legislation of a federated state will be pre-empted and consequently set aside should it be an obstacle to the full and complete achievement of the goals and objectives of the Congress legislation.⁸⁴ As a result, the spheres of competence traditionally reserved to federated States, like health or safety, may be subjected to the authority of the federal state.⁸⁵ This doctrine has made it possible to circumvent the obstacle of the Tenth Amendment of the Constitution whereby '*the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*'. At this point, the analogy with EU law is striking. However, there is a fundamental point on which the doctrines of the two Courts diverge: the US doctrine of pre-emption applies exclusively to federal acts. It is the intention or the purpose of the US Congress that is to be implemented. It aims at protecting the exercise of a federal legislative competence. By contrast, the Court's doctrine on retained powers concerns the application of EU primary law, namely the provisions on the freedom of movement related to internal market and EU citizenship. Its purpose is not to protect the legislative powers exercised by the Union. The Court relies on Treaty provisions precisely because it does not want to replace the powers of the Member States by those of the Union. EU Total law is not a matter of pre-empting the sphere occupied by national regulations but of adapting the way in which they are applied.

The doctrine on retained powers is perhaps better compared to the old

⁸³ For a full analysis of the doctrine of preemption, L. Tribe, *American Constitutional Law* (Vol I, Foundation Press, New York, 2000) 1200 ff.

⁸⁴ '*If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted... where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress*' (US Supreme Court, *Silkwood v. Kerr-McGee Corp.* 464 US (1984). See *Pacific Gas & Electric co. v. State Energy Resources Conservation & Development Comm'n* 461 US 190 (1983).

⁸⁵ On civil and social matters, see for example US Supreme Court, *Sandra Jean Dale Boggs, Petitioner v. Thomas F. Boggs, Harry M. Boggs and David B. Boggs*, n° 96-79 (1997).

doctrine of limits developed by the Court in criminal matters. In both cases, the aim is to create EU obligations so as to limit the exercise of national powers. The Court has since long recognized that

criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible' and not the Union.⁸⁶ And yet, 'it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain.'⁸⁷

It follows that criminal law may be 'affected'.⁸⁸ Notice however that this concerns mainly criminal sanctions as obstacles to free movement. Measures affected are measures of supervision or sanction that are adjunctive to legislations of economic or commercial nature. In fact, the criminal character of the regulation so affected matters less than its instrumental character.⁸⁹ It is first the policy instrument that is affected here. The doctrine on retained powers is much broader in scope. Beyond the State as regulator/sanction-taker, it is the deepest structures of the welfare state and of the nation state – taxation, social protection, conditions of persons – that are affected.

It may seem more judicious, then, to compare the doctrine with the 'absorption doctrine' described by Joseph Weiler in his outstanding study of the constitutionalization of EU law.⁹⁰ The Court has extended the reach of EU law to spheres of national law that lie outside the EU's area of competence. The finest example of this is perhaps *Casagrande*. In this judgment, as has been seen, the Court extends the rule of non-discrimination enshrined in EC regulation to a subject matter not covered by that regulation. Recent case law provides fresh examples of such extension. However, instead of referring to 'Community competences', the Court prefers to refer to the general principles of EU law.⁹¹ The argument then consists in seeing in a legislative provision the 'materialization' of a higher and more general principle, which then leads to the applicability of the said provision beyond the scope provided for by the legislation.

⁸⁶ Most recently, Case C-6/11 PPU, *El Dridi* [2011] § 53.

⁸⁷ Case 203/80, *Casati* [1981] § 27; Case C-387/93, *Banchero* [1995] § 58. See also Case C-348/96, *Calfa* [1999] § 17; Case C-338/04, *Placanica* [2007] § 68.

⁸⁸ Case C-226/97, *Lemmens* [1998] § 19.

⁸⁹ Compare on customs matters, Case C-546/09, *Aurubis Bulgaria* [2011] § 41.

⁹⁰ The term 'absorption' is used by J. Weiler in his commentary on *Casagrande*, (n 82) 47.

⁹¹ See, for example, Case C-307/05, *Del Cerro Alonso* [2007]; Case C-555/07, *Küçükdeveci* [2010].

Thereby EU law is applied to situations that lie outside the purview of the European legislator.⁹² Consider by way of illustration the *Impact* judgment on the application of the framework agreement on fixed-term employment. The Court referred to the distinction existence/exercise of competence to state:

while it is true [...] that the establishment of the level of the various constituent parts of the pay of a work falls outside the competence of the Community legislature and is unquestionably still a matter for the competent bodies in the various Members States, those bodies must nevertheless exercise their competence consistently with Community law [...] in the areas in which the Community does not have competence.⁹³

As a result, the non-discrimination clause inserted in the framework agreement shall have to be extended to the state policy relating to pay.

In view of this development, it may be tempting to reduce the totalization doctrine to the traditional absorption doctrine. However, this temptation should be resisted. Totalization is not absorption. In cases like *Casagrande* and *Impact*, the legislative competence of the Union is extended to sensitive national areas.⁹⁴ Under the application of the doctrine on retained powers, on the contrary, the Court protects ‘reserved areas’ regulated by Member States. Instead of suggesting an extension of Union competence, it acknowledges that full integration has not been and cannot be completed. There are areas which remain outside the Union jurisdiction. In these domains, the Court imparts to specific Treaty provisions a function of ‘responsibilization’ of national authorities. National authorities are vested with thinking if not acting ‘European’ to the full extent of the State’s capacity.⁹⁵ In so doing, the Court relies mainly on the provisions on free movement. They are general and flexible enough to allow for refashioning national decision-making processes.⁹⁶ The

⁹² See the criticism of this practice in Editorial Comments, ‘The scope of application of the general principles of Union law: An ever expanding Union?’ (2010) *CML Rev.* 1589.

⁹³ Case C-268/06, *Impact* [2008] § 129.

⁹⁴ On this recent development of case law, see K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) *CMLR* 1629; S. Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3 (1) *Review of European Administrative Law* 5.

⁹⁵ In analysing this case law, K. Lenaerts similarly invokes the obligation on States to ‘think federal’ (‘Federalism and the rule of law: Perspectives from the European Court of Justice’ (2010) 33 *Fordham International Law Journal* 1340).

⁹⁶ In *Rottmann*, AG Poiares Maduro considers however that ‘it would [...] be wrong to assume that [...] only certain Community rules – essentially the general principles of

obligations imposed on Member States are essentially reflexive in nature. They consist in requiring the States to use their power in a ‘reasonable’ way, in consideration of the singular case to which it applies and within the wider transnational framework in which it is exercised. The aim is to ask States to adapt their systems and procedures so as to open them up to the interests protected by the EU. What is required is a reorganization of the internal forum rather than a colonization of the State by EU rules and powers.

This may be true in theory but does it apply in practice? The dividing line may be hard to draw indeed. B. de Witte has recently convincingly argued that there has since long existed a competence for the EU ‘to pursue a large number of non-market aims by means of internal market legislation’.⁹⁷ This competence is subject to limits, in particular to ‘the requirement that the measure must also adequately contribute to improve the conditions for the establishment and functioning of the internal market’. However, in actual practice, these limits proved to be relatively easy to satisfy.⁹⁸ Now, the doctrine of totalization apparently stands as an ideal ground for developing further the ‘EU competence to protect’. The adoption of the directive on cross-border health care is an excellent example that this judicial doctrine can be readily exploited by EU institutions to justify new forms of legislative intervention.⁹⁹

V. INTEGRATION THROUGH LAW AND EQUITY

This article aimed at analysing a recurrent formula present in the case-law of the European Court of Justice. Many of the same facets of the relevant jurisprudence have already been explored in various strands of literature. These focus on EU citizenship and its impact on fields such as health, education and social security or on the ‘constitutional asymmetry’ which results from having weak EU legislative powers and strong primary Treaty provisions and the effect of this situation on the balance between economic and social rights under EU law are relevant in that connection.

law and the fundamental rights – are capable of being invoked against the exercise of State competence in this sphere. In theory, any rule of the Community legal order may be invoked if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it’ (§ 28 of opinion). So analysed, however, the doctrine becomes a mere expression of the doctrine of primacy of EU law.

⁹⁷ B. de Witte, ‘A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation’ in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2011).

⁹⁸ See e.g. Case C-58/08, *Vodafone* [2010].

⁹⁹ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare, OJ 2011 L 88, p. 45.

However, none of those studies have addressed specifically the common source of all these developments, namely the 'odd' formula on retained powers. Such formula may come as a surprise when contemplating the long evolution of EC/EU law. Under the 'constitutionalization trend' forged by the Court, EU law was deemed to encompass any situation relating to the establishment of the internal market, irrespective of the subject matter involved. Why then introduce this reference to the 'retained powers' of the Member States in the mid of the 1990s' and, since then, constantly resort to it while it may appear as an obstacle to the full application of EU law?

It has been argued that the formula has been used by the Court as a twofold argument. First as a way of recognizing the essential own capacities of the Member States within the integrated European space. Second as a matter of including certain under-protected interests and situations in the manner the national authorities usually use to think and to act. However, this refashioning of state authorities' reactions and behaviours should not be done arbitrarily. Otherwise, it would run the risk of being felt as over-intrusive. Much remains to be worked out as regards the specification of the concrete situations worthy of protection based on EU law. Closer scrutiny of this doctrine and of its implementation would be fruitful not only to de-fuse criticism elicited by the EU's supposed 'creeping competence' but also, more positively, to reconstruct the meaning of the process of integration through law and through equity.

A BAYESIAN MODEL OF THE LITIGATION GAME

F.E. Guerra-Pujol*

Over a century ago, Oliver Wendell Holmes invited scholars to look at law through the lens of probability theory: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’. But Holmes himself, and few others, have taken up this intriguing invitation. As such, in place of previous approaches to the study of law, this paper presents a non-normative, mathematical approach to law and the legal process. Specifically, we present a formal Bayesian model of civil and criminal litigation, or what we refer to as the ‘litigation game’; that is, instead of focusing on the rules of civil or criminal procedure or substantive legal doctrine, we ask and attempt to answer a mathematical question: what is the posterior probability that a defendant in a civil or criminal trial will be found liable, given that the defendant has, in fact, committed a wrongful act?

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I. INTRODUCTION

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Why do mathematics and legal studies travel in such different directions; why is it that mathematicians and lawyers rarely take the time to speak to one another? Mathematics is based on axioms and abstract symbols, beautiful patterns and elegant proofs, while law has traditionally been a linguistic game, one based on semantics, simple syllogisms, and reasoning by analogy.¹ This paper, however, attempts to bridge the gap between these apparently disparate disciplines by looking at the process of litigation through the lens of probability theory.

It was over a century ago that Oliver Wendell Holmes first invited scholars to look at the law through this lens: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’.² But Holmes himself and few other scholars have taken up this intriguing invitation. As such, in place of previous approaches to the study of law, this paper presents a non-normative, mathematical approach to law and the legal process. Specifically, we turn to Thomas Bayes, not William Blackstone, for inspiration and present a formal Bayesian model of civil and criminal litigation, or what we refer to as the ‘litigation game’.³ That is, instead of focusing on the rules of civil or criminal procedure or substantive legal doctrine, we ask and attempt to answer a mathematical question: what is the posterior probability that a defendant in a civil or criminal trial will be found liable, given that the defendant has, in fact, committed a wrongful act?

The remainder of this paper is organized as follows: following this brief introduction, Section 2 briefly summarizes previous approaches to the study of law: legal formalism, legal realism, and economic analysis of law. Next, Section 3 presents Bayes’ rule of conditional probability and explains the logic of the Bayesian or probabilistic approach to litigation, while Section 4 presents our formal Bayesian model of the process of adjudication, the litigation game. Section 5 concludes with a confession by

¹ Compare, for example, the overview of mathematics in Keith Devlin, *Mathematics: The Science of Patterns* (Holt 1994) with the description of the methods of legal reasoning in Edward H. Levi, *An Introduction to Legal Reasoning* (UChicago 1949).

² Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard LR 457, 461.

³ The main reason we refer to the process of adjudication or litigation as a game is to emphasize the interdependence of litigation outcomes. In summary, the outcome of a civil or criminal trial depends not only on the guilt or innocence of the defendant but also on the strategic moves made by the parties. For a vivid presentation of the idea of interdependence and a summary of strategic ploys, see Thomas C. Schelling, *The Strategy of Conflict* (Harvard 1960). To our knowledge, the first use of the term ‘litigation game’ appears in Marc Galanter, ‘Why the “Haves” Come Out Ahead’ (1974) 9 LSR 95, reprinted in David Kennedy and William W. Fisher, *The Canon of American Legal Thought* (Princeton 2006) 495-545.

the author.

II. BRIEF SUMMARY OF PREVIOUS APPROACHES TO THE STUDY OF LAW

Since the classical days of Christopher Columbus Langdell, Anglo-American scholars have produced three important intellectual movements, three Kuhnian ‘paradigm-shifts’⁴ often referred to as legal formalism, legal realism, and economic analysis of law (or ‘law and economics’).⁵ Beginning with Dean Langdell, the so-called ‘legal formalists’ presented law and the legal system as a rational and self-contained logical system.⁶ Then came Oliver Wendell Holmes and the more radical ‘legal realists’, who, broadly speaking, saw law as a form of politics.⁷ Where the formalists saw coherence and logical syllogisms, the realists saw politics and radical indeterminacy. But the realists and formalists shared the same fundamental flaw: they were unable to offer a workable and forward-looking research agenda. The law-and-economics movement thus attempted to fill this academic void, although some scholars have persuasively argued that economic analysis as applied to law is just another form of legal formalism.⁸

Nevertheless, economic analysis of law not only offered a forward-looking research program for legal studies, economists also imported another important innovation to legal scholarship: the use of mathematics and mathematical methods in law. Economists, not lawyers nor mathematicians, thus played a leading role in systematically applying mathematical methods to law. Perhaps the most celebrated use of mathematics in legal studies is found in the opening pages of Ronald Coase’s landmark paper, ‘The Problem of Social Cost’, in which Professor Coase presents a simple and straightforward arithmetical table to illustrate

⁴ The influential idea of scientific revolutions (or ‘paradigm-shifts’) is set forth in Thomas S. Kuhn, *The Structure of Scientific Revolutions* (3rd edn, UChicago 1996).

⁵ A general history of previous legal scholarship is more fully presented in Kennedy & Fisher, *The Canon of American Legal Thought* (n 3) 1-12. See also Pierre Schlag, ‘Spam Jurisprudence’ (2009) 97 Georgetown LJ 803, 821; Richard A. Posner, ‘The State of Legal Scholarship Today’ (2009) 97 Georgetown LJ 845, 847.

⁶ This formalist view of law appears in the preface to Dean Langdell’s famous casebook, Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (Little Brown 1871) v-vii.

⁷ Aside from Holmes, ‘The Path of the Law’ (n 2), another well-known statement of this position appears in Judge William Andrews’s dissenting opinion in *Palsgraf v Long Island RR Co* [1928] 248 NY 339, 162 NE 99 (Andrews J). See also Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia LR 809.

⁸ See, for example, Arthur Alan Leff, ‘Economic Analysis of Law: Some Realism about Nominalism’ (1976) 60 Virginia LR 451.

the reciprocal nature of negative externalities.⁹ Following Professor Coase's famous arithmetical analysis of the problem of harmful effects, many economists, and even some legal scholars, have continued to apply ever-more sophisticated mathematical methods to legal problems.¹⁰

For many scholars, however, the Achilles' heel of the economic approach to law is the 'rational actor model' of human behavior, the standard assumption of rationality. Broadly speaking, the law-and-economics literature tends to assume that legal actors have perfect information and are able to measure and weigh the benefits and costs of their actions, that is, that they are rational calculators of the expected utility of their decisions.¹¹ In contrast, in this paper we abandon the rationality assumption through the use of Bayesian analysis. Furthermore, in place of previous approaches to the study of law, such as legal formalism and legal realism, we present a formal mathematical model of civil and criminal litigation. Before presenting our Bayesian model of the litigation game, we briefly explain the logic of Bayesian reasoning below.

III. THE BAYESIAN APPROACH TO LITIGATION

In contrast to previous approaches to legal studies, our approach is Bayesian or probabilistic, since our model of the litigation game is derived from Bayes' theorem or Bayes' rule of conditional probability.¹² In summary, Bayes' theorem can be expressed in algebraic terms as follows:

$$\Pr(A|B) = ([\Pr(B|A)] \times [\Pr(A)]) \div \Pr(B)$$

⁹ Ronald H. Coase, 'The Problem of Social Cost' (1960) 3 JLE 1, 3.

¹⁰ For example, one of the leading proponents of the use of sophisticated mathematical models in law is the economist Gary Becker, who has applied such methods to illuminate a wide range of legal fields, including criminal law, employment discrimination, and even family law. Gary S. Becker, *The Economic Approach to Human Behavior* (UChicago 1976).

