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Jean Monnet Working Paper 08/10

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**Citizenship without Respect:  
The EU's Troubled Equality Ideal**

NYU School of Law • New York, NY 10011  
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ISSN 1087-2221 (print)  
ISSN 2161-0320 (online)  
© Dmitry Kochenov 2010  
New York University School of Law  
New York, NY 10011  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

# CITIZENSHIP WITHOUT RESPECT: THE EU'S TROUBLED EQUALITY IDEAL

By Dimitry Kochenov \*

## Abstract

The European Union suffers from an empty formalistic reading of the principle of equality when dealing with situations where different legal orders legitimately compete, aspiring to regulate the condition of the same persons in the same circumstances. Consequently, equality before the law is not safeguarded in the Union, and a radical reform of the procedural reading of the principle of equality is required. Most importantly, to live up to being a true principle of EU law, equality in the EU needs to acquire a substantive component which is entirely missing at the moment. This paper looks at the procedural *vistas* informing the ECJ's attempts to address the EU's fundamental problems through the redefinition of the scope *ratione materiae* of EU law following the introduction of Union citizenship, only to find the outcomes of such efforts inadequate and potentially dangerous for the rule of law in Europe. It is suggested that a substantive approach to equality could be employed instead, and that the idea of respect, lying just as equality itself, at the core of the notion of citizenship – and the law as such – could supply the missing core of the equality principle, providing the much-needed cure for some crucial deficiencies of EU law as it currently stands.

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I would like to thank Joseph Weiler and Gráinne de Búrca, as well as, among many others, the participants of the Fellows Forum at NYU Law School for their most helpful comments and the staff at the 'Think! Coffee' café in Mercer Street, where the core of this work was produced. The assistance of Harry Panagopoulos is kindly acknowledged.

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*People can be hypocrites, but some I am sure aren't.*  
Richard Wollheim<sup>1</sup>

*Law is a more or less empty framework capable of taking more or less any substantive content.*  
Philip Allott<sup>2</sup>

## 1. INTRODUCTION AND THE STRUCTURE OF THE ARGUMENT

Contemporary EU law preaches that injustice, apparently, is a necessary addition to the system of multilevel constitutionalism.<sup>3</sup> In fact, injustice seems to be merely a direct by-product of a purely formalistic application of the national and supranational principles of ‘equality’, which sees this principle applied strictly within the confines of the different legal orders in a situation when the latter allow for amœbous interpenetrations, being delimited virtually at random. In this situation no one can legitimately claim that basic equality before the law in the Union is safeguarded. More often than not, even which law is to apply and *why* is unknown, and a satisfactory test to resolve jurisdictional conflicts is missing.

Following the introduction of EU citizenship, both legal orders in the Union now have identical scopes of application *ratione personae*,<sup>4</sup> bringing the two levels of thinking about equality (national and supranational) into conflict with the concept of citizenship – both at the Member State level and at the level of the Union – potentially affecting every European. Given the dubious nature of the assumption that the situations of those covered by EU law and those covered by national Member State rules are principally different in a setting when the jurisdictional border between the legal orders is flexible and porous and where clear substantive

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<sup>1</sup> Wollheim, Richard, ‘Equality’, 56 *Proceedings of the Aristotelian Society*, 1955–1956, 281, 285.

<sup>2</sup> Allott, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge: CUP, 2002, 52.

<sup>3</sup> E.g. Ritter, Cyril, ‘Purely Internal Situations, Guimont, Dzodzi and Article 234’, 31 *Eur. L.Rev.*, 2006, 691; Geelhoed, L.A., ‘De vrijheid van personenverkeer en de interne situatie: Maatschappelijke dynamiek en juridische rafels’, in Manunza, Elisabetta, and Senden, Linda (eds.), *De EU: De interstatelijkheid voorbij?*, Nijmegen: Wolf Legal Publishers, 2006, 31, 47 (assuming that reverse discrimination, although probably not ideal, is a necessary addition to the very built-up of European law, which happens to be divided into different legal orders).

<sup>4</sup> For a compelling analysis, see Spaventa, Eleanor, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’, 45 *Common Mrkt. L.Rev.*, 2008, 13.

principles informing the assignment of jurisdiction have given way to legalistic procedural considerations, it becomes apparent that the EU's idea of justice and the rule of law is not without a touch of awkwardness. Unable to apply its laws to every national on its territory for no clear reason and without sufficiently predictable results, no Member State can legitimately claim that equality is safeguarded. The same applies to the Union: although equality is famously one of its fundamental principles<sup>5</sup> and although every Member State national is an EU citizen,<sup>6</sup> for the Union, the majority of citizens are beyond equality's reach, finding themselves in situations where the presumption of incomparability reigns. Legal formalism is threatening to annihilate the essential considerations of justice behind the law.

It is suggested that by providing for a substantive, rather than a purely formalistic reading of the principle of equality<sup>7</sup> through the idea of respect, the EU could depart from the present unsatisfactory state of affairs, thus adhering to Kenneth Karst's assertion that 'the idea of equality carries a meaning quite removed from the empty tautology that like cases should be treated alike'.<sup>8</sup>

We all are familiar with the constant assertions that equality is nothing but a fundamental principle of EU law. It is clear, nevertheless, that there is also deeper truth behind such

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<sup>5</sup> See e.g. Case 117/76 *Ruckdeschel et al v. Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, para. 7. For a more recent example see Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, para. 61.

<sup>6</sup> Art. 21(1) TFEU.

<sup>7</sup> Equality is not alone among the 'fundamental principles' of EU law, unable to boast any substantive core. The principle of the rule of law seems to suffer from the same disease. For a critical analysis see Williams, Andrew, 'Taking Values Seriously: Towards a Philosophy of EU Law', 20 *Oxford J. Legal Stud.*, 2009, 549, 568–569; Kochenov, Dimitry, 'The EU Rule of Law: Cutting Paths through Confusion', 2 *Erasmus L.Rev.*, 2009, 5; Arnall, Anthony, 'The Rule of Law in the European Union', in Arnall, Anthony and Wincott, Daniel (eds.), *Accountability and Legitimacy in the European Union*, Oxford: OUP, 2002, 240, 241, but see Pech, Laurent, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* (NYU), No. 4/2009.

The same holds also for justice, which is often split into a formal and a substantive component: Sadurski, Wojciech, 'The Concept of Legal Equality and an Underlying Theory of Discrimination', 4 *St. Louis – Warsaw Transatlantic L.J.*, 1998, 63, 68 and note 17. For a majestic work questioning the just substance of the whole European integration project see Williams, Andrew, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge: CUP, 2010.