¹¹ In defense of the rational actor model, it is worth noting that economists generally assume that legal and other actors maximize their utility functions, not because this is a realistic assumption (it is not), but rather to apply the methods of calculus and make economic analysis of legal problems mathematically tractable or, in the words of one writer, 'soluble'. Peter Medawar, *The Art of the Soluble* (Methuen 1967) 7.

¹² The first description of Bayes' ideas appears in Thomas Bayes, 'An Essay Towards Solving a Problem in the Doctrine of Chances' (1763) 53 Philosophical Transactions of the Royal Society of London 370. In addition, a comprehensive and useful survey of Bayes' theorem appears in James Joyce, 'Bayes' theorem', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <<http://plato.stanford.edu/archives/fall2008/entries/bayes-theorem/>> accessed 19 November 2011. In addition, a highly readable and simplified summary of Bayes' contributions to probability theory may be found in Brian Everitt, *Chance Rules* (Springer 2008) 88-104.

Explained in words, Bayes's formidable-looking formula may be broken down into the following five parts:

- (i) The term on the left-hand side of the equation, $\Pr(A|B)$, refers to the conditional probability (or posterior probability) of event A, given the occurrence of event B.
- (ii) The right-hand side of the equation is a fraction: the numerator contains two parts, $\Pr(B|A) \times \Pr(A)$, while the denominator consists of one term, $\Pr(B)$.
- (iii) The first term in the numerator, $\Pr(B|A)$, refers to the conditional probability of event B, given the occurrence of event A.
- (iv) The second term in numerator, $\Pr(A)$, refers to the prior probability (or unconditional probability) of event A, that is, the probability of A in the absence of any information about event B.
- (v) Lastly, the denominator, $\Pr(B)$, is the prior probability (or unconditional probability) of event B in the absence of any information about event A.

In the remainder of this paper, we will equate the term 'guilty' (or the letter 'A') with the event that the defendant in a particular litigation game has committed a wrongful or unlawful act, that is, an act for which he should be civilly or criminally liable.¹³ In addition, we will equate the term the symbol + (or the letter 'B') with the event that the defendant is actually found liable at trial for the commission of a civil or criminal wrongful act.¹⁴ In other words, B or + is the probability of a positive litigation outcome from the perspective of the moving party in the litigation game, the plaintiff (in a civil trial) or the prosecutor (in a criminal trial). In other words, the main idea here is that the moving party—the plaintiff or prosecutor, as the case may be—obtains a favorable or positive outcome, which is denoted by the symbol +, when the defendant is found civilly or criminally liable at trial. Our Bayesian model of the litigation game thus poses the following fundamental question: what is the posterior probability that a defendant in a civil or criminal trial will be found liable, given that

¹³ The term $\Pr(A)$ or $\Pr(\text{guilty})$ (in contrast to the terms 'A' or 'guilty') refers to the prior probability in the absence of additional information that this event (i.e., the imposition of civil or criminal liability) has in fact occurred.

¹⁴ In other words, the symbol + and the term 'positive litigation outcome' is not meant to convey a pro-plaintiff or pro-prosecutor bias; instead, we use it to indicate a litigation outcome in which civil or criminal liability is imposed on the defendant.

the defendant has not, in fact, committed any wrongful act?¹⁵

At this point, we must introduce and formally define the technical concepts of ‘sensitivity’ and ‘specificity’. In the context of our Bayesian model of the litigation game, these concepts refer to the underlying reliability of a civil or criminal trial to distinguish between guilty and innocent defendants. Since civil or criminal liability should be imposed only on guilty defendants, i.e., defendants who have in fact committed an unlawful wrongful act, sensitivity and specificity are thus important values. Specifically, the ‘sensitivity’ of the litigation game—written as $\Pr(\text{BIA})$ or, in our model, $\Pr(+|\text{guilty})$ —indicates how well a civil or criminal trial is able to correctly impose liability on guilty defendants. In summary, this measure is defined formally as the probability of a positive litigation outcome (i.e., liability imposed on the defendant, which represents a ‘positive’ outcome from the plaintiff’s or prosecutor’s perspective), given that the defendant being tried has actually committed an unlawful wrongful act.

By contrast, the ‘specificity’ of the litigation game, which may be written as $\Pr(-|\text{innocent})$, reflects how well a civil or criminal trial is able to correctly screen out innocent defendants. This measure is defined formally as the probability of a negative litigation outcome (i.e., no liability imposed on the defendant, which represents a ‘negative’ outcome from the perspective of the moving party, plaintiff or prosecutor), given that the defendant has not committed a wrongful act.

Before presenting our Bayesian model in section 4 below, we wish to make three general points about Bayesian reasoning in general. First, the basic idea behind Bayes’s theorem is the idea that the conditional probability of event A, such as a defendant being found liable, given the occurrence of another event B, the defendant’s commission of a wrongful act, not only depends on the strength of the relationship between A and B; it also depends on the prior probability of each event. Thus, according to Bayes’s theorem, the probability that a defendant in a civil action will be found liable (for tort, breach of contract, etc.), given that a plaintiff has brought an action against the defendant, will generally depend on two sets of probabilities: (i) the likelihood of the defendant being found liable given the strength of plaintiff’s claim, and (ii) the prior probabilities or success rates of plaintiffs and defendants generally.

¹⁵ Like the term ‘litigation’, we define ‘wrongful act’ broadly to include both civil wrongs, such as torts and breaches of contract, as well as criminal wrongs, such as homicide and theft.

Secondly, notice that the probability of some event A conditional on some other event B is not the same as the conditional probability of event B given event A, or stated formally: $\Pr(A|B)$ is not equal to $\Pr(B|A)$.¹⁶ For example, the probability that a defendant will be found civilly or criminally liable, given that the defendant has committed some wrongful act (the commission of a tort, a breach of contract, a crime, etc.), is not the same as the probability that the defendant's wrongful conduct will result in liability, given that the plaintiff brings an a civil or criminal action against the defendant. We will explore this idea further in section 4 below, when we present our Bayesian model of the litigation game.

Lastly, it is also worth noting that our Bayesian model of the litigation game does not rely on any unrealistic assumptions about human rationality, nor does it require any detailed information about any particular rules of procedure or about substantive legal doctrine. Since such procedural rules and legal doctrines are often unclear, contested, and subject to manipulation,¹⁷ one can begin to appreciate the advantage of the Bayesian approach to civil and criminal litigation. In place of hunches, verbal arguments, and the inevitable 'thrust and parry' of competing interpretations of indeterminate rules and doctrines,¹⁸ our Bayesian approach to the litigation game attempts to understand the legal process from a probabilistic perspective.

IV. THE MODEL

Here, we present a stylized Bayesian model of the litigation game. To do so, we make a number of simplifying assumptions about the litigation process. First, we define 'litigation' broadly to include both criminal and civil cases. In essence, the litigation game (whether civil or criminal) is a contest in which the moving party, the plaintiff or the prosecutor, attempts to impose civil or criminal liability on the defendant for the commission of an unlawful or wrongful act (whether civil or criminal in nature). And likewise, seen from the defendant's perspective, litigation is a contest in which defendants attempt to avoid the imposition of liability. Our model thus presents litigation as a game with two possible outcomes: (i) positive and (ii) negative (hence the term, 'litigation game'). Specifically, a positive outcome occurs when the moving party successfully imposes civil or criminal liability on the defendant; a negative outcome, when the defendant is able to avoid the imposition of liability.¹⁹

¹⁶ This point is also made in Everitt, *Chance Rules* (n 12) 90.

¹⁷ See, for example, Gordon Tullock, *The Logic of the Law* (Basic Books 1971) 48-49.

¹⁸ Karl Llewellyn, *The Common Law Tradition* (Little Brown 1960) 522-529.

¹⁹ As an aside, we note that our Bayesian model of the litigation game ignores the temporal dimension of adjudication ('time costs' and the problem of delay); instead,

Before proceeding, notice that the relevant rules of procedure (i.e., the rules of the litigation game)—as well as the scope and legal meaning of ‘wrongful acts’ and the types of legal liability imposed on wrongful actors—are not relevant and are thus extraneous to our simplified model. In place of traditional legal analysis, our model abstracts from the morass of legal materials and takes these features of the legal landscape as a given. Stated formally, these details are exogenous or external to our model. Having stated our simplifying assumptions, we now proceed to apply Bayes’ theorem to the litigation process. Recall the statement of Bayes’ rule from the previous section of this paper:

$$\Pr(A|B) = [\Pr(B|A) \times \Pr(A)] \div \Pr(B)$$

Translated into the language of our model of the litigation game, Bayes’ rule may now be restated as follows:

$$\Pr(\text{guilty}|+) = [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div \Pr(+)$$

In other words, we want to find the posterior probability, $\Pr(\text{guilty}|+)$, that a defendant will be found liable at trial, given that he or she has actually committed some wrongful act. Ideally, of course, liability should be imposed only when a defendant has actually committed a wrongful act, and conversely, no liability should be imposed on innocent defendants.²⁰ But in reality, false negatives and false positives will occur for a wide variety of reasons, such as heightened pleading standards and abuse of discovery in civil actions and prosecutorial discretion and prosecutorial misconduct in criminal cases.²¹ Stated colloquially, some guilty defendants will be able to avoid the imposition of liability, while some innocent ones will be punished.

Our Bayesian approach to the litigation game takes into account both (i) the possibility of a false positive (i.e., the imposition of liability when the defendant has not committed any wrongful act) as well as (ii) the

we assume for simplicity that litigation is an instantaneous event, like a coin toss or the roll of a die. For a deeper exploration of the problem of time scarcity, see F.E. Guerra-Pujol, ‘Time Scarcity and the Problem of Social Replicants: Clones and the Coase Theorem’ (forthcoming) 2 JLS.

²⁰ In an ideal or perfect legal system, the value for $\Pr(\text{guilty}|+)$ should be equal to or close one. Stated formally, $\Pr(A|B) \approx 1$.

²¹ In the context of the litigation game, a false positive or Type I error occurs when a defendant who has not committed a wrongful act is nevertheless found liable for the commission of such act. By contrast, a false negative or Type II error occurs when a tortious or guilty defendant is able to avoid the imposition of liability.

possibility a false negative (no liability even though the defendant has, in fact, committed a wrongful act). The purpose of our stylized model, however, is not to explore the many systemic imperfections—procedural or practical or otherwise—in the existing legal system, imperfections contributing to the problem of false positives and negatives. This well-worn path has been explored by many others.²² Instead, the goal of our model is to solve for $\Pr(\text{guilty}|\text{+})$ and answer the following key question: how reliable is the litigation game, that is, how likely is it that a defendant who is found liable is, in fact, actually guilty of committing a wrongful act?

We will consider four possible scenarios or types of litigation games in the remainder of this paper: (i) non-random adjudication with risk-averse or ‘virtuous’ moving parties, (ii) non-random adjudication with risk-loving or ‘less-than-virtuous’ moving parties, (iii), random adjudication with risk-averse moving parties, and (iv) random adjudication with risk-loving moving parties. This schema may thus be depicted in tabular form as follows:

Type of litigation game	Type of moving party
non-random adjudication	risk-averse
non-random adjudication	risk-loving
random adjudication	risk-averse
random adjudication	risk-loving

In summary, the adjudication variable in our model refers to the reliability or screening effectiveness of the process of adjudication. Specifically, ‘non-random adjudication’ refers to litigation games that are 90% sensitive and 90% specific, an assumption based on the classic and oft-repeated legal maxim ‘it is better that ten guilty men escape than that one innocent suffer’.²³ Random adjudication, in contrast to non-random adjudication, occurs when litigation games are only 50% sensitive and 50% specific and thus no more reliable than the toss of a coin.²⁴ As an aside, it is worth

²² See, for example, Galanter, ‘Why the “Haves” Come Out Ahead’ (n 3); see also Tullock, *The Logic of Law* (n 17).

²³ 4 Bl Comm 358, quoted in Eugene Volokh, ‘N Guilty Men’ (1997) 146 U Penn LR 173.

²⁴ With respect to trials with two possible outcomes (e.g., positive and negative, or heads and tails), by definition a random outcome cannot occur with more nor with

asking, why would the process of adjudication ever produce a ‘random’ outcome in the real world? One possibility is that the level of randomness or unpredictability of adjudication might be a function of the level of complexity or ambiguity of legal rules. Consider, for example, the ‘reasonable man’ standard in tort law: the more complex or ‘open-textured’ the rules of substantive and procedural law are, the more random the litigation game will be.²⁵ Also, before proceeding, notice that the adjudication variable can never be 100% sensitive nor 100% specific since errors are inevitable in any process of adjudication, regardless of the litigation procedures that are in place.

In addition, the term ‘risk-averse’ or ‘virtuous’, as applied to moving parties, refers to plaintiffs and prosecutors who play the litigation game only when they are at least 90% certain that the named defendant has committed an unlawful wrongful act, while ‘risk-loving’ or ‘less-than-virtuous’ moving parties refers to plaintiffs and prosecutors who are willing to play the litigation game even when they are only 60% certain that the named defendant has committed a wrongful act. Stated colloquially, virtuous plaintiffs are civil plaintiffs who rarely file frivolous claims and criminal prosecutors who rarely abuse their discretion; by contrast, less-than-virtuous moving parties are more willing to gamble on litigation games than their more virtuous colleagues.

I. *Non-random adjudication with risk-averse moving parties*

Suppose the litigation game is 90% sensitive and 90% specific, that is, suppose the process of litigation is able to determine correctly, at least 90% of the time, when a defendant has committed a wrongful act, and suppose further that the process will also determine correctly, again at least 90% of the time, when a defendant has not, in fact, committed a wrongful act. The intuition behind this assumption (non-random adjudication) is that reliable legal procedures will tend to produce just and fair results.²⁶ Of course, the existence of reliable adjudication procedures in which liability is imposed only on guilty defendants is not a sufficient condition for justice. When a defendant has broken an unjust or unfair law (licensure requirements and racial segregation laws quickly come to mind), justice would be better served by an unreliable adjudication procedure (i.e.,

less than 50% probability. We thank our research assistant, Sydjia Robinson, for pointing out this observation to us.

²⁵ See HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994); see also Gordon Tullock, *The Logic of the Law* (n 17) 48-49. For further exploration of this topic, see F.E. Guerra-Pujol, ‘Chance and Litigation’ (forthcoming) 21 Boston U Public Interest LJ.

²⁶ Henry M. Hart and Albert M. Sacks, *The Legal Process* (William N. Eskridge and Philip P. Frickey eds, Foundation 1994).

by not enforcing the unjust or unfair law in the first place). But putting aside the underlying meaning of justice, such a litigation game appears to be a highly accurate one, since it will correctly determine with 90% probability, or nine times out of 10, whether the defendant has or has not committed a wrongful act, an essential precondition before liability may justly be imposed.

Nevertheless, even in the absence of unjust laws, our model of non-random adjudication still suffers from a 10% error rate. Given this error rate, we must turn to Bayes' rule to determine the posterior probability that liability will nevertheless be incorrectly imposed on an innocent defendant, that is to say, the probability that a defendant who has not committed a wrongful act will be incorrectly classified as a wrongful or guilty defendant. To apply Bayes' theorem, we must find the prior probability that any given defendant, selected at random, has in fact committed a wrongful act. What is this prior probability?

First, let the term 'guilt' stand for a guilty defendant, let 'innocent' represent an innocent defendant, and let the + symbol indicate the event of a positive litigation outcome for the plaintiff or prosecutor, as the case may be. That is, from the plaintiff or prosecutor's perspective, a positive outcome, or +, occurs when liability is eventually imposed on the defendant. We now proceed to find the values for $\Pr(+|\text{guilty})$, $\Pr(+|\text{innocent})$, $\Pr(\text{guilty})$, $\Pr(\text{innocent})$, and $\Pr(+)$. To begin with, $\Pr(+|\text{guilty})$ is the probability that a guilty defendant will be found guilty at the end of a litigation game. Since we have assumed that the litigation game is 90% sensitive, the value for $\Pr(+|\text{guilty})$ is equal to 0.9. By the same token, $\Pr(+|\text{innocent})$, the probability that a particular litigation game will produce a false positive (i.e., the probability that liability will be imposed on an innocent defendant) is equal to 0.1. This value is 0.1 since, given our initial assumptions, the litigation game produces false positives only 10% of the time.

Now suppose that plaintiffs and prosecutors are risk-averse or virtuous parties, that is, assume that plaintiffs and prosecutors alike are willing to play the litigation game only when they are at least 90% certain that the named defendant has, in fact, committed an unlawful wrongful act.²⁷ Accordingly, given these stringent assumptions (i.e., risk-averse moving parties and non-random adjudication), the prior probability that a given

²⁷ This risk-averse conduct is considered 'virtuous' in our model since such moving parties are less willing than their risk-loving colleagues to gamble on the outcome of litigation, or expressed in legal language, virtuous civil plaintiffs rarely file frivolous claims and virtuous criminal prosecutors rarely abuse their discretion. The reader may rest assured, however, that we will relax these unrealistic assumptions later.

defendant is guilty is 90%, or stated formally, letting A stand for the prior probability of being guilty, then $\Pr(A) = \Pr(\text{guilty}) = 0.9$. Summing up, $\Pr(A)$ or $\Pr(\text{guilty})$ is the prior probability, in the absence of any additional information, that a particular defendant has committed a wrongful act. As stated above, this term is equal to 0.9 since we have assumed that 90% of all named defendants are guilty. Likewise, we determine $\Pr(B)$ or $\Pr(\text{innocent})$, the prior probability that a particular defendant has not committed any wrongful act. This is simply $1 - \Pr(\text{guilty})$ or 0.1, since $1 - 0.9 = 0.1$.

Lastly, $\Pr(+)$ refers to the prior probability of a positive litigation outcome—again, ‘positive’ from the plaintiff’s or prosecutor’s perspective—in the absence of any information about the defendant’s guilt or innocence. This value is found by adding the probability that a true positive result will occur ($0.9 \times 0.9 = 0.81$), plus the probability that a false positive will happen ($0.1 \times 0.1 = 0.01$), and is thus equal to 0.81 plus 0.01 = 0.82. Stated formally, $\Pr(+)=[\Pr(+|\text{guilty}) \times \Pr(\text{guilty})]$ plus $[\Pr(+|\text{innocent}) \times \Pr(\text{innocent})]$. That is, the prior probability of a positive litigation outcome, $\Pr(+)$, is the sum of true positives and false positives and, given our assumptions above, is equal to 0.82 or 82%.

Having translated all the relevant terms of Bayes’ theorem, we now restate our Bayesian model of litigation game and find the posterior probability, $\Pr(\text{guilty}|+)$, that civil or criminal liability will incorrectly imposed on a guilty defendant (i.e., the probability that a defendant who has not committed a wrongful act will nevertheless be incorrectly classified as a wrongful or guilty defendant):

$$\begin{aligned}\Pr(\text{guilty}|+) &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div \Pr(+) \\ &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div ([\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] + \\ &\quad [\Pr(+|\text{innocent}) \times \Pr(\text{innocent})]) \\ &= (0.9 \times 0.9) \div [(0.9)(0.9) + (0.1)(0.1)] \\ &= 0.81 \div 0.82 = 0.988\end{aligned}$$

In other words, given our rosy assumptions above, the outcome of any particular litigation game will be highly accurate. Specifically, the probability that a defendant who is found liable for a wrongful act is actually guilty of committing such wrongful act is close to 99%, a value that appears to vindicate Hart and Sacks’s optimistic vision of legal process, though there is still a 1% probability that an innocent defendant will nonetheless be found liable. But what happens when the litigation game is played by strategic plaintiffs or zealous prosecutors? That is, what happens when plaintiffs file a greater proportion of frivolous claims (relative to the optimal level of frivolous claims) or when prosecutors

routinely ‘overcharge’ criminal defendants with extraneous or vague offenses (e.g., conspiracy)? We turn to this possibility below.

2. *Non-random adjudication with risk-loving moving parties*

Suppose the litigation game is still highly sensitive and specific as before (i.e., 90% sensitive and 90% specific), but that plaintiffs and prosecutors are risk-loving or less-than-virtuous actors. Specifically, assume that the moving parties are willing to play the litigation game even when they are only 60% certain (instead of 90% certain, as we assumed earlier) that the named defendant has committed a wrongful act.²⁸ The intuition behind this revised assumption is that, in reality, the litigation game might be played by litigants (as well as judges) who are engaged in rent-seeking and self-serving behavior.²⁹ Thus, with risk-loving moving parties, the prior probability, $\Pr(\text{guilty})$, that a given defendant is guilty is now only 60%, while the prior probability, $\Pr(\text{innocent})$, that a particular defendant has not committed a wrongful act is $1 - \Pr(\text{guilty})$, or $1 - 0.6 = 0.4$. Stated formally: $\Pr(\text{guilty}) = 0.6$, and $\Pr(\text{innocent}) = 0.4$.

Next, we find the probability that a guilty defendant will be found guilty, or $\Pr(+|\text{guilty})$. In this variation of our model, the value for $\Pr(+|\text{guilty})$ is equal to 0.90 since we continue to assume the litigation game is 90% sensitive. $\Pr(+|\text{innocent})$, the probability that a particular litigation game will produce a false positive (i.e., the probability that liability will be imposed on an innocent defendant), remains 0.1. Lastly, recall that $\Pr(+)$ is the probability that a true positive result will occur (in this case, $0.9 \times 0.6 = 0.54$), plus the probability that a false positive will happen ($0.1 \times 0.4 = 0.04$), and is thus equal to 0.54 plus 0.04 = 0.58. Stated formally, $\Pr(+)$ = $[\Pr(+|\text{guilty}) \times \Pr(\text{guilty})]$ plus $[\Pr(+|\text{innocent}) \times \Pr(\text{innocent})]$ = 0.54 plus 0.04 = 0.58.

²⁸ Such behavior is ‘less-than-virtuous’ in our model because the moving party is less concerned with the defendant’s actual guilt than a risk-averse or virtuous moving party.

²⁹ For further exploration of this problem, see generally Galanter, ‘Why the “Haves” Come Out Ahead’ (n 3) and Gordon Tullock, *The Logic of the Law* (n 17). In principle, a more hard-core ‘risk-loving’ moving party might be willing to gamble on the litigation game even when he or she is only 50% certain of the outcome. Nevertheless, we assume that a risk-loving moving party requires a 60% probability of a positive litigation outcome simply because he or she must expend resources to play the litigation game. Put another way, since the litigation game is not costless—a point made in F.E. Guerra-Pujol, ‘Coase’s Paradigm’ (2011) 1 Indian JLE 1, 27–32; see also Galanter, ‘Why the “Haves” Come Out Ahead’ (n 3)—and thus, broadly speaking, the higher the cost of playing the litigation game (relative to the resources of the moving party), the more risk-averse an otherwise risk-loving moving party will be.

Given these revised assumptions—non-random adjudication and less-than-virtuous plaintiffs—we now find the posterior probability that liability will be correctly imposed on a guilty or wrongful defendant as follows:

$$\begin{aligned}\Pr(\text{guilty}|\text{+}) &= [\Pr(\text{+}|\text{guilty}) \times \Pr(\text{guilty})] \div \Pr(\text{+}) \\ &= [\Pr(\text{+}|\text{guilty}) \times \Pr(\text{guilty})] \div ([\Pr(\text{+}|\text{guilty}) \times \Pr(\text{guilty})] + \\ &\quad [\Pr(\text{+}|\text{innocent}) \times \Pr(\text{innocent})]) \\ &= (0.9 \times 0.6) \div [(0.9)(0.6) + (0.1)(0.4)] \\ &= 0.54 \div 0.58 = 0.931\end{aligned}$$

In this case, despite the presence of risk-loving moving parties, the outcome of any particular litigation game will still be highly reliable. Specifically, although there is a 7% chance that an innocent defendant will be found liable, the posterior probability that a defendant who is found liable for a wrongful act is actually guilty is still 93%, a value that, once again, appears to affirm the Hart and Sacks vision of the legal system.³⁰ But now, consider what happens when litigation is a crapshoot, that is, stated formally, what happens when the litigation game is only 50% sensitive and 50% specific?

3. *Random adjudication with risk-averse moving parties*

Suppose now that the litigation game is only 50% sensitive and 50% specific. In other words, suppose litigation games are completely random.³¹ Under this seemingly unusual scenario, the process of adjudication is no better than a coin toss. Although this assumption may appear fanciful, as we explained earlier,³² the randomness of adjudication might be a function of the level of the complexity or the level of ambiguity of the applicable legal doctrines (e.g., assumption of risk) or procedural rules (e.g., *res judicata*). In plain English, the more complex or ambiguous the applicable law is, the more random or arbitrary the outcome of litigation will be.

In summary, random adjudication produces purely random results, no better than a coin toss, since it will correctly determine with one-half probability, or $p = 0.5$, whether the defendant has or has not committed a

³⁰ Hart & Sacks, *The Legal Process* (n 26).

³¹ To this end, consider the following statement by one of the author's favorite professors in law school: 'Litigation is a crapshoot'. John Langbein, Sterling Professor of Law and Legal History, Yale Law School (New Haven, Conn). The author does not recall the precise date when this proposition was made, but this statement, like Holmes's prediction theory of law, has had a profound influence on our thinking about the legal process. For an empirical exploration of the randomness of litigation, see F.E. Guerra-Pujol, 'Chance and Litigation' (n 25).

³² See text accompanying notes 24 and 25.

wrongful act. Given this inherent randomness, along with the presence of virtuous or risk-averse moving parties, we now turn to Bayes' rule to determine the posterior probability that liability will be incorrectly imposed on an innocent defendant (i.e., the probability that a defendant who has not committed a wrongful act will be incorrectly classified as a wrongful or guilty defendant). Again, let 'guilt' stand for a guilty defendant, 'innocent' an innocent defendant, and the symbol + the event of a positive litigation outcome for the moving party (plaintiff or prosecutor). Next, we find the values for $\Pr(\text{guilt})$, $\Pr(\text{innocent})$, $\Pr(+|\text{guilt})$, $\Pr(+|\text{innocent})$, and $\Pr(+)$.

First, assuming that plaintiffs and prosecutors are virtuous or risk-averse actors and thus are willing to play the litigation game only when they are at least 90% certain that the named defendant is guilty, then $\Pr(\text{guilty})$, the prior probability in the absence of other information that a particular defendant has committed a wrongful act, will be equal to 0.9, or stated formally, $\Pr(\text{guilty}) = 0.9$. Likewise, $\Pr(\text{innocent})$, the prior probability in the absence of other information that a particular defendant has not committed a wrongful act, is simply $1 - \Pr(\text{guilty})$ or 0.1, since $1 - 0.9 = 0.1$.

Next, $\Pr(+|\text{guilty})$, the probability that liability will be imposed on a defendant who is actually guilty, is 0.5 since the litigation game in this variation of our model purely random (i.e., 50% sensitive). Similarly, $\Pr(+|\text{innocent})$, the probability that liability will be imposed on an innocent defendant, is also 0.5 since, given our revised assumptions, the litigation game will produce a false positive half of the time the game is played.

Lastly, recall that $\Pr(+)$ is the sum of true positives and false positives, that is, the prior probability of a positive litigation outcome, positive from the plaintiff's or prosecutor's perspective, in the absence of any information about the defendant's guilt or innocence. Specifically, given our assumptions above, this value is equal to 0.5, that is, $0.5 \times 0.9 = 0.45$ (true positives) plus $0.5 \times 0.1 = 0.05$ (false positives). Thus, the prior probability of a positive litigation outcome, $\Pr(+)$, absent any information about the defendant's guilt or innocence, is equal to 50%.

Thus, given random adjudication and virtuous or risk-averse plaintiffs, we apply Bayes' theorem as follows:

$$\begin{aligned}
 \Pr(\text{guilty}|+) &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div \Pr(+) \\
 &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div ([\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] + [\Pr(+|\text{innocent}) \times \Pr(\text{innocent})]) \\
 &= (0.5 \times 0.9) \div [(0.5)(0.9) + (0.5)(0.1)] \\
 &= 0.45 \div 0.50 = 0.9
 \end{aligned}$$

This result is perhaps the most surprising one thus far. Even when the litigation game is a purely random process, no better than a coin toss, the outcome of any individual litigation game will still be highly reliable, given the presence of virtuous moving parties. Specifically, under this scenario there is a 90% probability that a defendant who is found liable for a wrongful act is, in fact, actually guilty.³³ Although this value is less than the corresponding values for $\Pr(\text{guilty}|\text{+})$ in the previous two permutations of the model (subsections 4.1 and 4.2 above), this difference is marginal at best, considering the enormous qualitative differences between non-random adjudication and a purely random legal system. The present permutation of the model, however, assumes the presence of virtuous plaintiffs and prosecutors. What happens when the litigation game is purely random and the moving parties are less-than-virtuous? We explore this intriguing possibility in subsection 4.4 below.

4. *Random adjudication with risk-loving moving parties*

Now suppose the litigation game is still a crapshoot but that plaintiffs and prosecutors are risk-loving or 'less-than-virtuous'; that is, assume that the moving parties are more willing to gamble than their virtuous colleagues. Specifically, we will assume that the litigation game is 50% sensitive and 50% specific and that plaintiffs and prosecutors are willing to play the litigation game even when they are only 60% certain that the named defendant has committed a wrongful act. Although these assumptions do not appear to be plausible, this permutation of our model, however implausible, may nevertheless provide an instructive counter-factual or hypothetical illustration of our Bayesian approach to litigation.³⁴

Given our revised assumptions (i.e., random results and risk-loving or less than virtuous actors), we once again turn to Bayes' theorem to determine the posterior probability that liability will be incorrectly imposed on an innocent defendant (i.e., the probability that a defendant who has not committed a wrongful act will be incorrectly classified as a wrongful or guilty defendant), and once again, 'guilt' stands for a guilty defendant, 'innocent' indicates an innocent defendant, and the symbol + represents the event of a positive litigation outcome for the plaintiff or prosecutor.

As such, in the absence of any additional information or evidence, $\Pr(\text{guilty})$, the prior probability that a particular defendant has committed

³³ In other words, even when the outcome of litigation is random, there is only a 10% chance that an innocent defendant will be found guilty or civilly or criminally liable.

³⁴ This scenario, however, would be plausible in the presence of risk-loving actors, or if we picture the litigants as pure gamblers.

a wrongful act, is equal to 0.6, while $\Pr(\text{innocent})$, the prior probability that a particular defendant has not committed a wrongful act, is 0.4 (i.e., $1 - \Pr(\text{guilty})$, or $1 - 0.6$). Next, $\Pr(+|\text{guilty})$, the probability that liability will be imposed on a defendant who is actually guilty, and $\Pr(+|\text{innocent})$, the probability that liability will be imposed on an innocent defendant, are both equal to 0.5 since, given our assumptions, this version of the litigation game is purely random. Lastly, $\Pr(+)$, the sum of true positives and false positives, is also 0.5 since, given our assumptions above, $0.5 \times 0.6 = 0.3$ (true positives) and $0.5 \times 0.4 = 0.2$ (false positives), or put another way, the prior probability of a positive litigation outcome (again, from the plaintiff's or prosecutor's perspective), absent any information about the defendant's guilt or innocence, is equal to 50%.

Therefore, given random adjudication and risk-loving plaintiffs, we now apply Bayes' theorem as follows:

$$\begin{aligned} \Pr(\text{guilty}|+) &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div \Pr(+) \\ &= [\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] \div ([\Pr(+|\text{guilty}) \times \Pr(\text{guilty})] + [\Pr(+|\text{innocent}) \times \Pr(\text{innocent})]) \\ &= (0.5 \times 0.6) \div [(0.5)(0.6) + (0.5)(0.4)] \\ &= 0.3 \div \text{by } 0.5 = 0.6 \end{aligned}$$

What is most surprising about this result is the ability of the litigation process to produce reliable results more than half the time, even when the underlying litigation game itself is purely random and even when the actors are less than virtuous. Specifically, the probability that the outcome of any individual litigation game will be accurate is 60%, even though the underlying litigation game is purely random, no more reliable than a coin toss. One way of explaining this potential paradox is to take another look at the $\Pr(\text{guilty})$ term: the prior probability in the absence of additional information that a defendant selected at random is guilty (i.e., the prior probability that a particular defendant has committed a wrongful act). This prior probability term exerts a decisive influence in the fourth permutation of our model precisely because the outcome of litigation is purely random. That is, when litigation is a crap shoot, or to be more precise, when litigation is a coin toss, both the prior and posterior probabilities of the defendant's guilt are the same. Here, since $\Pr(\text{guilt}) = 0.6$, then $\Pr(+|\text{guilty}) = 0.6$.

V. CONCLUSION

We wish to close this paper with a confession. Ex ante, before researching and writing this paper, we took a dim view of the litigation game. Given the complexity and ambiguity of substantive as well as procedural rules, the

indeterminate nature of most legal standards, and the high levels of strategic behavior by both litigants and judges, we expected our Bayesian model to confirm this negative view of the legal process. Ironically, however, the results of our Bayesian model of the litigation game are still surprising. In essence, they show that, regardless of the operative rules of procedure and substantive legal doctrine, 'positive' litigation outcomes (as defined in this paper) are nevertheless a highly reliable indicator of a defendant's guilt. Specifically, our model demonstrates that when a defendant is found guilty of committing a wrongful act (civil or criminal), there is a high posterior probability that the defendant actually committed such wrongful act, even when the underlying process of adjudication is random and even when the moving parties are risk-loving or less-than-virtuous.