<sup>8</sup> Karst, Kenneth L., 'Why Equality Matters', 17 *Georgia L.Rev.*, 1983, 245, 249.

statements. To put it mildly, following Gráinne de Búrca, equality ‘is only selectively relevant in certain specific areas of [EU] law [...and...] does not have a single coherent role in [Union] law’.<sup>9</sup> In other words, the literature on the ‘fundamental principles’<sup>10</sup> notwithstanding, equality has only become such a principle of EU law through ‘largely rhetorical’ statements,<sup>11</sup> not through fact or, for that matter, law. It can be even conceded that ‘in a number of fields Community law actually permits or even promotes discrimination and unequal treatment’.<sup>12</sup> In the words of Joseph Weiler, ‘oggi, noi accumuliamo la retorica dei valori anche se, nelle parti operative dei trattati, vi diamo poca importanza o lasciamo prevalere ambiguità’ – however widely lauded, the principle of equality is certainly a victim of this unfortunate development.<sup>13</sup>

At the same time, equality is citizenship’s key element. In fact, it forms a part of citizenship’s very definition as ‘a status of equal membership within a bounded polity’.<sup>14</sup> It is thus particularly important in the context of the current transformation of the Union in Europe, where the role played by the notion of EU citizenship is increasing in importance.<sup>15</sup>

Clearly, equality should not be confused in this context with yet another ‘citizenship right’: where equality is not safeguarded, there is *no* citizenship. The two notions are interconnected in all democratic legal systems, be it a dual citizenship system in a federation<sup>16</sup> or

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<sup>9</sup> de Búrca, Gráinne, ‘The Role of Equality in European Community Law’, in Dashwood, Alan and O’Leary, Siofra (eds.), *The Principle of Equal Treatment in EC Law*, London: Sweet and Maxwell, 1997, 13, 14.

<sup>10</sup> E.g. Tridimas, Takis, *The General Principles of EU Law* (2<sup>nd</sup> ed.), Oxford: OUP, 2006, 59; Arnall, Anthony, *The General Principles of EEC Law and the Individual*, Liecester: Liecester University Press, 1990.

<sup>11</sup> de Búrca (1997), 13.

<sup>12</sup> *Id.*, 15.

<sup>13</sup> Weiler, Joseph H.H., ‘Europa: “Nous coalisons des Etats nous n’unissons pas des hommes”’, in Cartabia, Marta and Simoncini, Andrea (eds.), *La Sostenibilità della democrazia nel XXI secolo*, Bologna: Il Mulino, 2009, 51, 54.

<sup>14</sup> Bauböck, Rainer, and Guiraudon, Virginie, ‘Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance’, 13 *Citizenship Stud.*, 2009, 439.

<sup>15</sup> On the growing role of EU citizenship see, *inter alia*, Kochenov, Dimitry, ‘Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship’, *EUI Working Paper* (Florence), RSCAS No. 23/2010.

<sup>16</sup> For a detailed analysis see Beaud, Olivier, ‘The Question of Nationality within a Federation: A Neglected Issue in Nationality Law’, in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/ Oxford: Randall Books, 2002, 314. For EU

a mono-citizenship construct in a unitary state. Equality is thus one of the necessary conditions that summons citizenship into being. Although it is indispensable for the organisation of political participation, which also lies at the core of the understanding of citizenship, equality should be treated as a value in itself, not merely as a facilitator of the creation of a political space. Agreeing with Gareth Davies,

[although c]itizenship is often associated with rights to political participation, [...] for many citizens this is but a part, and not necessarily a particularly important part, of what they feel their citizenship entails. There are other rights and privileges associated with citizenship which make a greater contribution to the importance of the status to those who have it.<sup>17</sup>

As for equality, it is absolutely crucial, since

The sense of this right to equality gives status to individuals [:] one of the major effects of citizenship is to provide a sense of place. Formal equality provides a high level of transparency and certainty, and rights to protection and services give a sense of security and obligation, which the state can leverage to further collective ends – taxation or military service, for example. To possess citizenship is to have a form of socio-political fixed abode, convenient for both the denizen and the authority who may wish to address them.<sup>18</sup>

The starting point of equality as a key element inherent in the idea of citizenship consists in the assumption that enjoying the legal status of citizenship, alongside possessing simple humanity is enough to be treated by the competent authority as well as society as a whole in the same way as other citizens are treated. In this context, equality is necessarily employed not as a

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context see Schönberger, Christoph, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative federalism', 19 *Revue européenne de droit public*, 2007, 61.

<sup>17</sup> Davies, Gareth, 'Services, Citizenship, and the Country of Origin Principle', *Mitchell Working Paper* (Edinburgh) No. 2/2007, 2.

<sup>18</sup> *Id.*, 2–3.



merely formalistic principle, but as a substantive one, related to the ideals of respect<sup>19</sup> and justice.<sup>20</sup> Fragmentation of authority or administrative divisions between jurisdictions does not remove the principle of equality from the scene *per se*; rather it becomes more acute. No legal system aspiring to approach the ideal of justice can exist without providing at least for equality before the law.

Two problems arise in the Union in this respect.

*Firstly*, a clear, logically predetermined border between the material scopes of the application of the laws rooted in the two different legal orders is missing, making even the formalistic application of equality difficult, if not impossible. While more clarity is a pressing need, the distinction between what is to be regulated by EU law as opposed to national law is actually becoming ever more elusive.

*Secondly*, equality has been consistently employed in the Union as lacking its own substance, which has innate negative effects on the future of the EU legal system, undermining its legitimacy and justice, and the trust of the citizens in *both* legal orders in question: the core of the legal-political systems of the Member States suffers in the same way as the Union does.

The current situation is akin to the organisation of the pre-modern empires: citizenship, territoriality and law parted ways, to give way to neo-mediaeval esoteric principles,<sup>21</sup> such as the eventual need to establish a ‘cross border element’, diluting clarity and undermining the ideal of justice by making the upholding of the key elements necessary for the proper functioning of any

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<sup>19</sup> Karst, Kenneth L., ‘Equal Protection of the Laws’, *Society*, Nov./Dec. 1986, 24; Karst (1983); Karst, Kenneth L., ‘The Supreme Court 1976 Term Foreword: Equal Citizenship under the Fourteenth Amendment’, 91 *Harv. L.Rev.*, 1977, 1.