LEGAL APPLICATION, GLOBAL LEGAL PLURALISM AND HIERARCHIES OF NORMS

Jean-Sylvestre Bergé*

In a context of global legal pluralism, the application of the law can be analysed at several levels, namely national, international and regional. At each level, legal systems are organized around different normative hierarchies. This raises questions regarding the articulation of these constructions in a multilevel perspective of legal application that is both practical and theoretical. To answer these questions, two approaches are imaginable: a first that studies the application of normative hierarchies, level by level and, beyond that, legal system by legal system; a second that aims to make explicit the interactions that can result from the coexistence of different normative levels. This study favours the second approach while attempting to appreciate the material and formal utility of normative hierarchies each time a jurist questions the application of the law at different levels. Two conclusions can be drawn from this study: there is a plurality of normative hierarchies in a context of global legal pluralism; in a process of multilevel legal application, normative hierarchy coexists with other methods of reasoning.

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I. INTRODUCTION

This study is based on a conference presentation delivered in June 2011 at the Sorbonne, during a half-day of studies organised by the Association Française des lauréats de la Chancellerie des Universités de Paris (ALCUP) on the general topic of 'normative hierarchy'¹. the study is part of a current research project² that aims to render explicit the methods of legal application in a triple national, international and European context. Without calling into question, and without even discussing, the numerous reflections on the methods of production and interpretation of the law at a global scale, such a research project aims to further the questions with which jurists (judges, attorneys, counsel, experts) of domestic, international or European law are frequently confronted at the stage of legal application. The practical perspective of legal application can potentially shed a light on the theoretical questions regarding the different ways a jurist can apprehend the relationships between domestic, regional and international legal systems and the norms contained therein.

In the following study, it is the utility of 'normative hierarchy' type constructions that is discussed at the stage of legal application at a national, international or European level.

II. GLOBAL LEGAL PLURALISM AND MULTILEVEL LEGAL APPLICATION

¹ L'ALCUP is presided over by Professor G. Teboul. It's secretary general is L. Soubelet. Professors J. Ghestin, Ph. Jestaz and G. Teboul also participated in this conference. The works of the association are regularly published at L'Harmattan (Paris).

² *Le pluralisme juridique mondial appliqué*, (Dalloz, forthcoming 2013) (Méthodes du droit collection).

1. *Global legal pluralism*

Developed by Santi Romano³ as an instrument to define legal order, legal pluralism has been largely used in legal theory, sociology and anthropology⁴ to describe the diversity of legal systems and the connections between them. Legal pluralism, without a doubt, has a more specific significance in the global environment that is both simpler and more modest.⁵ Synonymous with internationalisation and regionalisation of the law, global legal pluralism⁶ describes, in a context of globalisation of trade, a multiplicity of places of fabrication and application of law that appear outside of the state model. Law is no longer only constructed in the national sphere. As a result of the activity of international and regional (namely European) organisations, these organisations have a state origin (the United Nations, the World Trade Organisation, the International Labour Organisation, the Council of Europe, etc) or a private origin (non-governmental organisations, multinational corporations, trade unions, etc.). The national level, which is not a stranger to certain forms of legal pluralism, does not disappear. Rather, it coexists with models developed at the international and European contexts.

2. *The Application of the law at different levels*

The jurist devotes an important part of his work to mastering the application of the law in order to anticipate its effects. Whether he is a legal practitioner or an academic, counselor, litigator or decision maker, the jurist is called upon to create tools to help apply the law.

³ Santi Romano, *L'ordre juridique*, (P. Gothot and L. François tr., Dalloz 2002 reissue).

⁴ For a global approach, along with the numerous bibliographical references, see Verbo, 'Pluralisme juridique' in A.-J. Arnaud (ed.), *Dictionnaire encyclopédique de théorie et sociologie du droit* (2nd edn, LGDJ 1993). See also, more recently, *Cahiers d'Anthropologie du droit, Les pluralismes juridiques*, (Karthala 2003); *Archives de philosophie du droit, Le pluralisme*, (Dalloz 2006). For a renewed analysis of these questions, see, in particular, M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (N. Norberg tr., Hart 2009).

⁵ On this particular significance, see: M. Delmas-Marty, *Les Forces imaginantes du droit – I. Le relatif et l'universel* (Seuil 2004) 228.

⁶ 'Global Legal Pluralism' has been regularly used since the end of the 1990s by one author: F. Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law', (1999) *Eur. Law Rev.* 334 (for a French version see : (2003) *Droit et Société* 435). This expression has had a certain success in English language legal literature. See: O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart 2004); P. S. Berman, 'Global Legal Pluralism', (2007) *South. Calif. Law Rev.*, 1155; R. Michaels, 'Global Legal Pluralism', (2009) *Annual Review of Law & Social Science* 45.

In a context of global legal pluralism, this application of the law can be imagined at different levels. The expression 'levels of legal application' does not necessarily have a very strong theoretical value. It does not serve to designate a specific 'system' or 'legal order'⁷. In a voluntarily vague way, this concept alludes to the idea that the jurist can be guided in his reflection or practice to apply the law in different legal environments. These environments include the purely internal State environment, the national level, which includes the local level. This environment can go beyond State borders, either referring to relations between several States, or having a purely transnational dimension; this is the international level. Finally, the legal environment can also have a regional dimension, aimed at a specific region of the globe, such as, for example, the European level.

The objective of a multilevel approach to legal application is to take stock of the facts useful for resolving a case, regardless of whether these facts belong to the national, European or international level. It is up to the jurist to identify the relevant level or levels, that is to say the levels that are most likely to supply the methods and solutions useful for resolving a given case. Is the situation purely internal to a State, belonging *a priori* to the national level? On the contrary, is the situation international, mobilising resources of international law (either private or public) or transnational law? Finally, is the situation regional, subject to, for example, European law (the European Union or the Council of Europe)? The answers to these questions give a first indication as to what we can call the level of reference, or the level at which the case is primarily connected.

Once this first step is completed, the jurist can question the relevance of projecting the case to levels other than that which served as an *a priori* level of reference. Indeed, it is possible that a purely domestic situation may nonetheless be subject to rules elaborated at the international or European level. Similarly, we can imagine that a European or international situation involved the application of national law. Finally, we can imagine that a mainly international case can be transposed at the European level or vice-versa. Certain links between levels are apparent. On the contrary, others may be difficult to identify. To recognize them, one must have the dexterity to project the situation outside of its level of reference.

This identification work is very useful. It allows us to confront methods and solutions drawn from different levels. However, it is insufficient. In

⁷ Regarding the distinction between these two concepts, see, along with the numerous bibliographical references, the synthetic presentation proposed by par P. Deumier in his recent *Introduction générale au droit* (LGDJ 2011), n° 128 and the following numbers.

the perspective of laying out the facts extracted from their original environment, the jurist that applies the law cannot be satisfied with a down to earth and rudimentary approach that consists in comparing legal norms⁸. The comparison between the potentialities offered by different levels of legal application must also have a dynamic dimension where the work of the person comparing considers not only the applicable sources drawn from different levels (national, international or European), but also the legal environment of these sources. Thus, the application of national, international or European law does not necessarily respond to the same logic, depending on whether it is considered by a national, international or European⁹ judge.¹⁰

III. THE PLACE OF NORMATIVE HIERARCHY IN A CONTEXT OF LEGAL APPLICATION AT THE INTERNATIONAL OR EUROPEAN LEVEL

I. 'Normative hierarchy' type constructions at different levels of legal application

A multilevel legal application that integrates a comparison of the different legal systems present highlights a plurality of 'normative hierarchy' type constructions. Whatever their level- national, international or European, all legal systems rest on a normative structure. State systems coexist with international and European systems. Each system potentially carries its own 'normative hierarchy', even if certain hierarchies are more explicit or elaborate than others. Today, the state systems present the most apparent hierarchies¹¹. The phenomenon of normative ranking can also be observed

⁸ Regarding this criticism, essentially formulated in a traditional context of comparing national legal systems, see particularly P. Legrand (ed.), *Comparer les droits, résolument* (Puf 2009). See also, critiquing this approach in terms of gaps between privatists and publicists, M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Economica 2010) 43.

⁹ For examples of legal situations successively submitted to judges belonging to different levels of legal application, see *infra*, § 4.2, the analysis suggested in terms of judicial circulation.

¹⁰ The figure of the judge is the most useful to illustrate the intervention of a legal actor at different levels of national, international or European legal application. However, there it would not be inconvenient to substitute another institutional actor (a legislator or an executive authority) or a non-institutional actor (a jurist used to working in a national, international or European environment).

¹¹ See, during this conference, the historical presentation of professor Ph. Jestaz highlighting the recent character of 'normative hierarchy' type constructions in state configurations (*Rapport introductif sur la hiérarchie des normes* (L'Harmattan, forthcoming)).

at the international level.¹² The legal system of the European Union and, on a lesser scale that of the Council of Europe, also lend themselves to this type of analysis.¹³

This overview of different legal systems potentially present at the national, international and European levels demonstrates that, contrary to what one can think, 'normative hierarchy' type constructions are not threatened by the contemporary phenomenon of global legal pluralism. Rather, the opposite appears to be true. The propensity for legal systems to proliferate at different levels of legal application (proliferation of states, and, especially, of international and regional organisations along with the increased propensity of these organisations to apply law) leads to a veritable inflation of normative hierarchies. Thus, a plural reading of the law – or global legal pluralism – is inescapable. That is why it is preferable to speak of normative hierarchies (plural) when discussing multilevel legal application.

2. *Two constants: the ranking of norms corresponds to a withdrawal of the system onto itself and a stigmatisation of the foreign norm*

The plurality of legal systems and the resulting plurality of 'normative hierarchies' raise questions as to the operating mode used by these hierarchies at the stage of multilevel legal application. How does the application of normative hierarchy in a context of global legal pluralism manifest itself?

The answer to this question remains sensibly the same, no matter what case is imagined. Indeed, the ranking of norms is almost always translated by a withdrawal of the legal system on to itself, whether the legal system belongs to a national, international or European level. In a pluralist context, normative hierarchy does not appear to be a tool for coordinating legal systems¹⁴. On the contrary, it appears to be a tool for preserving the

¹² See, on this point, the analysis proposed during this conference by the professor G. Teboul (*A propos d'une règle coutumière internationale méconnue – remarques sur la subordination hiérarchique du droit international conventionnel au droit international coutumier*, L'Harmattan, forthcoming). See also, from the same author, 'Remarques sur le rang hiérarchique des conventions inter-étatiques et du droit international coutumier dans l'ordre juridique international' (2010) J. Droit Int. 705.

¹³ On the development of a 'European law' that rests on a normative hierarchy within the European Union and, more modestly, the Council of Europe, see along with the numerous references cited: J.-S. Bergé and S. Robin-Olivier, *Droit européen* (2nd edition, PUF 2011) 337.

¹⁴ For an observation of this type about the tools of public international law, see the thesis of L. Gannagé, *La hiérarchie des normes et les méthodes du droit international privé – Etude de droit international privé de la famille* (LGDJ 2001).

system when it is threatened or, more modestly, disturbed by other systems. Normative hierarchy is used to allow one or several fundamental norms from one system or legal solutions external to the legal system to take precedence every time the application of one of those norms or solutions is considered incompatible with the system in question.

To achieve this result, normative hierarchy is used as a tool to stigmatise the 'foreign' methods or solutions that threaten the system that the hierarchy is trying to preserve. Everything functions as if the system was closing in on itself, distinguishing its 'founding' norms from the norms that are 'fundamentally' foreign.¹⁵

The most well-known illustration of this phenomenon stems from domestic legal systems, every time that the system tries to make a domestic constitutional norm prevail over a 'foreign' norm, stemming from the international or European (or *a fortiori* another national) level. In France, for example, the ordinary judge and the constitutional judge have rendered judgments on this topic. Using identical formulations, the Conseil d'Etat and the Cour de Cassation both decided that the supremacy conferred upon international commitments by the Constitution (art. 55) does not apply, in the domestic legal order, to sections of the law with a constitutional value. As for the Conseil constitutionnel, it decided, in 2006,¹⁶ following a series of decisions rendered in 2004 that transposing a community directive to domestic law was a constitutional obligation.

Using identical formulas, the Conseil d'Etat¹⁷ and the Cour de Cassation¹⁸ decided that the supremacy conferred to international commitments by the Constitution (Article 55) does not apply, in domestic law, to constitutional provisions¹⁹. As for the Conseil Constitutionnel, it decided,

¹⁵ An interesting parallel can be made with the questions formulated during this conference by professor J. Ghestin regarding the participation of the contract in the elaboration of superior legal norms external to the French state (*La hiérarchie des normes et le contrat*, (L'Harmattan, forthcoming)) and that which is ours. In both cases, one must question the meaning, the value or the scope of a judicial act (contract, international convention, law, etc) when it is considered external to the system that gave rise to it. This question is interesting to the study of normative hierarchies each time that the judicial act is confronted with a norm considered in it its superior or fundamental dimension.

¹⁶ See, notably, [2006] DC, 2006-540, <http://www.legifrance.gouv.fr/>.

¹⁷ *Sarran et Levacher*, [1998] Cons. d'Etat, 200286 and 200287, <http://www.legifrance.gouv.fr/>.

¹⁸ Fraisse, [2000] Cour de cass., ass. plén., 99-60274, <http://www.legifrance.gouv.fr/>.

¹⁹ 'la suprématie conférée aux engagements internationaux par la Constitution (art. 55) ne s'applique pas, dans l'ordre interne, aux dispositions de valeur constitutionnelle'.

in 2006,²⁰ following a series of decisions rendered in 2004,²¹ that the transposition into national law of an EU directive is the result of a constitutional requirement. It is then up to the Conseil constitutionnel, seized as provided for in article 61 of the Constitution of a law intended to transpose into national law an EU directive, to ensure compliance with this requirement. However, the control for this purpose is subject to a limit. The transposition of a directive cannot go against a rule or principle inherent to the constitutional identity of France, except with the constituent's consent.²² Thus, the preservation of the national Constitution can lead judges to refuse to apply a international or European standard.

Similar situations can be found in legal systems that formed at the international or European levels. The process is generally as follows. To rule out the possibility for a national standard to challenge the hierarchical structures established at the international or European levels, international and European judges consider that the national law is not legally enforceable. Did the Permanent Court of International Justice (PCIJ) not say, in a now famous decision, that a State cannot plead State its own constitution vis-à-vis another so as to avoid the obligations imposed by international law or treaties?²³ Similarly, has the Court of Justice of the European Union not considered that invoking violations of national constitutional norms cannot affect the validity of a Community measure or its effects on the territory of the State in question,²⁴ or, more generally, that the use of provisions of domestic law to limit the scope of application of community law cannot be accepted?²⁵

²⁰ See, notably, [2006] DC 2006-540, <http://www.legifrance.gouv.fr/>.

²¹ See, notably, [2004] DC 2004-496, <http://www.legifrance.gouv.fr/>.

²² 'la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle. Il appartient par suite au Conseil constitutionnel, saisi dans les conditions prévues par l'article 61 de la Constitution d'une loi ayant pour objet de transposer en droit interne une directive communautaire, de veiller au respect de cette exigence. Toutefois, le contrôle qu'il exerce à cet effet est soumis à une (...) limite (...). La transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti'.

²³ '(...) un État ne saurait invoquer vis-à-vis d'un autre État sa propre Constitution pour se soustraire aux obligations que lui imposent le droit international ou les traités en vigueur', see Jurisdiction of the Courts of Danzig, [1928]PCIJ, Series A/B n° 44.

²⁴ 'l'invocation d'atteintes à des normes constitutionnelles [nationales] ne saurait affecter la validité d'un acte de la Communauté ou ses effets sur le territoire de l'État en cause', see *International Handelsgesellschaft* (1970) CJEC, 11/70, 1125.

²⁵ 'le recours à des dispositions d'ordre juridique interne afin de limiter la portée des dispositions communautaires... ne saurait être admis', see *Commission v Grand-Duché* [1996] CJEC, C-473/93, Rec. I-3207.

The phenomenon is not just marked by a few leading cases that remained famous in the annals of national, international or European law. It is actually quite common. Every time an actor in a legal system, namely an institutional actor (judge, governor, and possibly, legislators) feel a reluctance to apply a method or a legal solution from elsewhere on the (more or less openly admitted) grounds that it does not have a natural place in the hierarchical constructions of the system in which the actor belongs, the actor contributes to a withdrawal of the system on to itself.