<sup>20</sup> For an analysis, see Ake, Christopher, ‘Justice as Equality’, 5 *Philosophy and Public Affairs*, 1975, 69. Ake asserts that there is a ‘sense of justice, different from all its specific institutional senses, which is uniquely appropriate for determining the justice of a society as a whole’ (at 69–70). See also Miller, David, ‘Equality and Justice’, 10 *Ratio (new series)*, 1997, 223; Julius, A.J., ‘Basic Structure and the Value of Equality’, 31 *Philosophy and Public Affairs*, 2003, 321.

<sup>21</sup> Zielonka, Jan, *Europe as an Empire: The Nature of the Enlarged European Union*, Oxford: OUP, 2003, 11–22. In the context of the feeling of belonging see Aziz, Miriam, *The Impact of European Rights of National Legal Cultures*, Oxford: Hart, 2004, 80–91 (making an analogy with ‘citizenship’ of the Mediaeval City-States).

mature legal system impossible. These include, to name just a few: equal citizenship, legal certainty and democratic legitimation<sup>22</sup> – all rhetorically embraced by the Member States and the Union alike.

What is more worrisome, however, is that equality in the EU does not in fact behave as a true principle of law, since, deprived of any substance, it can be easily interpreted away, as it does not possess any principle significance of its own, unable to influence the legal-formalistic *gestalt* of the Union, notwithstanding the pronouncements of the Institutions, including the Court.<sup>23</sup> The simple truth is that the EU is not quite built on the principles of equality and justice.<sup>24</sup> Rather, the rhetorical appeals to the principle of equality in the atmosphere of the legal formalism immune by its very design to the nature of the principle, are employing equality merely as a tool to further the achievement of specific economic goals, which is far short of the principle's potential, if not contrary to its nature.<sup>25</sup>

Formalism demands that, when confronted with equality dilemmas, no legal order looks to another legal order for comparison, only *within itself*, subject to its own jurisdiction perceived as exclusive and clearly outlined. This ensures that the application of equality to citizens who are *ex vi termini* within the scope of *each* legal order across the arbitrary and unclear dividing line between such legal orders is popularly perceived as impossible,<sup>26</sup> thus undermining this fundamental principle at both levels: at the level of the Union and at the level of the Member States. In practice this amounts to nothing less than the destruction of the idea of citizenship and opens to question the rule-of-law rationale of the Union: in the absence of the clear substantive facet of the equality principle, the application of the law of a particular order to a particular

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<sup>22</sup> For an illuminating analysis see Aziz (2004), 75–80.

<sup>23</sup> Using Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat* ([2008] ECR I-6351) as an example, Williams demonstrated that the ECJ usually displays the principles to ensure the preservation of the coherence of the EU legal system, rather than in order to protect some fundamental values they are designed to guarantee, which necessarily affects the outcomes of the Court's interventions: Williams (2009), 572.

<sup>24</sup> Williams (2010); Williams (2009).

<sup>25</sup> See also de Búrca (1997).

<sup>26</sup> International law suffers from the same limitations: Kingsbury, Benedict, 'Sovereignty and Inequality', 9 *Eur. J. Int'l L.*, 1998, 599. See also Part 5(e) *infra*.

situation would seem simply arbitrary. In a situation where equality stops at the arbitrary and extremely mobile border between the legal orders, it is rendered practically inapplicable, since, all the efforts of the Court notwithstanding,<sup>27</sup> no sufficiently convincing substantive considerations are ever employed to transcend the formalistic reading of the principle.

The principle of equality in the contemporary Union functions in such a way that at any moment any citizen can end up on either side of the jurisdictional divide and no substantive explanation for the non-availability of equal treatment in comparison to those left on the other side, however similar in fact their circumstances may be, will ever be granted, while the status of citizenship will *not* play a decisive role (or, indeed, literally no role at all) in the formal assignment of jurisdiction. To agree with Niamh Nic Shuibhne, the principle of equality thus ‘undergoes something of an ideological battering’.<sup>28</sup> This is not a surprise, given that an enlightenment-inspired notion of citizenship, necessarily rooted in equality viewed through the prisms of justice and respect, is put in a neo-mediaeval setting which by definition contradicts citizenship’s very essence. It is a clear sign that EU citizenship, frankly, is hardly worthy of this glorifying term, which seems to be true both in the context of its purely legalistic assessment as well as in the context of sociological reality, which would take into account the feeling of belonging, for instance. Member State nationalities, as legal statuses, are profoundly undermined as well. The truth is very plain: the two simply can simply no longer be separated.<sup>29</sup> A blow served to one, necessarily also knocks down the other.

Considered from this point of view, the Union has entered a dangerous phase where the old is destroyed and the new is yet to be built. Worse still, the need to build anything is generally denied. We are supposed to be content with the current situation, which ultimately rests on the unfounded belief that formalism is enough to hold the system together and *no* underlying substantive philosophy of equality, new or old, is needed either at the EU level (where it does not

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<sup>27</sup> For analysis see Part 4 *infra*.

<sup>28</sup> Nic Shuibhne, Niamh, ‘The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?’, in Beaumont, Paul, Lyons, Carole, and Walker, Neil (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, 177, 188.

<sup>29</sup> Kochenov (2010) ‘Rounding up the Circle’.

exist), or at the Member State level (where it is profoundly undermined), which is unsettling. The EU, as it stands at the moment, thus potentially corrupts the very idea of citizenship at both levels as far as its equality component is concerned.

In fact, a similar process seems also to be unfolding in the realm of the political: the second major facet of citizenship – that of political representation – seems to be equally undermined. The citizen, in the words of Joseph Weiler ‘è ridotto a un consumatore di risultati politici’.<sup>30</sup> Citizenship came under attack on both fronts and at both levels. This paper, however, will focus on the analysis of the equality side of the citizenship coin, leaving political representation for future academic scrutiny.

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This paper starts with an outline of the fundamental connection existing between the concept of citizenship and the idea of equality, also sketching the fundamental distinction between the functional and procedural approaches to equality, and emphasising the particular importance of the substantive understanding of equality, were it to play a role as a fundamental principle of law. Upon demonstrating the dangerous hollowness of the idea of procedural equality – which can hardly be employed as a legal principle – the notion of respect is suggested as the starting point to take when addressing the substance of the principle (2.).

Turning specifically to the legal climate of the EU, the paper sketches the intricacies of the operation of the principle of equality in the situation of the constant contestation of jurisdiction, inherent in any federation. This is done by outlining the problematic context of the functioning of equality within and between the legal orders in the Union. The section opens up a route to the search for a new approach to dealing with the deficiencies of the principle, as currently understood, in the law of the Union and the Member States (3.).

The section that follows demonstrates that the ECJ made attempts to remedy the problematic aspects of the current *status quo* in the operation of equality at the dividing line

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<sup>30</sup> Weiler (2009) ‘Nous coalisons des Etats’, 64.

between the legal orders. It is argued that the deficiencies of equality were seriously amplified following a veritable explosion of the scope *ratione personae* of EU law triggered by the introduction of the citizenship of the Union. Upon a dynamic analysis of the ECJ's approach to the framing of the personal and material scopes of EU law, it is submitted that the ECJ, although actively attempting to resolve the current problems by stretching the material scope of EU law, has failed to achieve any sound results due, *inter alia*, to the fact that it approached the issue of equality from a purely formalistic standpoint, without embracing any substantive idea of equality and justice. Consequently, all the current problems remain, the ECJ's labours notwithstanding. The legalistic approach adopted by the Court is, with all respect, embarrassingly empty, readily providing a pretext to further *any* ends. The section turns to Kenneth Karst's principle of equal citizenship<sup>31</sup> to suggest, once again, possible substantive approaches to equality among EU citizens, focusing on dignity, respect and justice, which the legal system of the Union fails to provide (4.).

In a search for the explanations for the failure of the Court to tackle the outstanding problems in an effective manner, the paper turns to the assessment of the dangers of legal formalism, employing Jack Balkin's notion of 'Constitutional evil'<sup>32</sup> in the context of the clash between the legal orders. It is submitted that the principle of equality acquired its imperfect form under pressure from the Member States' 'sensitivities'. The recent BVerfG decision in the *Lisbon Treaty* seems to support this point.<sup>33</sup> By clinging to the sovereign concerns in a legal-political setting where they are no longer in a position to guarantee equality before the law for their citizens and where no clear correlation exists between the territory, citizenship, state authority and applicable law, the Member States end up undermining the key principles lying at the foundations of their own constitutional orders. The approach to equality in international law is then deployed in the section as an extreme example of what European constitutional law,

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<sup>31</sup> Karst (1977), 5–11.

<sup>32</sup> Balkin, Jack M., 'Does the Constitution Deserve Our Fidelity: Agreements with Hell and Other Objects of our Faith', 65 *Fordham L.Rev.*, 1997, 1703, 1704.

<sup>33</sup> BVerfGE 63, 2267 (2009).

aspiring to justice should not be like, notwithstanding the fact that a number of similarities can be found between the current state of equality in international law and in the law of the EU (5.).

Is the Union doomed to surrender equality and citizenship at both supranational and national levels in the face of the currently popular formalistic approach? Do the appeals to substantive reading of equality really provide an available remedy to make up for the dangerous deficiencies of the current *status quo*? The paper makes a modest argument in favour of the change in addressing the meaning of the principle of equality in the EU. The substantive core of the principle of equality should inform the interaction between the different legal orders at all the stages of their coexistence. It is abundantly clear at the same time that mere equality is not a panacea for all Europe's ills. The fundamental problem outlined in the paper simply exposes the systemic deficiencies of the legal build-up of the Union, which undermine its very core, the fundamental values,<sup>34</sup> on which the Union is said to be built. Unfortunately, in the Union as it currently stands, the purely formalistic approach is probably innate, as the EU–Member State system functions through turning fundamental moral issues into management problems, rendering itself unable to generate substantive principles which would inform its rationale (6.). This systemic deficiency has all the potential to undermine the Union in the future, should it not be addressed.

## 2. EQUALITY AND CITIZENSHIP

Although it is at least as important in the context of any theoretical model of citizenship as citizenship's exclusionary nature (a.), equality remains but a moral assumption (b.), which plays, nevertheless, a fundamental systemic role in the framing of citizenship (c.). The principle of

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<sup>34</sup> These are listed in Art. 2 EU, which reads as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

equality has a problematic formal side – popular with the ECJ and a very large number of national courts in the EU (d.) – and a substantive side (e.). Numerous concepts are legitimately regarded as potential candidates for investing equality with substance – but the notion of respect stands out in their midst (f.).

### a. Citizenship’s dual nature

Whenever the word ‘citizenship’ is mentioned, the concept of inequality necessarily springs to mind. By its very definition, citizenship is a profoundly dividing concept, an expression of a ‘deep and common desire to exclude and reject large groups of human beings’.<sup>35</sup> This statement coined by Judith Shklar in the context of the analysis of US citizenship is true of any other citizenship in the world. Should we embrace Raymond Aron’s assumption that citizenship can only be a ‘citizenship of a country among countries’<sup>36</sup> – all kinds of borders appear immediately, marking exclusion. The EU, although providing an essentially quite useless update of terminology, works as an exclusion machine through Union citizenship in a way which is perfectly reminiscent of any other citizenship in the world.<sup>37</sup> However, inside the borders, the concept of citizenship is marked by a very strong rhetorical commitment to the idea of equality: once the status of citizenship is established, you are in.<sup>38</sup> Here too EU citizenship is not at all different from the citizenship of a country among countries. The only difference could be that

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<sup>35</sup> Shklar, Judith, *American Citizenship: The Quest for Inclusion*, Cambridge, MA: Harvard University Press, 1991, 28. For a stimulating analysis of the possible valid moral grounds for the exclusion of ‘outsiders’ see Bauböck, Rainer, ‘Global Justice, Freedom of Movement and Democratic Citizenship’, 51 *Archives européennes de sociologie*, 2009, 1; Carens, Joseph H., ‘Aliens and Citizens: The Case for Open Borders’, 49 *Rev. of Politics*, 1987, 250, 251. For a literal legal-historical example of a legal status of citizenship designed to ‘fail’ certain groups see e.g. Tyler, Imogen, ‘Designed to Fail: A Biopolitics of British Citizenship’, 14 *Citizenship Stud.*, 2010, 61.

<sup>36</sup> Aron, Raymond, ‘Is Multinational Citizenship Possible?’, 41 *Social Research* 4, 1974, 638.

<sup>37</sup> See, in general, Balibar, Étienne, *Nous, citoyens d’Europe: Les frontières, l’État, le peuple*, Paris: La Découverte, 2001.