This type of withdrawal on to itself can lead to practical results which are sometimes debatable. This is the case every time that this attitude reflects a sort of reflex, consisting of excluding, *a priori*, without any necessity, the application of all methods or solutions from outside of the legal system. We can cite two relatively recent examples, of varying importance but that have the advantage of being from two very different legal environments, which suggests the magnitude of the phenomenon. One is based on French jurisprudence which has taken more than twenty years to acquire the effect of justiciability normally produced by the directives of the European Union within the national legal order²⁶. The second is the decision of the arbitral tribunal, ICSID (International Centre for Settlement of Investment Disputes), which declined to assess the compatibility of an international treaty with the law of the European Union, notably on the grounds that the latter should be regarded as a mere 'fact' in the international legal order.²⁷

Such decisions and the reasoning behind them are probably the result of an

²⁶ See, for example, in France, the difficulties confronted by the Conseil d'Etat in trying to go back on its jurisprudence ('*Cohn-Bendit*' (CE Ass., 22 déc. 1978, *Rec. Lebon*, 524) refusing to have the European directives produce a substitution effect when it is confronted with an individual administrative act. More than twenty years of jurisprudence needed to go by first. (CE Ass., 30 Oct. 2009, *Perreux* Req.n° 298348, <http://www.legifrance.gouv.fr/>).

²⁷ Compare with the partial sentence of January 30th 2007 in the *Eurotunnel v. France and the United Kingdom*, articulating different national, international and European laws around the question of a legal regime applicable to the relations between parties to a concession contract. On the more general question of the choice of applicable law in this type of case involving different levels of regulation: M. Forteau, 'Forum shopping et fragmentation du droit applicable aux relations internationales - le regard de l'internationaliste publiciste', in M. Forteau, J.-S. Bergé, M. Forteau, M.-L. Niboyet, J.-M. Thouvenin (eds.), *La fragmentation du droit applicable aux relations internationales – Regards croisés des internationalistes privatistes et publicistes* (Pedone 2011) 143. Compare with: Y. Kerbrat (ed.), *Forum Shopping et concurrence des procédures contentieuses internationales* (Bruylant 2011).

analysis of the legal system obsessed with the dualist and monist readings²⁸ which, though today relativised²⁹, are unable to cope with a pluralist approach to legal systems.³⁰ In the dualist theories, the phenomenon of the withdrawal of the system is obvious, since it is always up to the jurist to use the resources present in the system to receive (reception theory) law that came from elsewhere. Monism, which claims to melt all systems into one, must also make a choice between a prioritization of internal or international law. The system, even a unitary one, withdraws on to its fundamental norm. Thus the same ordering phenomenon is at work.

No doubt one could do without these frames of reference that register freely the relationship between norms, in addition to the relationship between systems in a ordered representation.³¹ This is what we would like to try now; to demonstrate that the 'normative hierarchy' type constructions do not have any real relevance in a context of multilevel legal application.

IV. WHAT IS THE PRACTICAL VALUE OF 'NORMATIVE HIERARCHY' TYPE CONSTRUCTIONS IN A CONTEXT OF MULTILEVEL LEGAL APPLICATION?

I. The material approach to normative conflicts and normative hierarchy

The hierarchy of legal systems has a static dimension in which the relationship of validity between norms rests on the existence of peremptory norms. The jurist must then become interested in the content, the substance of the norms to determine whether or not they are compatible with each other. From this perspective, the hierarchy of norms

²⁸ For a synthetic presentation of the different dualist and monist theories, see, for example: A. Berramdane, *La hiérarchie des droits – Droits internes et droits européen et international* (L'Harmattan 2002) 17.

²⁹ M. Virally, *Sur un pont aux ânes : les rapports entre droit international et droits internes* (Mélanges Rolin, Pedone 1964) 488 ; see, more recently, arguing in favour of a dualist reading of the french legal system, generally presented as monist: A. Pellet, 'Vous avez dit 'monisme' ? Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française', in *L'architecture du droit. Mélanges en l'honneur de Michel Troper* (Economica 2006), 827 ; M. Troper, 'Le pouvoir constituant et le droit international', *Recueil des cours de l'Académie de droit constitutionnel* (2007), vol. XVI, 357.

³⁰ On this specific point, the very convincing demonstration by D. Boden, *Le pluralisme juridique en droit international privé* (Arch. de Philo du droit 2006) vol. 49, 'Le pluralisme', 275.

³¹ For a critical approach of the conception of normative hierarchy, seen as a simple piling up of norms, one on top of the other, in a given legal system, see, along with the works cited, the synthetic analysis by O. Pfersmann, 'Hiérarchie des normes', in D. Alland and S. Rials (eds) *Dictionnaire de la culture juridique* (Puf 2003) 779.

is used to rank their content. What happens in a context of global legal pluralism in which the jurist is required to conceive of the application of the law at different levels? Do 'hierarchy of norms' type construction have a value which we could refer to as 'material'? Our feeling is that, in a context of global legal pluralism, the material approach of conflicts of norms faces two realities of which the jurist is not always fully aware: the laws designed at different levels are not necessarily focused on the same object and are often complementary in their implementation.

2. *The weak utility of normative hierarchy in the presence of different laws*

The jurist is accustomed to a mode of thinking about the law centred around major institutions: people, property, legal obligations, etc. The fact that he was trained primarily within a single level (often national) naturally leads him to consider that these institutions are equivalent at all levels of law. Yet that is not always the case. Indeed, sometimes an institution built in a specific legal level does not obey the same characteristics as those that can be observed on a different level. For every topic, it is thus necessary to determine if the concepts are similar or if they present a particular distinction.

In this regard, a distinction between the 'sources' of law and the 'objects' of law can help the jurist to conduct his work of confronting the present laws. The term 'sources of law' refers to the most commonly accepted hypothesis that the different levels of law are able to supply, like sources or springs, a single legal institution. For example, we can consider that there exists a single legal model of contract, which is supplied by domestic, international and European sources. We can apply the same reasoning to a brand protected by intellectual property rights. The brand is a distinctive sign protected by an exclusive right. Trademark law is particularly subject to three regulatory levels: national³², international³³ and European³⁴. These different sources feed a single legal subject: the brand seen as a national title of industrial property. There is no difference in the nature of the object apprehended by national, international or European law.

Another example concerns the right to a nationality. Each State is free to define as it sees the conditions for granting, acquiring or losing 'its' nationality. No other source is intended to define the existence of a right

³² For example, in France the *Code de la propriété intellectuelle* (Code of Intellectual Property).

³³ For example, the Paris Convention of 1983 for the Protection of Industrial Property.

³⁴ For example, la Directive (CE) n° 89/104, December 21st 1988, the 'First directive', replaced by Directive 2008/95/CE, JO L 299 of November 8th, 2008.

to nationality in a foreign State. National law, however, coexists with international and European sources. The obligation of States to respect their international and European commitments may, however, sometimes force the State, often in very specific situations (multiple nationality or statelessness, for example), to respect principles and solutions that have been jointly defined. These different international and European sources co-exist with the right of citizenship regulated by each state. In this case, we can say that the same institution of national origin (nationality) feeds to other levels of law (international and European) without changing its legal nature.³⁵

In another approach, legal institutions analyzed at different levels are not considered to be strictly equivalent. They possess their own foundations so they are not perfectly substitutable or competing. Instead, they have to sustainably co-exist, much like with the different levels of legal application that gave rise to them. There are fewer examples of this type than of the preceding type. Here, the law has reached a level of sophistication that is not always desirable. However, these examples exist and it is important to identify them.

Let us consider again the example of the brand. From our multilevel legal application perspective, the brand is not just a single right fed by several sources. It is also a 'object' of law in the sense that there are potentially as many objects of law as there are the sources of law. For example, the law of the European Union has created a Community (European), single (one way) and unitary (a single legal regime) trade mark, protected throughout the European Union³⁶. This right of the Community trade mark does not cause the national, international and European trademark laws to disappear. It adds to them. Economic actors retain the choice to use one tool over another. In a specialized field, we can also consider that there exists the beginning of truly global brands. For example, the protection of the Olympic emblem by the Nairobi Treaty of 1981, which prohibits State Parties to grant a national brand for the Olympic sign, gives a form of international protection for the sign in question. Other examples can be imagined. Can we not consider that there is a difference in kind between the international contract, including one that meets the needs of international trade and the contract under national law? Similarly isn't a contract with a European dimension, distinct from the other two pre-existing forms, emerging? The jurist should at least consider this matter.

³⁵ See, on the sources of the right to a nationality, P. Lagarde, *La nationalité française* (4th ed., Dalloz 2011) Introduction, 13.

³⁶ Council Regulation (EC) 40/94 on the Community trade mark, replaced by Council Regulation (EC) 207/2009 on the Community trade mark [2009] OJ L78.

Another example can be sought in EU citizenship. The Treaty on the European Union established a European citizenship in addition to the nationality of nationals of Member States. This citizenship does not replace national citizenship (Article 9 TEU). It confers rights of a specifically European dimension: the right to move and to reside freely within the territory of the Member States, the right to vote in and to present oneself as a candidate for the European Parliament and municipal elections, the right to petition the European Parliament, the right to seek recourse to the European Ombudsman, etc. (Articles 20 et seq of the TEU). Even if it draws its source from nationality (nationals of Member States are citizens), citizenship forms a separate legal subject from nationality and is intended to interact with it.³⁷

In the presence of different legal objects, analysis grids based on a hierarchy of norms are not useful. On the contrary, they often skew analysis. Particularly considering that the constructions of international and European law takes precedence over domestic law, even though those constructions are not necessarily on the same subject, the jurist artificially creates hierarchical relations that have no place in a material perspective.

Let us consider again the above illustrations of brands and citizenship. It is useless to consider, for example, that the Community trade mark takes precedence over national brands, since the system of the Community trade mark has not caused the system of national brands to disappear; rather, it coexists with it. It may, indeed, be possible that the validity of a community trademark be challenged by the prior existence of a national brand competitor or vice versa. There is no hierarchical relationship here between the two objects considered at two different levels.

The same type of reasoning can be applied to European citizenship in dealing with nationality. Indeed, it is not useful to oppose two legal objects by considering, for example, that European citizenship is used by the Court of Justice to settle disputes of nationality³⁸. This analysis is simply wrong, since there is no conflict between citizenship and nationality. Instead, the two concepts are complementary; the second (the nationality of a Member State) gives rise to the first (European citizenship).

³⁷ For a remarkable illustration of this interaction, see CJEU, Case C-135/08 *Rottmann* [2010] ECR I-1449. On the concept of European citizenship, see the very relevant analysis by C. Schönberger, *La citoyenneté européenne en tant que citoyenneté fédérale – Quelques leçons sur la citoyenneté à tirer du fédéralisme comparatif*, *Annuaire 2009 de l'Institut Michel Villey* (Dalloz 2010) 255.

³⁸ Two cases, in particular, have given rise to this type of analysis: Case C-148/02 *Garcia Avello* [2003] ECR I-11613 ; Case C-353/06 *Grunkin* [2008] ECR I-7639.

3. *The weak utility of normative hierarchy in the presence of complimentary laws*

The preceding discussion of the potential coexistence of different legal institutions at the national, international and European levels suggests that the presence of complementary substantive rights is the assumption most frequently encountered by the lawyer who works in a context of global legal pluralism. Countless examples exist, in fact, showing that the phenomenon is widespread. Two such examples will be presented here: the first historical, the second more contemporary.

The first example is taken from the *Boll* case of the International Court of Justice (ICJ)³⁹. In 1958, the ICJ had to render a decision regarding the successful implementation of an international convention on private international law (the 1902 Convention Governing the Guardianship of Infants) in a dispute between the Netherlands and Sweden. The question was mainly whether a State (Sweden) could take an educational measure destined to protect a child whose status fell, according to the Convention, under the jurisdiction of another State (the Netherlands). In considering that Sweden had not violated its international obligations, the International Court of Justice ruled that ‘in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden’. The solution adopted by the international court rests on a combination of the two laws, the national law regarding measures to protect minors is considered complementary to the rules of private international law that can designate the law applicable to guardianship.

This historical example of complementarity between the provisions of international and national law can be usefully supplemented by other examples, namely those provided by the jurisprudence of the Court of Justice of the European Union. Indeed, the latter provides many examples of cases that combine national, international and European law. The *Bogiatzi* case is one such example⁴⁰. In this case, the Court of Justice was asked to respond to questions raised by a national jurisdiction that had to

³⁹ Case concerning the application of the convention of 1902 governing the guardianship of infants (*Netherlands v. Sweden*) [1958] ICJ Rep 66.

⁴⁰ Case C-301/08, [2009] ECR I-10185.

deal with a civil action brought against an airline because of an incident that occurred at the boarding of a intra-European flight. These questions involved three potentially applicable sources of law: 1) the Warsaw Convention for the Unification of Certain Rules for International Carriage by Air (as amended at The Hague in 1955), 2) Regulation (EC) No 2027/97 of the Council of 9 October 1997 on air carrier liability in case of accident (as applicable to the facts of the case), and, 3) the internal rules of procedure allowing the victim to bring an action before a national court. The application of national and European law was not discussed before the Court of Justice. It was nevertheless evident. It is national law and only national law that allows a victim to institute proceeding before a state jurisdiction and to introduce various means for remedy, in appeal and in *cassation*. It is the law of the EU and only the law of the EU that grounded the legal action in tort directed particularly against the airline. However, this application was discussed in the Warsaw Convention which poses a statute of limitations of two years on such an action, the case having been introduced five years after the incident. In deciding that the agreement was 'binding' in the context of this case, the Court acknowledged that the outcome of the dispute would result from the combined application of three laws: the national law (which allows the claimant to seize a domestic court) , European law (which gives the action its legal basis) and international law (which poses the statute of limitations on such a claim). The legal result thus obtained is the result of cumulative application of three rights, a result that could not have been achieved through the individual application of either one of those three rights. In this sense, it is permissible to speak of material complementarity.

The complementary nature of laws is not limited to a few specific cases, bearers of unexpected encounters between laws designed at different levels. It is also part of the extensive process demonstrating that the laws and legal systems involved often resort to another construction than normative hierarchy to define their relationships. We can refer to this construction as 'implementation reports'. This term refers to the frequent assumption that the benefits built in different systems, who have to coexist and to be applied with each other, are not intended to exclude each other by a set hierarchy. It is therefore necessary to include their application in a lasting phenomenon of coexistence of norms if one wishes to be able to control all potential effects produced by a combinatorial type process. These effects are not exhausted after the application of one law in the place of another. They are part of the implementation of one law in the place of another⁴¹. These implementation reports are common in

⁴¹ See, for a detailed analysis, our study: 'Le droit à un procès équitable au sens de la coopération judiciaire en matière civile et pénale : l'hypothèse d'un rapport de mise

different models of multilevel legal application. Indeed, it is not uncommon to encounter at the international and European levels, sets of rights that are highly specialised, given the principles of specialization and division of competences that govern international and regional organizations. These special rights coexist with national legal systems that maintain a general vocation, given the fullness of competences generally recognized for states. The coexistence of specialised and generalised laws greatly enhance the implementation reports, whether they be at the national, international or European level.

The preceding developments show that the hierarchy of norms is not the best tool to account for the material confrontation of rights developed at the national, international and European levels. Often, this confrontation is not part of a rivalry between standards with contradictory imperatives. Sometimes different, often complementary, these laws are part of the implementation reports which requires that the lawyer develops the intelligence that allows him to combine, rather than prioritize, the solutions present.

V. WHAT IS THE FORMAL VALUE OF 'NORMATIVE HIERARCHY' TYPE CONSTRUCTIONS IN A CONTEXT OF MULTILEVEL LEGAL APPLICATION?

I. The formal approach to normative conflicts and normative hierarchy

The hierarchy of legal systems does not only have a static dimension. It also involves what Hans Kelsen called a 'dynamic' dimension⁴². The ratio between the standards of validity here rests on the existence of accreditation standards. The approach is formal. We are interested in the shape of the law, in its envelope, capable of producing a legal effect in a given legal system. Seen in this light, normative hierarchy is useful to prioritise forms and not contents.

What happens in a context of global legal pluralism in which the lawyer is trying to think of law enforcement at different levels? Do 'normative hierarchy' type constructions have a value which we will call here 'formal'?

en œuvre', in F. Sudre et C. Picheral (eds), *Le droit a un procès équitable au sens du droit de l'Union européenne* (Droit et Justice Collection, Némésis-Anthémis 2011).

⁴² 'Un ordre juridique est un système dynamique de normes', H. Kelsen, 'Théorie pure du droit', (H. Thévenaz tr.), (1988) 37 *Cahiers de Philosophie, Etre et penser*, 2nd ed, 122 ; for a synthetic presentation of the author's analyses, see once again M. Tropéa, *La philosophie du droit* ; E. Millard, *Théorie générale du droit* (Dalloz 2006).

We feel that, in a context of global legal pluralism, the formal approach of normative conflict faces two interrelated realities of which the jurist is not always fully aware: legal situations subject to different laws are likely to move from one level to another, and the quest by the jurist of the 'best' hierarchy defeats the most predictable solutions, based on a formal hierarchy. Let us examine in turn these two hypotheses.