<sup>38</sup> There is no overlap between political borders and the borders of citizenship: Bauböck, Rainer, ‘Citizenship and National Identities in the European Union’, *Jean Monnet Working Paper* (Harvard) 97/04, 1997.

third country nationals are treated far worse in the EU than in any other republic<sup>39</sup> – something the EU has been notorious for a while already.<sup>40</sup>

When discussing those in possession of the legal status of citizenship, a simple and powerful trend emerges throughout the democratic world. It consists of establishing the fundamental connection between the concepts of citizenship and equality. Equality matters for any citizenship<sup>41</sup> primarily because the main function of citizenship as a legal concept is to ascribe equal dignity and equal worth to all the members of the society in possession of this status, with no regard to their actual talents and abilities. A citizenship of unequals before the law is an oxymoron representing a reality impossible in any mature legal system. Consequently, however one regards citizenship<sup>42</sup> – as a legal status, as a bundle of rights, duties and responsibilities,<sup>43</sup> as a corollary of political participation, or, less legalistically, through patriotic

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<sup>39</sup> For an analysis of the EU from a republican perspective see von Bogdandy, Armin, ‘The Prospect of a European Republic: What European Citizens are Voting on’, 42 *Common Mrkt. L.Rev.*, 2005, 913.

<sup>40</sup> See e.g. Weiler, Joseph H.H., ‘Though Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique’, 3 *Eur. J. Int’l L.*, 1992, 65; Balibar (2001), 190, 191; Ward, Ian, ‘Law and Other Europeans’, 35 *J. Common Mrkt. Stud.*, 2002, 79. Repression is actually at the core of the current construction of the EU. Countless internal borders in Europe, although invisible, cut the internal market into pieces *uniquely* for those who do not ‘belong’, overwhelmingly complicating their lives and robbing both these individuals and Europe as a whole of countless possibilities – economic, cultural, and otherwise. Indeed, where the borders between the Member States are non-existent, preserving them on paper exclusively for third-country nationals seems not only impractical, but also unjust: Kochenov, Dimitry, ‘*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, 15 *Columbia J. Eur. L.*, 2009, 169, 286. See also Wiesbrock, Anja, ‘Free Movement of Third-Country Nationals in the European Union: The Illusion of Exclusion’, 35 *Eur. L.Rev.*, 2010, 455.

<sup>41</sup> Karst (1986), 24. See also Forbath, William E., ‘Caste, Class, and Equal Citizenship’, 98 *Mich. L.Rev.*, 1999, 1; Karst (1983), 245; Karst (1977), 1 (writing from an American perspective). See also Koppelman, Andrew, *Antidiscrimination Law and Social Equality*, New Heaven: Yale University Press, 1996 (providing a detailed critical overview of all the main equality theories employed by lawyers (at 13–114)).

<sup>42</sup> For a number of different approaches see e.g. Bosniak, Linda, ‘Citizenship Denationalised’, 7 *Indiana J. Global Legal Stud.*, 2000, 477; Rubinstein, Kim, and Adler, Daniel, ‘International Citizenship: The Future of Nationality in a Globalised World’, 7 *Indiana J. Global Legal Stud.*, 2000, 519, 522. See also Mindus, Patricia, ‘Europeanisation of Citizenship within the EU: Perspectives and Ambiguities’, *Università degli Studi di Trento Working Paper* WP SS 2008, No. 2, 2008.

<sup>43</sup> Weiler (2009) ‘Nous coalisons des Etats’.



feeling and the idea of ‘belonging’<sup>44</sup> – the fundamental principle of equality always plays a leading role whenever we speak of citizenship’s essence.

Equality is at least as important for bringing citizenship into being, as is citizenship’s exclusionary nature, the two marking different sides of the same coin.

### **b. Equality as a presumption**

That people are equal *ab initio*, that ‘every man [is] to count for one and no one [is] to count for more than one’,<sup>45</sup> that ‘human worth one cannot lose, however wicked or hopeless might be one’s performances’<sup>46</sup> – is a moral assumption,<sup>47</sup> not an assertion of fact.<sup>48</sup> It is simply accepted as a reasonable starting point for the organisation of human society, which virtually all contemporary theorists seem to embrace.<sup>49</sup> Sir Isaiah Berlin rightly emphasised that the ‘connection between “counting for one” and the doctrines of Christian theology, or the French *philosophes*, or this or that view of reason or of nature is rather more historical and psychological than logical.’<sup>50</sup> The presumption of equality can thus be held or rejected *for whatever reason*.

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<sup>44</sup> On the European context see e.g. Horváth, Enikő, *Mandating Identity: Citizenship, Kinship Laws and Plural Nationality in the European Union*, The Hague: Kluwer Law International, 2008; Bauböck (1997); Preuß, Ulrich K., ‘Citizenship and Identity: Aspects of a Political Theory of Citizenship’, in Bellamy, Richard, Bufacci, Vittorio and Castiglione, Dario (eds.), *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995, 107; Stephanou, Constantin A., ‘Identité et citoyenneté européennes’, *Revue du marché commun*, 1991, 30. For a social science perspective see e.g. Shore, Chris, ‘Whither European Citizenship? Eros and Civilization Revisited’, 7 *Eur. J. Social Theory*, 2004, 27.

<sup>45</sup> Berlin, Isaiah, ‘Equality’, 56 *Proceedings of the Aristotelian Society*, 1955–1956, 301.

<sup>46</sup> Lloyd Thomas, D.A., ‘Equality within the Limits of Reason Alone’, 88 *Mind*, 1979, 538, 540. On the notion of ‘individual human worth’ see e.g. Vlastos, Gregory, ‘Justice and Equality’, in Brandt, Richard B. (ed.), *Social Justice*, New Jersey: Prentice Hall, 1962, 43.

<sup>47</sup> Dworkin, Ronald, *Taking Rights Seriously*, Cambridge MA: Harvard University Press, 1977, 179–183. See also Waldron, Jeremy, ‘Basic Equality’, *NYU School of Law, Public Law & Theory Research Paper Series, Working Paper No. 08-61*, 2008, 1.

<sup>48</sup> Singer, Peter, *Animal Liberation: A New Ethics for Our Treatment of Animals*, New York: New York Review, 1975, 5 (as cited in Pojman, Louis P., ‘Are Human Rights Based on Equal Human Worth?’, 52 *Philosophy and Phenomenological Research*, 1992, 605, 614).

<sup>49</sup> For a detailed critical overview of the main trends in egalitarian theorizing, embracing such an assumption as a starting point, see Pojman (1992), *passim*. Outlining ten main contemporary secular arguments for equal human worth, Pojman convincingly dismisses them all, coming to questioning the starting assumption, which, he concludes, is ‘is one of the shallowest assumptions of our time’ (at 622).

<sup>50</sup> Berlin (1955–1956), 301, 302.

A number of authors tried to downplay what they saw as the ‘logical gap between fact and value’<sup>51</sup> by making attempts to reconcile the moral presumption of equality with the empirical reality, which differs from such presumption in the most obvious way: all people are different, possessing different talents, beauty and capacities of mind.<sup>52</sup> Notwithstanding the contemporary consensus on the importance of equality, the historical opposition to this idea, personified, most importantly, by Aristotle and Hobbes, is well known. In fact, it is worth remembering, following John Schaar, that

the pursuit of equality as an ideal of justice in a rather recent political fashion, one belonging distinctively to modern constitutional and democratic thought. The classical writers who invented political thought were profoundly, almost instinctively, inegalitarian.<sup>53</sup>

Presumptions tend to change with time: in the contemporary world, egalitarianism (at least rhetorical) has won the preferment of the majority. Kai Nielsen seems to be right in declaring about equality ‘I do not know how anyone could show this belief to be true’.<sup>54</sup> Like democracy,<sup>55</sup> equality simply has no moral value in itself.<sup>56</sup> Indeed, to refer to Sir Isaiah yet again,

Equality is one of the oldest and deepest elements in liberal thought, and is neither more nor less ‘natural’ or ‘rational’ than any other constituent in them. Like all human ends it cannot itself be defended or justified, for it is itself that which justifies other acts – means taken towards its realisation.<sup>57</sup>

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<sup>51</sup> Schaar, John H., ‘Some Ways of Thinking about Equality’, 26 *Journal of Politics*, 1964, 867, 868.

<sup>52</sup> E.g. Lloyd Thomas (1979). For a sound criticism of a wide range of such attempts see Pojman (1992), 605.

<sup>53</sup> Schaar (1964), 868 *et seq.*

<sup>54</sup> Nielsen, Kai, *Equality and Liberty: A Defence of Radical Egalitarianism*, Totowa, NJ: Rowman and Allenheld, 1985, 95.

<sup>55</sup> Weiler, Joseph H.H., ‘In Defence of the *Status Quo*: Europe’s Constitutional *Sonderweg*’, in Weiler, Joseph H.H. and Wind, Marlene (eds.), *European Constitutionalism beyond the State*, Cambridge: CUP, 2003, 7, 18: ‘a democracy of vile persons will be vile’.

<sup>56</sup> Frankfurt, Harry, ‘Equality and Respect’, 64 *Social Res.*, 1997, 3, 4.

<sup>57</sup> Berlin (1955–1956), 326.

### c. Equality and the making of the citizen

Once one moves into the realm of the political – shifting from merely ‘human beings’ to ‘citizens’<sup>58</sup> – the clash between empirical reality and philosophical vision could be easier to reconcile.<sup>59</sup> The reconciliation comes through distinguishing a human being from a citizen. Citizenship by definition lies within the realm where merit, talent or wealth do not play any role. The notion of formal equality is fundamental to the very definition of this concept. Applied in the context of citizenship, the idea of the equal worth of every member of society can thus be presented as an equivalent of a ‘soul, re-packaged for secular consumption’.<sup>60</sup> The notion of equality of opportunity is usually employed to ensure that presumptions and reality are not worlds apart, in theory at least.<sup>61</sup>

Equality among citizens is as deeply instrumental as it is an indispensable cornerstone of the idea of gaining political legitimacy in a representative democracy.<sup>62</sup> Without providing for equality, at least in the narrowest sense in terms of equal representation and equality before the law, democracy is unthinkable.<sup>63</sup> It is thus the concept of citizenship in the context of a liberal

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<sup>58</sup> On this duality see Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen, trans.) Stanford, CA: Stanford University Press, 1998.

<sup>59</sup> This reconciliation comes at a high price though: since not every human being is necessarily a citizen, citizenship thinking has the potential to encourage the ugliest forms of exclusion and dehumanisation. See Arendt, Hannah, *The Origins of Totalitarianism*, New York: Harcourt, 1968; See also Bosniak, Linda, ‘Persons and Citizens in Constitutional Thought’, 8 *Int’l J. Const’l L.*, 2010, 9. For a defence of equality during the global rise of totalitarianism see Spiegelberg, Herbert, ‘A Defence of Human Equality’, 53 *Philosophical Rev.*, 1944, 101, 105.

<sup>60</sup> Lloyd Thomas (1979), 541 (he does not disagree with this view, discussing equality of human beings, however, not equality of citizens).

<sup>61</sup> See e.g. Schaar (1964), 870 *et seq.*

<sup>62</sup> See *inter alia* Sadurski, Wojciech, ‘Majority Rule, Legitimacy and Political Equality’, *EUI Working Papers* (Florence) LAW No. 2005/21, 2005 (underlining that not the idea of majority rule *per se*, but the postulate of equality serves as the main legitimising factor in a democracy (*Id.*, at 2)).

<sup>63</sup> The EU is notorious in this respect. Even with the little representative democracy that it has, its system does not provide for basic equality of EU citizens’ votes in EP elections. Art. 14 EU speaks of ‘degressively proportional’ representation of EU citizens. Moreover, making use of EU citizenship rights can result in outright disenfranchisement: Kochenov, Dimitry, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?’, 16 *Maastricht J. Eur. Comp. L.*, 2009, 197. For the analysis of democratic representation in the Union in the larger context, see e.g. Fabbrini, Federico, ‘The Right to Vote for Non-citizens in the European Multilevel System of Fundamental Rights Protection’, *Eric Stein Working Paper* (Prague) No. 4/2010.

democracy which is most suited to illustrate the differences between contemporary states and other socio-legal systems, evolving around the division of all their members into a number of groups marked by presumed differences, based on belonging to castes, nobility or professional associations and organising public life accordingly.

The similarity between such systems where the function of equality is profoundly dissimilar to the modern understanding of the term and the modern idea of equal citizenship consists in the fact that both accept as a starting point the need to disregard the actual differences/similarities between human beings in certain situations. A caste system is never meritocratic: those belonging to a better caste simply get born into it, just like slaves or people of ‘better’ skin colour<sup>64</sup> – which is the reason why such societal organisation is irreconcilable with the idea of citizenship. At the same time, the idea of citizenship is equally disconnected from ‘physical’ reality, which is one of its strongest points in the eyes of its supporters. An iconic dissent in US Constitutional law serves as a perfect reminder of the formal essence of the citizenship world: ‘*in the eye of the law*, there is ... no superior, dominant, ruling class of citizens. There is no caste here.’<sup>65</sup>

The notion of citizenship implies the reversal of inequality presumptions deeply held by human beings, putting individuals with this status on equal footing in a number of respects by ignoring any *objective* or *subjective* differences between them and, in theory at least, protecting the oppressed minorities against the majorities. Such blindness to the facts, to the real differences between people, is the core of the concept of citizenship, devised to create a political being out of

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Assessing the EU from the point of view of the general depoliticisation in authority–citizen relations, Joseph Weiler went as far as to outline the corruptive nature of the Union in Europe, when regarded from the point of view of *homo politicus*: Weiler (2009) ‘Nous coalisons des Etats’. Indeed, the first message carried in the EU by ‘*civis europaeus sum*’ is hardly political.