5.2 The relativity of normative hierarchy in the presence of the circulation of legal situations

The term 'circulation of legal situations' is not commonly used by jurists. The term 'movement' is not always included in specialised dictionaries. Here, it receives a relatively precise meaning⁴³. Circulation refers to the set of phenomena that allows a situation to produce a legal effect (a 'mandatory' effect, an 'opposable' effect or even a 'factual' effect) in a legal area other than where it originated. The effect of these movements from one normative space to another may be perfectly identical, the legal circulation reproducing, feature by feature, a given legal effect in two distinct environments. However, this effect is often different, the circulation then being only partial, from any other given aspect of the circulating legal situation. The phenomenon is of interest whenever the impact of a situation arising in one legal environment is seen to occur again in another legal environment because of its origin. If the effects are total strangers to each other or are purely fortuitous⁴⁴, it is no longer useful to talk about circulation.

Considered as part of multilevel (national, international and European) legal application, the circulation of legal situations has, as a principal vector, the mode of intervention of international and regional courts which co-exist with national courts. Indeed, the circulation of legal situations is part of the very process of access to most supranational courts, which is dominated by the principle of exhaustion of domestic

⁴³ The expression is, for example, absent from the *Dictionnaire de la globalisation*, A.-J. Arnaud (ed.) (LGDJ 2010) and though the term 'circulation' appears in *Vocabulaire juridique*, G. Comu (ed) (8th ed., Puf 2007), the definitions proposed do not coincide with those presented here. We prefer the terms 'échanges' (exchanges), 'd'influences croisées' (crossed influences) or 'cross-fertilization' (see, on this topic, S. Robin-Olivier et D. Fasquelle (eds.), *Les échanges entre les droits, l'expérience communautaire: une lecture des phénomènes de régionalisation et de mondialisation du droit* (Bruylant 2008).

⁴⁴ For a stigmatisation of the fortuitous character of the phenomenon of nesting of legal orders in certain situations: P. Brunet, 'L'articulation des normes – Analyse critique du pluralisme ordonné', in J.-B. Auby (ed), *L'influence du droit européen sur les catégories du droit public* (Dalloz 2010) 195, 200.

remedies. Thus, as an author noted⁴⁵ regarding an action in diplomatic protection by a State after exhaustion of domestic remedies, the domestic and international judge are reputed to judge the same claim.⁴⁶ This circulation can also be seen in Europe. The preliminary ruling procedure before the Court of Justice of the European Union allows for movement from one legal situation to another. This is also the case for a motion brought before the European Court of Human Rights.

The fact that a legal situation can be successively examined at different levels has an impact on normative hierarchies. This circulation considerably relativises the scope given by each system to 'its own' normative hierarchy. So long as the situations were enclosed within a single level system, the normative hierarchy that carries a system can be of a potentially absolute effectiveness. The norms applied within a system are entitled by a superior norm within the system, the reasoning happening within a vacuum. So long as one situation can be subjected to various legal viewpoints, at different levels, there is a possibility to see a different normative hierarchy, that of another legal system, for a same situation. This legal pluralism has the effect of considerably relativising the hierarchical constructions present at different levels.

Let's take, for example, the case of freedom of association which is recognized as a fundamental right at different levels. In France, it has a constitutional value (paragraph 6 of the preamble of 1946). It is inscribed in international (for example, ILO Convention no 87) and European (CPHRFF, art. 11) treaties. Its application can be discussed before national and European jurisdictions. That is how legal situations that are objects of domestic courts have been brought before European jurisdictions with regards to the objectives of free circulation defined by the European Union⁴⁷ or by objectives of protection of fundamental rights by the Council of Europe.⁴⁸ Each system applies, successively, its own hierarchy. We know, for example, that within the European Union, the Court of justice confers to the freedom to circulate a fundamental value that limits the application of other

⁴⁵ M. Forteau, 'Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l'un et l'autre à la fois?' in *Liber amicorum Jean-Pierre Cot: Le procès international* (Bruylant 2009) 101.

⁴⁶ Originally in French: 'le juge interne et le juge international sont réputés connaître de la même réclamation'.

⁴⁷ Case C-438/05, *Viking* [2008] ECR I-10779; Case C-341/05, *Laval* [2007] ECR I-11767.

⁴⁸ *Demir and Baykara v. Turkey* [2008] CEDH 34503/97.

fundamental rights, namely freedom of association⁴⁹. Indeed, national judges increasingly frequently take charge of this fundamental dimension of global legal pluralism⁵⁰.

2. *A strategic search for the 'best' normative hierarchy*

The awareness by jurists, especially by those that are invested with a power (legislative, executive or judiciary), of the possibility for a legal situation to circulate potentially from one level to another fuels strategic visions. Indeed, the jurist can be tempted to look for what he considers (justly or not) to be the best normative hierarchy by anticipating, halting or provoking a movement of the legal situation from one level (national, international or European) to another.

This capacity of the jurist to play with the levels present must be clearly accepted as a form of instrumentalisation of normative hierarchies. Behind this instrumentalisation, one cannot prevent oneself from seeing a form of weakening of the formal hierarchy figure, capable of drawing the 'dynamic' of a system. Another concurrent dynamic that rests on legal pluralism (that is to say, for the interest of our topic, on a plurality of normative hierarchies used plurally) sets itself into place.

To illustrate this phenomenon, we shall use a case that attracted a lot of attention in France, regarding the introduction into the French constitution, in 2008 of a constitutionally important question ('question prioritaire de constitutionnalité') (art. 61-1 of the Constitution⁵¹). In a domestic procedure, a question of jurisdiction was raised before the Cour de cassation, a constitutionally important question in view of its eventual transmittal before the Conseil constitutionnel. The question formulated by the first judge raised the question of compatibility of an article of French law (article 78-2 paragraph 4 of the code of criminal procedure⁵²) with the rights and liberties guaranteed by the constitution of the French Republic.⁵³ Refusing to limit itself to the strict wording of the question asked by the judge, the Cour de cassation used the writings of the claimant to move the discussion from the terrain of the constitutionality of the French law to that of its conformity with

⁴⁹ For a comparative analysis of the jurisprudence of the Court of Justice and the European Court of Human Rights on this topic, see S. Robin-Olivier, *Normative interactions and the Development of Labour Law, A European Perspective*, *Cambridge Yearbook of European Legal studies* (Hart 2009) 377.

⁵⁰ On this dimension, see E. Dubout et S. Touzé (eds.), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Pedone 2010).

⁵¹ This text is accessible at <http://www.legifrance.gouv.fr/>.

⁵² This text is accessible at <http://www.legifrance.gouv.fr/>.

⁵³ 'les droits et libertés garantis par la Constitution de la République française'.

European law. To do so, the Court made two leaps in its reasoning. It began by questioning the compatibility of the rule of criminal procedure with an article of the European treaty on the free movement of persons (article 67 FTEU). Then, increasing slightly its generalisation, it asked the sensible question regarding the compatibility of certain rules of procedure relating to the important question of constitutionality (articles 23-2 et 23-5 of the ordinance of November 7th 1958, as modified by the organic law of December 2009) with the provisions of the European treaty on a preliminary ruling (article 267 FTEU). On this last question, the Cour de cassation questioned the European compatibility of the French purview that obliges an ordinary judge to first render judgement on constitutional matters when he is seized with a case that also question the conformity of a law to France's international commitments. Once these two steps were completed, the Cour de Cassation decided to suspend judgement and to address to prejudicial questions to the Court of Justice⁵⁴. Without awaiting the Court of Justice's analysis, the French Conseil Constitutionnel⁵⁵, as well as the Conseil d'Etat,⁵⁶ evaluated that there was no incompatibility between the organic French law and the European treaties. The court of justice rendered its decision in June 2010.⁵⁷ The Court of Justice made an effort to highlight the means for conciliation between European treaties and the margin of manoeuvre recognised in terms of institutional and procedural autonomy, all the while specifying that the French law was contrary to article 67 FTEU. When the proceedings resumed, the Cour de cassation decided not to refer the question of constitutional priority to the Conseil constitutionnel for the reason that only the domestic judge could take the provisional measures that were necessary given the incompatibility of the French penal law with the law of the European Union.⁵⁸

The deliberate choice by the Cour de cassation not to transmit the question of constitutional priority to the Conseil constitutionnel illustrates rather remarkably the manner in which a jurist, here the judge, can want to use what he considers the 'best' normative hierarchy. In the context of this case, two formal hierarchies were at play: A hierarchy created by French law which orders that priority be given to

⁵⁴ Cassation., QPC, 16 April 2010, n° 10-40001 & 10-40002, <http://www.legifrance.gouv.fr/>.

⁵⁵ Decision n° 2010-605, 12 May 2010, <http://www.legifrance.gouv.fr/>.

⁵⁶ Conseil d'Etat, 14 mai 2010, Req. n° 312305, <http://www.legifrance.gouv.fr/>.

⁵⁷ CJEU, Cases C-188 & 189/10 *Melki & Abdeli* (judgment of 22 June 2010, not yet published).

⁵⁸ Cassation., QPC, 29 June 2010, n° 10-40001 & 10-40002, <http://www.legifrance.gouv.fr/>.

either the procedural treatment of the control of constitutionality over the control of conventionality (articles 23-2 and 23-5 de of the ordinance of November 7th 1958 cited above, as modified by the organic law of December 10th, 2009) and a hierarchy developed by the Treaty of the European Union that obliges superior national courts to judge and to pose a prejudicial question to the Court of Justice in case of difficulties in applying European law (article 267 TUE). To escape the constraints inherent to the first hierarchical rule, the French judge places himself deliberately under the second hierarchical rule. The judicial situation submitted to the Cour de cassation in this case is literally delocalised. From the national level, it moves to the European level.

As criticisable as it may be with regards to the means of conciliation possible between two French and European rules of procedure,⁵⁹ this attitude draws, from our point of view, the logical consequences of a plurality of judicial systems. A major institutional actor here demonstrates his capacity to use the entirety of tools presented to him by the different systems to select, at a given time, the normative hierarchy under which to place himself. The solutions that result from this are not necessarily contradictory. However, one must accept that they may borrow different paths.

A plurality of legal systems, several normative hierarchies and situations likely to circulate from a national, international or European level to another, such is the environment in which the jurist is sometimes called upon to act.

VI. CONCLUSIONS

There are two conclusions that can be drawn from this paper: normative hierarchies are, potentially, a plural phenomenon in a context of global legal pluralism; in a process of multilevel legal application, they coexist with other forms of legal reasoning.

The first conclusion rests on an observation made on several occasions in this study, according to which a same legal situation can be examined in the context of different legal systems, be they national, international

⁵⁹ See, amongst other analyses, along with the numerous other references cited: D. Simon, 'Les juges et la priorité de la question prioritaire de constitutionnalité : discordance provisoire ou cacophonie durable ? ' [2011] RCDIP 1. See, as a counterpoint, the approach suggested by P. Puig (regarding, namely, the organic law), ' La question de constitutionnalité : prioritaire mais pas première... ' [2010] RTD Civ. 66; compare, from the same author: 'Hiérarchie des normes: du système au principe' [2001] RTD Civ. 749.

or European. Each legal system potentially carries within it its own normative hierarchy. Thus, the jurist who wishes to consider the situation globally, taking into account all the legal systems potentially relevant to the situation at any given time, must question the existence of a plurality of normative hierarchies. The implication of this conclusion must not, however, be exaggerated. Global legal pluralism does not affect the singular normative hierarchy that we all know within different legal systems, be it in a national, international or European context. It only – though some would consider this to be a lot already – invites us to consider that these systems exist plurally and, consequently, that the normative hierarchies are also plural. Indeed, there are potentially as many normative hierarchies as there are minimally organised normative systems. As soon as the jurist accepts to place himself in a comprehensive perspective where many distinct legal systems (be they at different national, international or European levels) can be asked to consider, at the same moment or at different times, a same legal situation, the jurist must inevitably question the existence of a plurality of normative hierarchies defined by several legal systems.

The second conclusion concerns the coexistence of a plurality of methods to apprehend the phenomenon of global legal pluralism at the stage of multilevel legal application at different national, international and European levels. In a context of global legal pluralism, normative hierarchy does not constitute a good first contact for the jurist. If the jurist buys into a pluralist vision of the law, he must then accept that different systems coexist at different levels. Thus his job will not limit itself to constructing a 'super' normative hierarchy, capable of merging in one system all the hierarchies that exist at various levels. On the contrary, the jurist will compare the systems⁶⁰. If necessary, he will combine them⁶¹. The ordering of norms shall then intervene, at a different stage of legal reasoning⁶², if there is a need to enclose the solution within a single legal system. Indeed, it is one thing to build the system. It is another to allow the existence of a plurality of systems. The method is not the same. The first (construction of the systems) does not exclude the second (coexistence of the systems) since the construction of the systems is a condition for their coexistence. However, one must recognize that, in a perspective of multilevel legal application, the hierarchy of norms limits rather than gives impulse to a dynamic. Whether he is a judge, attorney, legislator, governor or academic, it is up to the individual jurist to determine, at any given time and for any

⁶⁰ See *supra*, the developments at § 1.2.

⁶¹ See *supra*, the developments at § 3.3.

⁶² See *supra*, the developments at § 4.3.

given result, the intellectual procedure that seems the most appropriate. Normative hierarchy (or normative ranking) is a precious tool, but it is not the only tool. Others exist, namely comparison and combination of norms.⁶³

⁶³ On these three steps in reasoning, see, regarding the confrontation between private international law and the European law of the common market ' Le droit du marché intérieur et le droit international privé communautaire : de l'incomplétude à la cohérence ' in V. Michel (ed.) *Le droit, les institutions et les politiques de l'Union européenne face à l'impératif de cohérence* (Presses universitaires de Strasbourg 2009), 339. See, regarding the more general theme of interactions between international and European law, the annual chronicle published in the *Journal du droit international* (n° 3 of each year, since 2009).

CORPORATE GOVERNANCE OR CORPORATE GOVERNMENT?

BOOK REVIEW:

‘QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN’ BY PEPPER D. CULPEPPER

(CAMBRIDGE UNIVERSITY PRESS, 2011, ISBN: 9780521134132, \$100)

Benjamin Farrand*

‘Quiet Politics and Business Power: - Corporate Control in Europe and Japan’¹ is the new book by Professor Pepper D. Culpepper, currently based at the European University Institute in Florence, Italy. In this ambitious work, Culpepper seeks to address the question of how corporate interests can shape policy. In order to do so, the book adopts a case-study methodology, analysing how corporate actors have been able (or not) to influence the development of law relating to corporate governance and hostile takeovers, focusing on examples taken from France, Germany, the Netherlands and Japan. While being a work that falls categorically into the field of political sciences, it nevertheless is of value to lawyers and legal academics who wish to go beyond the question of *what* corporate governance is, and ask *why* corporate governance develops in a certain way.

In Chapter 1, Professor Culpepper seeks to explain that whereas some writers in the field believe that regulation of issues such as the hostile takeover of companies is an ideological issue with legislative control (or protection) being favoured by left-leaning political parties², differences in regulatory mechanisms are not ideologically based, but are determined by ‘*political salience*’. Culpepper defines political salience as being the importance of an issue to the average voter, relative to other political issues³. In other words, where an issue is of high political salience, or of high importance to voters, then politicians are likely to exert strong influence over the direction of policy, most likely along ideological grounds

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¹ Pepper D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (Cambridge University Press, 2011).

² Culpepper refers here to works such as John W. Cioffi, Martin Höpner, ‘*The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Party Politics in Corporate Governance Reform*’ [2006] 34(4) *Politics & Society* 463 and Yves Tiberghien, ‘*Entrepreneurial States: Reforming Corporate Governance in Germany, Britain, the United States and Japan*’ (Cambridge University Press, 2007).

³ Pepper D. Culpepper (n 1) 4.

(such as, for example, when dealing with issues such as income taxation). Where issues are of low political salience, Culpepper argues, then issues are decided through 'quiet politics' – as the issues are regarded as being of low political importance to voters, and corporate actors are much more able to determine the direction of policy. One such area, according to Culpepper, is corporate governance. Due to the limited public interest in such subjects, corporations and corporate lobbying groups have much more influence over corporate structuring. Furthermore, as these bodies are deemed to be experts in their fields, corporate representatives are substantially (and sometimes over-) represented on political committees concerned with corporate regulation. Culpepper provides an empirical framework for analysis of these issues in Chapter 2, where change and stability in markets is examined, taking into account both the number of hostile takeovers attempted and the number of successful takeovers. Culpepper presents this somewhat complex information in a systematic and effective manner, making frequent use of tables that help to break down information into digestible statistics. While perhaps unsurprisingly the liberal free-market countries such as the United States and the United Kingdom dominate the tables of hostile takeovers attempted and achieved, countries such as Germany and the Netherlands demonstrate strong markets of patient capital – companies are predominantly characterised by concentrated ownership and few hostile takeovers. In comparison, France and Japan have seen higher drops in stable ownership⁴. Yet what explains these differences?