<sup>64</sup> Similarly to the modern cast system of different citizenships of different practical utility rooted in state sovereignty and international law. Carens (1987), 252; Shachar, Ayelet, and Hirschl, Ran, ‘Citizenship as Inherited Property’, 35 *Political Theory*, 2007, 253.

<sup>65</sup> Marshall Harlan, J., dissenting in *Plessy v. Fergusson* 163 U.S. 537 (1896), 559 (emphasis added).

an imperfect human creature, supplying the standardised ‘minimal human being’,<sup>66</sup> indispensable for the flourishing of any contemporary democracy.<sup>67</sup> In this sense, equality as a legal principle can be legitimately regarded, following Andrew Koppelman, as an attempt to change the process of cultural reconstruction, where the ‘inferior status of certain groups is socially produced and reproduced’.<sup>68</sup> To what extent should the objective differences between human beings be ignored with the view to producing citizens? Generally embraced as a fundamental starting point of citizenship, equality does not provide all the answers as such.

#### **d. Formal equality**

In fact, introducing the principle of equality into the picture can also result in the rise in vagueness and complications – especially true if equality is applied only in a formal, purely legalistic sense. That purely formal equality is deceptive is ‘a point often made, rarely challenged directly, but often forgotten’<sup>69</sup> – hence the necessity to make it again.

As such, equality (just as ‘inequality’)<sup>70</sup> is one of those essentially contested concepts<sup>71</sup> which are able to boast of countless meanings. The most popular use of the term in law, which some would even equate with the legal principle of equality itself, is purely formalistic and can be reduced to the Aristotelian maxim that what is alike should be treated alike and what is different should not.<sup>72</sup> While this formulation of equality seems appealing to many, it also reduces the principle to mere formalism, making it unusable in organising societal relations, since any two things, states, situations etc. can always be presented as ‘like’ or ‘unlike’,

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<sup>66</sup> For the analytical connection between democracy, nominal political equality and the concept of citizenship see Mueller, John, ‘Democracy and Ralph’s Pretty Good Grocery: Elections, Equality, and the Minimal Human Being’, 36 *Am. J. Pol. Sci.*, 1992, 983.

<sup>67</sup> *Id.*, *passim*.

<sup>68</sup> Koppelman (1996), 13.

<sup>69</sup> Greenwalt, Kent, ‘How Empty is the Idea of Equality?’, 83 *Columbia L.Rev.*, 1983, 1167, 1169.

<sup>70</sup> The notion of ‘inequality’ poses its own problems and deserves a separate study alongside equality: Temkin, Larry S., ‘Inequality’, 15 *Philosophy and Public Affairs*, 1986, 99; Carter, Alan, ‘Simplifying “Inequality”’, 30 *Philosophy and Public Affairs*, 2001, 88.

<sup>71</sup> On this term see Gallie, William B., ‘Essentially Contested Concepts’, 56 *Proceedings of the Aristotelian Society*, 1955–1956, 167.

<sup>72</sup> See Aristotle, *Nicomachean Ethics* (Ross, W.D. (trans.)), Oxford: OUP, 2009, 84 (1131a).

depending on the context of the assessment,<sup>73</sup> infusing the concept of equality so understood with ‘fundamental ambiguity’.<sup>74</sup>

Claims have been made in American legal scholarship that equality does not and cannot exist as a legal principle, due to such fluidity of its ‘non-meaning’. Although this perspective – defended by Peter Westen,<sup>75</sup> who would compare equality with a Nietzschean tarantula, lured from its hole<sup>76</sup> – probably prematurely dismisses the idea,<sup>77</sup> it certainly has a valid point, emphasising the dangers of equating equality and formalism.

Such formalistic definition of equality is also the most popular one among the institutions and ordinary people alike. In one example, the ECJ constantly employs this particular vision through a reference to the standard formula:

[i]t is settled case law that the general principle of equality, which is one of the fundamental principles of Community law, requires that similar situations are not treated differently and different situations not treated alike unless such treatment is objectively justified.<sup>78</sup>

This formalistic statement is unable to live up to the great ideal many would wish to connect with it, especially given that the promise of equality as such is deprived of any innate moral value, as explained *supra*. Harry Frankfurt is right,

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<sup>73</sup> Kurland, Philip B., *Politics, the Constitution and the Warren Court*, Chicago: University of Chicago Press, 1970, 165.

<sup>74</sup> Sadurski (1998), 65. By ‘fundamental ambiguity’ a reference is made to the fact that ‘the same ideal can be understood in a way which leads to two mutually antithetical but equally *prima facie* reasonable sets of specific prescriptions’ (*Id.*).

<sup>75</sup> Westen, Peter, ‘The Empty Idea of Equality’, 95 *Harv. L.Rev.*, 1982, 537; Westen, Peter, *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse*, Princeton, NJ: Princeton University Press, 1990. See also Frankfurt (1997), 3.

<sup>76</sup> Westen, Peter, ‘To Lure the Tarantula from Its Hole: A Response’, 83 *Columbia L.Rev.*, 1983, 1186.

<sup>77</sup> Which has also been demonstrated in numerous reactions to Prof. Westen’s position, including Karst (1983); Greenwalt (1983); Waldron, Jeremy, ‘The Substance of Equality’, 89 *Michigan L.Rev.*, 1991, 1350.

<sup>78</sup> E.g. C-292/97 *Karlsson and Others* [2000] ECR I-2737, para. 39; Joined cases C-184&223/02 *Spain and Finland v. Parliament and Council* [2004] ECR I-7789, para. 64; C-292/97 *Karlsson and Others* [2000] ECR I-2737, para. 39; Joined cases C-27&122/00 *Omega* [2002] I-2569, para. 79; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, para. 57.