Chapter 3 brings Culpepper's hypothesis that political parties and political ideology are not the main reason for changes in corporate governance. Both France and Germany saw left-leaning political parties come to power in the period between 1995 and 2006, yet the legislative efforts on hostile takeovers differed significantly. According to Culpepper, these differences reflected the differences in managerial structures and objectives in both countries – whereas German company managers preferred concentrated shareholding, French companies focused more on being competitive internationally and therefore relied more upon international capital markets, which favoured company deconcentration. As a result, German companies lobbied extensively against adoption of certain clauses seen as unfavourable to concentrated shareholding in the EU Takeovers Directive⁵, whereas French companies lobbied strongly in favour of them. As a result, Germany and French transposition of the Directive matched closely the desires of their respective companies. Due to the low political

⁴ Pepper D. Culpepper (n 1) 37.

⁵ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

saliency of the issues involved, corporations were able to achieve their desired objectives through both formal mechanisms such as influence over the transposition of Directives, and informal mechanisms such as internal preferences on the structure of the companies involved. In Chapter 4, which considers the example of the Netherlands, Culpepper argues that while protections against hostile takeovers are formalised through legislation, this is not due to a 'corporatist coalition' of neoliberal parties existing between 1994 to 2006, but due to the low political saliency of issues of corporate control. Voters, it is argued, were much more focused on high saliency issues such as taxation and immigration for much of this time⁶, and therefore the issue was not of primary concern to political leaders. According to a quotation from the former Minister of Finance, Gerrit Zalm, *'I would never make a cabinet crisis on a corporate issue. I would make a cabinet crisis on budgetary policy or social insurance or tax reforms'*⁷. This is due to the low political saliency of the issue – voters care about social insurance, and less so about corporate takeovers. This means that in the Netherlands, corporate regulation was often left to informal committees comprised substantially by corporate managers, who were left to dictate the specifics of particular acts of legislation. Chapter 5 considers the case of Japan. Unlike in the other examples, where governmental decisions coincided with the interests of companies, ultimately in the Japanese case, 'quiet politics' were less useful to Japanese company managers, due to the high salience of issues of corporate control. Before 2004, Japanese company managers were highly influential in the development of takeover legislation. However, in 2005, corporate control developed into a high salience issue. The issue surrounded the concept of 'triangular mergers', where a company could create a subsidiary company in order to merge with a third company, yet do so on the basis of the combined shares of parent and subsidiary company. Japanese companies were strongly opposed to the adoption of legislation legitimising such mergers, as it would leave Japanese companies open to hostile takeover bids by foreign investors. Despite the strong lobbying of Japanese companies, Japanese legislators nevertheless adopted legislation that allowed for triangular mergers. This refusal to accede to the wishes of corporate actors, argues Culpepper, is due to the saliency of the issue. According to his argument⁸, the issue of hostile takeovers was highly mediatised in Japan post-2005 due to a high profile hostile takeover – whereas prior to 2005 there were less than one article per month in Japanese newspapers relating to hostile takeovers, in 2005 and 2006 there was an average of 25 per month⁹.

⁶ Pepper D. Culpepper (n 1) 113.

⁷ Ibid.

⁸ Ibid, 128-132.

⁹ Ibid, 129.

Because of the strong media focus and apparent interest of the public in this matter, legislation was determined along party political lines through formalised institutions, rather than through informal management structures and corporate lobbying.

The argument of political saliency brought by Professor Culpepper therefore helps to convincingly explain why in some fields corporate actors fail to gain their desired outcomes – if corporate policy was solely a question of lobbying and the view that ‘money talks’, then it would appear logically consistent that corporations would achieve their desires no matter the saliency of the topic at hand, and that Japanese company managers would have been able to water-down or even drown the legislation pertaining to triangular mergers. However, in areas of high political salience, even where substantial amounts of money are used in lobbying, corporate players are not guaranteed success. While they may still be highly influential, ideology and voter preference will become more important. This is expanded upon in Chapter 6, where Culpepper considers the issue of executive pay. Traditionally considered an issue of low salience, executive pay has increasingly become an issue of high political salience. Due to scandals such as the Enron scandal which broke in 2001, which combined high executive pay with perceived executive incompetence, issues of pay became highly salient issues in the US, with an increase from 184 articles to 545 articles per year in the New York Times, Washington Post and Wall Street Journal alone. Where political salience is high, companies are not able to rely on quiet politics, and must instead seek to rely more directly on partisan political protection, and try to counter or change public opinion¹⁰. In the case of executive pay, Culpepper argues, public outrage over the fallout of the Enron crisis meant that despite extensive lobbying from corporations, a neoliberal centre-right government nevertheless introduced sweeping legislation to regulate executive remuneration. In comparison, in France the issue was much less salient, and until 2009, Nicholas Sarkozy left executive pay as a matter of self-regulation by the companies. In 2009 however, a series of pay scandals and the economic crisis more generally began to change public perception of executive remuneration, and developed high political saliency. As a result the Sarkozy administration, also representing neoliberal centre-right economic policy, acquiesced to demands for legislation governing executive pay.

It is this reviewer’s belief that Professor Culpepper presents a very convincing argument. ‘Quiet Politics and Business Power’ helps to explain why, when it comes to issues of corporate governance, centre-left

¹⁰ Ibid, 175.

governments have often allowed businesses to self-regulate and have legislated strongly in their favour, yet has also explained why centre-right administrations have in some instances legislated strongly against the interests of corporations. By engaging in comparative analyses of hostile takeover legislation in several states, and using process tracing to determine not only how legislation is formulated but how governmental policy is changed by increased mediatisation and public interest in an issue, Culpepper provides a robust argument for considerations of corporate regulation which go beyond considerations of party ideology and pragmatism. As such, this book may be of great benefit to lawyers and legal academics seeking to adopt an inter-disciplinary approach to issues of corporate governance which address not only questions of what corporate governance is and what laws dictate the regulation of corporations, but why and how corporate governance regulation comes about.

BEYOND CONTRACTS AND ORGANIZATIONS
‘NETWORKS AS CONNECTED CONTRACTS’
BY GUNTHER TEUBNER
(EDITED WITH AN INTRODUCTION BY
HUGH COLLINS, TRANSLATED BY MICHELLE EVERSON)

(HART PUBLISHING, 2011, 9781849461740, \$100)

Maciej Konrad Borowicz*

Professor Gunther Teubner's (Goethe University, Frankfurt am Main) book *Netzwerk als Vertragsverbund* (2004) is now considered in Germany to be a classic. It was therefore only appropriate to make it available to a wider audience. Hart just published it in English, bringing us yet another in a series of brilliant books in the theory of private law – Teubner's *Networks as Connected Contracts* (translated by Michelle Everson), with an excellent introduction by Hugh Collins.

Books that appear in Hart's International Studies in the Theory of Private Law series aim at exploring the potential of self- and co-regulatory strategies that promote the use of private law techniques of ordering in social and economic interactions. Networks – as Teubner argues in his book – can be devised as one such strategy. The book begins with the discussion of two German cases that – in his view – demonstrate the need to recognize a novel institution of private law, one that goes beyond the familiar notions of contracts and organizations (Chapter 1). Networks, the socio-economic argument unveils in Chapter 2, unlike contracts or organizations display certain features that uniquely predispose them to accommodate important regulatory functions. But if that function is to be socially beneficial, rather than one benefiting private actors themselves, law has to step in (Chapter 3). The three last chapters of the book discuss three hypothetical ways in which law can help achieve that result.

Professor's Teubner argument is persuasive, even if somewhat convoluted. It might strike the reader as convoluted because of the method he is using in his endeavor – systems theory. When a book about networks begins with the assertion that our legal language may be not be complex enough to account for some of their properties and it also so happens that the book attempts to circumvent those alleged limitation of our legal language

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by embracing a paradox (in a “something simultaneously is and is not” fashion), it likely promise a tough and uncompromising read. And yet even if one is skeptical of the method (the second part of the review discusses why one may want to be), *Networks as Connected Contracts* still provides us with some truly illuminating insights into what are the different ways of thinking about them.

I. NETWORKS, BUSINESS NETWORKS

Networks have been studied in social sciences for many years now. The notion is based on a straightforward recognition that relationships among things (people, organizations) have a number of different dimensions and are complicated. The notion of networks has been devised as a conceptual framework within which the patterns can be described and measured in a meaningful manner. A network describes a collection of nodes and the links between them. This notion has useful explanatory application in personal and professional contexts. Workers find jobs through personal acquaintances, academics develop their work through conversations with colleagues etc. But the notion of networks has also obvious applications in the business context. Business opportunities and choices, just like those personal and professional, are shaped by business connections and relationships. And it is business networks (in a broad sense, including virtual enterprises, just-in-time systems and franchise chains) that Teubner is interested in.

A business network, as such, is thus hardly a legal concept. This is where professor Teubner's inquiry begins. How can the legal system account for and accommodate the network-like properties of arrangements such those - “normally concluded in the form of bilateral contracts, but at the same time give rise to multilateral (legal effects)”¹ As he himself notes “[s]uch networks are extraordinarily confusing phenomena of private co-ordination, since they fit neither within the market category nor within the concept of organization.”² They “cut across the conceptual framework of private law doctrine. In legal terms, networks can take the form either of partnerships, corporate groups, relational contracts or of special tort/contractual relationships. For this reasons alone, the autonomy of legal doctrine precludes the immediate adoption of the social science concept of ‘network’ as a legal category.”³ And so the struggle begins.

¹ Gunther Teubner, *Networks as Connected Contracts* (Hart Publishing, 2011) (edited with an Introduction by Hugh Collins. Translated by Michelle Everson), 73.

² Ibid.

³ Ibid.

The struggle that Teubner's book is concerned with is a struggle within German legal academia, one that has been ongoing for quite some time. But despite its doctrinal outlook, the argument's relevance could not have been greater and timelier for a non-German audience. In the last two or three decades we have indeed witnessed a 'network revolution', which – as Teubner points out – has dramatically altered the strategic position of networks within the economy and that is now forcing law to recognize them in their own right. Empirical studies from many industrial sectors – to which Teubner also refers – have provided comprehensive proof of the exponential expansion in business networking.⁴ Volatile market conditions and an ever-increasing market pressure for greater efficiency necessitates the search for novel and more flexible modes of commercial interactions between economic actors. "As a direct consequence, business have been forced to restructure themselves as network-type arrangements, within which trust-based co-operation forms the basis for enduring informational relations, recursive reinterpretation of events, and for the collective construction of knowledge."⁵ From that point of view they can be beneficial, because they generate efficiency. But Teubner is of course not a law and economics scholar. This is why he insists that when trying to conceptualize networks in law "at no time should the efficiency principle used by economists to characterize networks as a market/hierarchy hybrid be permitted to serve as a legal norm for networks."⁶ Rather "social science analyses should explore the logic of action within network, should reveal the opportunities and risks posed by operations of networks and should reveal perspective of alternative solutions beyond our traditional categories of market and hierarchy."⁷

II. EMBRACING PARADOXES: SYSTEMS THEORY

Professor Teubner is a prolific man, but he is not a man of easy answers. In chapters two and three of the book he outrightly rejects the legal characterization of networks as either organizations or typical exchange contracts. He tells us that we have to accept the contractual construction of networks, but also the corporate elements thereof. Moreover, we have to accept the two as contradictions and embrace the contradiction as something meaningful, productive and, in fact, a necessity. Law – he says – itself has not answer to this, because it can only respond to networks' contradictions by reference to the parties' will. There is however a different response which can be distilled out of sociological and economic

⁴ Ibid., 94

⁵ Ibid., 96

⁶ Ibid., 75

⁷ Ibid.

analyses of networking paradoxes.

Networks can be, in his view, understood as paradoxes because “[h]ybrid networks result from the fragile co-existence of different and contradictory logics of action . . . [t]his gives rise to ‘paradoxical structure’ of interorganizational interpretation, since it is founded on ‘contradictory demands’ that are simultaneously functional”.⁸

In of the most problematic passages of his book he provides for a prescriptive solution of how can the legal system respond to that ‘paradoxical’ situation: “[i]n contrast to the treasured legal ability to furnish turbulent life with sufficient clarity, reliability and precision, legal doctrine in this context needs to produce ambiguous concepts that not only encompass contradiction, but that even cultivate and intensify them.”⁹

Several legal concepts have been proposed in Germany earlier that were supposed to account for network-like properties of certain business arrangements. Teubner outrightly rejects all of them. He rejects Jhering and Gierke’s notion of networks as communities, Amschutz’s concept of ‘mixed contracts’, the idea of networks as corporate groups or Rohe’s notion of network contracts. He introduces the reader into these theories but rejects them as, for one reason, deficient and/or insufficient (perhaps, one is tempted to add, he does not find them sufficiently ambiguous). Also the notion of relational contracts, which will be familiar to English reader from the writings of Ian Macneil, “furnishes us with a relatively narrow box of normative tools with which to tackle the particularly interesting issue of multilateralism in networks.”¹⁰ Instead Teubner undertakes to make use of a notion of ‘connected contracts’, which has been introduced into the German Civil Code (BGB §358), after a long and heated discussion, in the context of credit agreements. But as a concept doctrinally tailored to these sorts of agreements it is not well suited to serve as a more general doctrinal vehicle suitable for networks. Therefore Teuber attempts to generalize it.

In his conceptualization a genuine connected contract emerges when, in addition to the usual characteristic that create a bilateral contract, mutual references within the bilateral contracts to one another; a substantive relationship with the connected contract’s common project and; a legally effective and close co-operative relationship between

⁸ Ibid., 123.

⁹ Ibid., 127.

¹⁰ Relational contracts however, in Teubner’s view provide us with a more promising starting point, at least to the extent that they can be “infused with a network logic”. Ibid., 145.

associated members are present.¹¹

As such connected contracts are not just a subset of the normal range of legally effective relations – contracts and organizations. They are *sui generis* category.¹² What makes them so special? Back to systems theory: “The specificity of network lies in the fact that a contract observes its environment in a particular manner. Under normal conditions, contracts observe prevailing market conditions, in particular pricing, and adapt their internal structures accordingly.”¹³ Rather – Teubner draws on Luhman here – “the contractual systems observe another contractual system rather than the market, adapting its internal norms accordingly . . . all preconditions thus establish a *legal relationship between the individual contract and a spontaneous and extra-contractual private ordering* [emphasis in original].”¹⁴ This has nothing to do however, as Teubner is quick to disclaim – with a Hayekian conception of spontaneous order, whereby a discovery process gives rise to a competitive order. “Neither the market nor competition has a role to play. Instead, networking and co-operation are the purveyors of a spontaneous order. Generalized reciprocity is the fundamental motor of spontaneous order within the network.”¹⁵

Networks are thus constituted by internal conflicts that derive from the simultaneous challenges posed by external contradictions. These, in turn, take different structural forms: contradictions between bilateral exchange and multilateral connectivity, contradictions between competition and co-operation and contradictions between collective and individual orientation. What is not immediately apparent from this analysis is that it is a highly normative project. This only becomes evident in the last three chapters of the book, in which Teubner persuades us that if these contradictions are successfully internalized by the network – thereby also endangering internal network co-ordination, as well as trustworthiness and responsibility displayed by the network – a need for regulation arises.

III. TEUBNER’S LAW OF NETWORKS

How should networks be regulated? Consider Teubner’s example of the legal response that should be given to the first structural contradiction that occurs in networks – that between bilateral exchange contracts and multilateral connectivity. Internal decision making in networks is simultaneously subordinated to the contradictory demands of bilateral

¹¹ Ibid., 158.

¹² Ibid., 162.

¹³ Ibid., 163.

¹⁴ Ibid., 164.

¹⁵ Ibid., 164-165.

exchange and multilateral connectivity. In his analysis Teubner invokes a case, in which a retailer of optical goods distributes some of its products through its fully own subsidiaries and some of them through franchise outlets. The firm bundles the purchasing of both channels in order to gain higher discounts from suppliers. Suppliers guarantee – without any differentiation – discounts to the firm of up to 52%. The firm however supplies its franchisees with an ‘official’ production discount list. The list only details production discount of up to 38%. Should there be an obligation on the firm to pass on its advantages also the franchisees? Teubner response is, yes. He conceptualizes several duties of loyalty that, in his opinion, arise in the virtue of the connectivity of those contracts as described above. This is justified by the “network purpose” of these contracts, that is, in virtue of the function that these contracts perform.

But the notion of ‘network purpose’ entails more than that. As he notes, the network purpose – as distinct from the contractual exchange purpose and the common purpose in corporate law – is not only relevant for duties of loyalty, but also plays its part in the judicial review of standard form contracts applicable to networks. For example, if in the above case, all risk would be transferred from the firm to the franchisees, this – in Teubner’s view – would not be justified by the network purpose. “Exactly the opposite: the real aim of networking is the establishment of an unusually close degree of co-operation between suppliers and manufacturers in the transition from a typical business operation through exchange contract to just-in-time systems.”¹⁶ He makes it explicit however that “the issue is not one of the precedence of supplier interests.” Rather, “the legal policy is to secure demanding technological coordination between different stages in the market through legal protection of autonomy and legal support for co-operation within complex contractual relations.”¹⁷

IV. NETWORKS AND THE LIMITS OF COMPARATIVE SOCIOLOGICAL JURISPRUDENCE

In the past there have been complaints, including those articulated by Teubner himself, concerning poor reception of systems theory in the English speaking world. One American law professor famously commented on Luhman’s *The Unity of the Legal System* by saying that it reminds him of Jabberwocky – the famous nonsense verse poem written by Lewis Carroll (you know: “Twas bryllyg, and ye slythy toves” etc.). Bad translations played a role – Teubner acknowledged on one occasion. And national and cultural context play a role too. “However, the core of the problem lies

¹⁶ Ibid., 200.

¹⁷ Ibid., 201.

elsewhere. It is a question of whether the language is complex enough to match the complexity of the subject matter.”¹⁸ In his book he argues that the notion of connected contracts, if manipulated skillfully, will suffice to account for many properties of networks. But, of course, the notion of ‘connected contracts’ is one that can be found in the BGB. Common law, for example, has no equivalent notion. Thus, it is perhaps no coincidence that Hugh Collins starts his preface to the book with a question that can easily appeal to the common law audience – “Does the common law need a new legal concept”?

Hugh Collins is a professor at London School of Economics and a close acquaintance of Teubner. One of the few legal scholars in the common law world who use systems theory (he did that rather well in his book *Regulating contracts*). It is thus, no coincidence that he wrote the Introduction to *Networks*, especially given that both Collins and Teubner are the editors of Hart’s International Studies in the Theory of Private Law series. Collins’ Introduction, excellent even if unusually long, is an essay in its own right worth of a review. In that essay professor Collins tests the feasibility of applying Teubner’s notion of ‘connected contracts’ in the English common law. His essay is meant as an introduction to Teubner’s book, but one may want as well read it as an afterword to it and it may turn out to be even more valuable then.

One central premise of Collins’ argument will be relevant here. “A difference in legal methods creates a[n] . . . obstacle of a shared multi-jurisdictional concept of network”¹⁹ – he observes. It is hardly surprising that Teubner ties his analysis to a concept that can be found in the BGB. It can be envisaged that other continental scholars could do the same thing. But “the common law lacks the disciplines of the need to find a root in a particular text, and the statutory texts themselves are not perceived generally as a source of principle that can be developed.”²⁰ Moreover, differences in substantive law can also provide to be an obstacle. “For instance, whereas a German legal scholar can manipulate such doctrines as good faith in contracts etc., these handy tools are not readily available to the common lawyer.”²¹

A legal concept of a network suitable for a variety of legal systems may thus be difficult to find. As professor Collins soberly notes: “a sophisticated doctrinal mode that might seem plausible for networks in

¹⁸ Gunther Teubner, “How Law Thinks: Toward a Constructivist Epistemology of Law” (1989) 23 (5) *Law and Society Review* 728.

¹⁹ Teubner (n 1) 26.

²⁰ Ibid.

²¹ Ibid.

one legal systems may make little sense within the doctrinal framework of another.”²² The notion of ‘connected contracts’ is a case in point. At the same time, this is not to say that a comparison may not be fruitful, but it is just to say that it has limits. “What the German doctrinal debates may teach common lawyers . . . is that extending traditional solutions to the problems posed by networks will probably not work satisfactorily in the end.”²³

The limits of comparative sociological jurisprudence are thus, the same as those of the comparative law method. Comparative law can provide us with important insights into how different legal systems operate. In the same vein comparative sociological jurisprudence can tell us, also in a prescriptive way, how the features of these networks differ in different legal contexts. But what about transnational networks? Comparative sociological jurisprudence hardly provides a framework for the analysis of transnational legal phenomena. Just as comparative law is not international law, comparative sociological jurisprudence is not the law of transnational private regulation. And yet there can be little doubt that, at the transnational level, many networks perform important regulatory functions. This is evident for example when these networks internalize certain environmental, health and safety, labor or human rights standards. If Collins is right saying that we have to take Teubner’s analysis with a grain of comparative salt, what about the utility of that analysis for transnational networks, such as global value chains? *Networks as Connected Contracts* provides fruitful ground to think about this and other questions, but the answers to them – whether drawing on or distinguishing themselves from Teuber’s analysis – are only to arrive in the future.

V. CONCLUSION

Professor Teubner’s analysis is rich and impressive. Network legal scholarship is only emerging, and Teubner’s book is an important contribution to that strand of literature. Legal networks’ scholars will most certainly read his recently published volume widely. But many of them will question his method. They will do that because Teuber’s method is problematic, to say the least. Collins points out to the limits of comparative sociological jurisprudence, but sociological jurisprudence is problematic in its own right, in particular because it offers little analytical clarity. It claims to use insights from economics, sociology, political science etc. but it does it in a rather obscure way. Moreover, Teubner’s reliance on systems theory largely removes the question of power from the

²² Ibid., 27.

²³ Ibid., 72.

analysis. In other words, Teuber's method may not be the only way of thinking about networks; it may, perhaps, not even be the most useful one.

BOOK REVIEW:
‘EUROPEAN READMISSION POLICY:
THIRD COUNTRY INTERESTS AND REFUGEE RIGHTS’
BY NILS COLEMAN

(MARTINUS NIJHOFF PUBLISHERS, LEIDEN, 2009, ISBN: 978-90041655
40, \$138)

Stephen Coutts*

I. INTRODUCTION

In this, the published version of his PhD thesis, Nils Coleman provides the first dedicated account and analysis of the EU's readmission policy and in particular assesses its compatibility with fundamental rights in the area of asylum law. In doing so he combines a legal analysis with a sophisticated presentation of the policy dynamics in this crucial and developing area of EU law and policy. It will, without a doubt, be a useful addition to the literature in the field and will be of interest to practitioners and academics working in the external relations of the EU, immigration and asylum law and policy, and questions of fundamental rights and the EU more broadly.

The book gives a general account of the readmission policy of the European Community (now Union) while also providing answers to two more specific research questions: a policy related question and a legal question. The policy question concerns the negotiation and implementation of these agreements and the motivation of third countries in entering into these agreements. The second, more legally focused question, focuses on the compatibility of such agreements with the fundamental rights obligations of the European Community and its Member states, particularly with regard to the situation of protection seekers and international refugee law.

The text is divided into three broad sections. Chapters 1 and 2 to outline the historical and legal contexts of readmission agreements. Chapters 3 to 8 give a comprehensive account of the readmission policy of the European Community and also address the first research question. They deal with the legal basis of the readmission policy, its policy context, the content of such agreements and give an account of the negotiation of specific agreements. Chapter 9 deals with the second research question namely the compatibility of the EC readmission policy with international human

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rights obligations.

The history of readmission agreements and their international law context are contained in the first two chapters. Coleman traces the origins of readmission agreements to the early 19th century rather than the 1950s and 1960s, identifying a longer history than most commentators. Nonetheless he admits that such agreements became more widespread in the mid-20th century, particularly between European states. Another milestone in their history occurred in the early 1990s with the fall of the iron curtain and a rise of migration as an issue in the domestic politics of many European states. It is this point that marks the departure of a common European policy towards readmission, directed towards central and Eastern European states and some non-European states.

In the second chapter Coleman outlines the relationship between readmission agreements and international law more broadly. He implicitly seeks to identify to what extent readmission agreements represent added value compared to pre-existing international law obligations. He finds that in principle states have an obligation under customary international law to accept their own nationals. However, it is an obligation that can often be frustrated in practice; a corresponding obligation does not exist in relation to third country nationals. Readmission agreements therefore confirm obligations regarding a state's own nationals, providing important details for implementation whilst establishing a legal basis for a state's obligation to readmit connected third country nationals.

Chapters 3 to 8 provide a useful and comprehensive account of readmission policies in the context of the European Union and provide an answer to the first research question: how third countries are persuaded to enter into such agreements given that they do not, at first glance, provide significant advantages to such states.

Chapter 3 identifies the rationale for the creation of a common readmission policy at the Community level. Rather surprisingly, at least from a European lawyer's perspective, the existence of the internal market, the free movement of persons and the corresponding need for a common admission policy, did not figure amongst the reasons provided for the creation of a common readmission policy. Rather, its motivation was more prosaic and related to the desire of member states to employ the political and economic weight of the community in the hope of a speedier and more advantageous outcome for the negotiations that individual bilateral agreements could achieve. Interestingly Coleman points out that such agreements often provided a vehicle for the establishment of wider cooperation with such states in migration and asylum matters, thereby

contributing to the increasing externalisation of such matters.

Chapter 4 deals with the thorny question of the competence of the Community to conclude such agreements. The analysis, while mentioning the ill-fated Constitutional Treaty is based on the law as it existed following the Treaty of Amsterdam. Unfortunately, with the entry into force of the Treaty of Lisbon and in particular the new Article 79(3) TFEU, which created an explicit competence of the Union to conclude readmission agreements, some of the legal analysis of the chapter is now out of date. Nonetheless, much remains relevant and readers will still no doubt find useful his distillation of five rules regulating the division of competences between Member states and the Union when negotiating and concluding such agreements.

Chapter 5 gives an account of the content of these agreements and identifies the pragmatic and programmatic approach employed by the Commission, an approach of the European Parliament based more on fundamental rights concerns having been rejected. It is particularly useful in providing an insight into the internal dynamics of the Commission and in particular the interplay and contrasting goals of different sections of the Commission, namely the Directorate General on Justice and Home Affairs (DG JHA) and Directorate General on External Relations (DG RELEX), manifesting the interplay between internal and external policies within the Commission itself.

Chapter 6, integrating readmission policies into the broader external relations environment of the EU, has the dual function of locating readmission policies at the intersection between internal and external policies while at the same time providing some answers to the question of what motivates third countries to enter into such negotiations with the EU. While not including any formal reference to compensation, readmission agreements are linked to both positive and negative incentives for third countries – the proverbial carrots and sticks. Flanking measures of particular note are financial aid for capacity building in the areas of border control, immigration and asylum reception and processing. Some practical drawbacks exist and there is a lack of uptake of such schemes, nonetheless they provide some measure of incentives for third countries. These measures beginning as specific budget lines under JHA, have developed over time and now are found in the general EU external assistance program within the thematic program of migration. The EC has been less successful in formulating a policy for the application of negative, punitive flanking measures. Coleman notes that, beyond general political statements by the European Council and other bodies, it has failed to specify in detail possible negative consequences for uncooperative third

countries.

Chapter 7 deals with the negotiation of such agreements and completes the assessment of the motivation of third countries in entering such agreements. The author provides an assessment of what the Community generally attempts to include in such agreements via an historical analysis of the policy since its inception at a Community level in the early 1990s. The second half of the chapter provides a detailed and invaluable country-by-country analysis. It identifies the issues that were common to the negotiations while providing an assessment of considerations particular to individual countries. Thus countries situations tend to vary depending on their different geographical position, their importance in general EU external policy, their status as origin and/or transit countries and their general geo-political situation. Coleman is particularly insightful in identifying the linkages that can exist between different sets of negotiations, particularly in a regional context.

The third section of the book considers the compatibility of EC readmission agreements with international law in relation to refugees. Chapter 9 is a lengthy and detailed chapter providing a rich mixture of exposition and analysis and to a large extent can be read independently of the preceding eight chapters. It assesses the current European Union practice of readmission agreements in light of international obligations in refugee law. In doing so it provides a useful general account of the obligations of the European Union and its Member states in relation to refugees and asylum seekers, concentrating specifically on obligations stemming from the Geneva Convention and the European Convention on Human Rights. It highlights concerns that have been raised in relation to readmission agreements generally and specifically Community Readmission agreements and analysis these agreements in light of such concerns. It addresses considerations such as non-refoulement, procedural guarantees, the risk of chain expulsions, the extra-territorial nature of fundamental rights protections and obligations to determine the status of protection seekers. In the specific context of Community readmission agreement it looks at the 'safe third country' clauses included in the procedures directive and other possible obligations arising from international law. It amounts to a nuanced and careful consideration taking into account the interaction of readmission agreements and international legal obligations and the particularly discretionary and minimal nature of the EC directives in asylum matters which grant member states sufficient discretion to provide for a higher level of protection and thereby comply with fundamental rights standards. It comes to the conclusion that EC readmission agreements are in general compatible with fundamental rights obligations arising from the ECHR

and the Geneva Convention albeit while interpreting such agreements rather narrowly. Furthermore there are no provisions in international refugee law making the inclusion of clauses aimed at safeguarding the rights of protection seekers into readmission agreements obligatory.

The conclusion, while brief, brings together the various elements of the work. It answers the research questions as outlined at the beginning of the book but perhaps its principal value is addressing the question of whether readmission agreements do in fact provide the benefits normally associated with them. It looks at the rate of return, both formal and informal, to a third country following the conclusion of such an agreement and on the possible effects on the border control and general immigration policy of a state. It concludes that difficulties arise in establishing causation and that further quantitative and qualitative studies are required.

The study is sceptical when addressing the value of a common European policy of readmission agreements, as opposed to individual national policies. It points out the difficulties that have arisen in achieving the stated goal of a speedier and more advantageous result for the Member states. Three reasons are identified for the less than hoped for level of success; the insistence on the part of the Council on the inclusion of third country nationals in all readmission agreements, the forthright attitude of third parties in holding out for counter-demands to be met and finally the lack of negotiating leverage accorded the Commission by the Council. Coleman notes that the desire of the EU, responding to domestic political concerns, creates opportunities for third countries to extract concessions and benefits. Finally it notes that, contrary to much scholarly opinion, readmission agreements as concluded by the EU are indeed compatible with international human rights law.

II. COMMENTARY

The book is the product of a PhD thesis and is a well accomplished piece of legal research. It is a comprehensive, detailed and clear account of this important and growing area of EU policy. It is nuanced and detailed in both its exposition and analysis yet requires no previous knowledge of the subject and should be of benefit to both academics and policy makers.

While its comprehensive nature is to be lauded the book can at times seem somewhat unbalanced. Beyond a detailed account of the readmission policy the book's detailed analysis concentrates exclusively on the question of its compatibility with international refugee law to the exclusion of other supplementary questions. Such issues are occasionally touched upon and would have benefited from further analysis. In particular the role of

readmission policies in the general externalisation of EU immigration policy is mentioned on a number of occasions but not elaborated upon. This is an important characteristic of the developing legal landscape and readmission policies are an important element in this development. The failure to develop this aspect of readmission policy and to relate it to other areas where immigration and asylum law is being externalised is therefore to be regretted. In a similar vein it would have been helpful if the text had elaborated on the claim that readmission policies can be considered a means of developing relations with third countries on migration and asylum matters broadly.

Nonetheless the work is a useful addition to the field and fills a gap in existing literature. In particular it provides the first dedicated analysis of such agreements and does so with success. While remaining a legal text it is adept at marrying the political, administrative and legal aspects of the European Readmission policy as befits its place in a series dedicated to Immigration and Asylum law and Policy in Europe. It describes in detail how varying political actors, be they Member states, the Council, the Commission or even different elements within the Commission, interact to formulate and implement policies. Not only does it accurately present the various characteristics of European readmission policy but also assess why the policy has developed in such a way. While not explicitly a work of policy analysis it shows a degree of sophistication in its combination of the tools of path dependency while taking into account the role of institutional concerns and individual actors.

Nuance and depth is added by relating readmission policy to other fields such as internal migration, constitutional and institutional questions of competence, human rights and external aid policies. In particular its clear empirical analysis of fundamental rights issues associated with such agreements will be a welcome addition to a body of literature that is often skewed heavily in the normative direction. Readmission policy is an area of law and policy that lies at the crossroads of internal and external policy, a fact that is not lost on the author. In fact internal and external policy considerations are integrated with ease and the author is quick to note where they complement each other and where they might find themselves in tension.

Overall this is a comprehensive and well-accomplished piece of research combining a thorough account of the readmission agreements while placing them in their legal, political and historical context. It highlights the interaction between internal and external policies that lie at the heart of readmission agreements and is particularly valuable in its clear assessment of their relationship to fundamental rights obligations. Yet

perhaps its most valuable characteristic is the overtly empirical nature of the analysis, allowing for a clear, comprehensive and objective account of readmission agreements. In providing such an account Nils Coleman has made a valuable addition to research in the field and his work will be of immense benefit to academics and practitioners.