The evil does not lie in the circumstance that the inferior lives happen to be unequal to other lives. What makes it an evil that some people have bad lives and not than some people have better lives. The evil lies in the unmistakable fact that bad lives are bad.<sup>79</sup>

A statement empty of any meaning – like the one employed by the ECJ – has nothing to do with equality at all, since justification of unequal treatment is always possible as long as more or less rational reasons (or pretexts) for such approach are provided.<sup>80</sup> Even if it is true that nobody in the EU would openly question a deeply held belief in ‘equality’, whatever its meaning, the idea as such does not become more valuable because of this.

Reading the ECJ’s maxim, the whole construct of equality seems to come down to a call not to act arbitrarily when discriminating, while defaulting to the presumption of equality as a starting point.<sup>81</sup> In this context Louis Pojman rightly emphasises that the presumption as such does not seem to be necessary at all. As long as all arbitrary actions are outlawed, the contrary presumption – that of inequality – would also do the job.<sup>82</sup>

To be fair, the ECJ’s solemn but frighteningly empty position is not drastically different from the national visions of the principle adopted in the Member States, which unavoidably inform the Court’s vision. The position of the French *Conseil Constitutionnel* is informative in its similarity to the essence of ECJ’s reasoning, *de facto* approaching equality solely as a duty to give reasons for the choices made by the public authorities:

le principe d'égalité ne s'oppose ni à ce que le législateur règle de façon différente des situations différentes ni à ce qu'il déroge à l'égalité pour des raisons d'intérêt général pourvu que, dans l'un et l'autre cas, la différence de traitement qui en résulte soit en rapport avec l'objet de la loi qui l'établit.<sup>83</sup>

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<sup>79</sup> Frankfurt (1997), 6.

<sup>80</sup> See the last part of the ECJ’s standard formula: ‘unless such treatment is objectively justified’.

<sup>81</sup> Pojman (1992), 608.

<sup>82</sup> *Id.*

<sup>83</sup> *Conseil Constitutionnel*, Décision No. 87-232 DC, para. 10.

How does such equality function in practice? A great example of formalism annihilating the essence of equality is ECJ's shameful jurisprudence on sex-orientation discrimination, such as *Grant v. South-West Trains*,<sup>84</sup> where the Court found that there was no discrimination by comparing the rights of a woman in a same-sex relationship with those of a man in a homosexual couple, as if heterosexuals did not exist.<sup>85</sup> This case was identical,<sup>86</sup> logically speaking, to the case law of the US Supreme Court in the early cases concerning anti-miscegenation legislation, such as *Pace v. Alabama*,<sup>87</sup> where the US Supreme Court ruled that since both races were affected by a prohibition 'to share a room at night', there was no discrimination.<sup>88</sup> Both in *Grant* and in *Pace*, the law, as in Anatole France's *Le Lys Rouge*, is applied in such a way that it equally prohibits the rich and the poor from sleeping under bridges. What the ECJ technically presents as equal by engaging in a virtuoso abuse of its empty standard, is alien to basic common sense, let alone to what any substantive vision that the notion of equality would require. Nonetheless, even when deeply disrespectful *vis-à-vis* European citizens, it obviously meets an empty formalistic equality standard, which was precisely the result Prof. Westen warned of. Equality does not work well when reduced to the duty to give reasons in the vein of the French

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<sup>84</sup> Case C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-621. For critical commentary as well as overviews of other relevant case law (*Grant* has not yet been overruled) see *inter alia* von Toggenburg, Gabriel N., "LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', *Eur. L. Rep.*, 2008, 174; Carolan, Bruce, 'Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union', 40 *Tulsa L.Rev.*, 2005, 527; Canor, Iris, 'Equality for Lesbians and Gay Men in the European Community Legal Order – "They Shall Be Male and Female"?'', 7 *Maastricht J. Eur. & Comp. L.*, 2000, 273; Bamforth, Nicholas, 'Sexual Orientation Discrimination after *Grant v. South-West Trains*', 63 *Modern L.Rev.*, 2000, 694; Bethou, Katell, and Masselot Annick, 'La CJCE et les couples homosexuelles', 12 *Droit social*, 1998, 1034. In the context of the EU's 'democracy and human rights promotion exercise' see Kochenov, Dimitry, 'Democracy and Human Rights – Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities', 13 *Texas Wesleyan L.Rev.*, 2007, 459.

<sup>85</sup> Koppelman, Andrew, *The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolf Hitler*, in Wintermute, Robert, and Andenæs, Mads (eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law*, Oxford: Hart, 2001, 623.

<sup>86</sup> For the miscegenation parallel see *Id.*, see also Kochenov, Dimitry, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', 33 *Fordham Int'l L.J.*, 2009, 156, 177–180.

<sup>87</sup> *Pace v. Alabama*, 106 U.S. 583 (1883).

<sup>88</sup> The case was overruled only in the sixties: *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 288 U.S. 1 (1967).



*Conseil Constitutionnel* – especially when the reasons are not informed by fundamental substantive considerations.

### **e. Substantive equality**

The idea of drawing a line between formal and substantive principles of equality formulated, *inter alia*, by Kent Greenwalt, could be of assistance.<sup>89</sup> To ensure that equality is worthy of a name of a true principle of law, it is necessary to move beyond the empty formalism of ‘like’ and ‘unlike’. Judgements of what is like and what is unlike should be based on some substantive idea of the good, a ‘substantive value’,<sup>90</sup> which the empty shell of ‘pure’ equality cannot boast by itself.

It is clear from the outset that since different legitimate values able to supply substantive equality with its meaning compete with each other, it is only natural that the rhetoric of equality can absolutely consistently be used, literally, by anyone in any situation, hijacking the logic of this principle.<sup>91</sup> Karl Marx formulated this with abundant clarity:

Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard in so far as they are brought under an equal point of view ... everything else being ignored.<sup>92</sup>

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<sup>89</sup> Greenwalt (1983), 1168. *But see* Westen (1983), 1186. Greenwalt’s idea is quite different from Wojciech Sadurski’s vision of formal and substantive equality, which comes down to equality at the level of enforcement of the rule and equality at the level of the substance of the rule respectively (Sadurski (1998), 68) and should not be confused with these.

<sup>90</sup> Karst (1983), 246. See also Cohen, G.A., ‘On the Currency of Egalitarian Justice’, 99 *Ethics*, 1989, 906.

<sup>91</sup> Numerous proposals of ‘what to equalise’ have been made in the literature, all of them being in potential conflict with each other: Carter, Alan, ‘Value-Pluralist Egalitarianism’, 99 *J. Philosophy*, 2002, 577.

<sup>92</sup> Marx, Karl, ‘Critique of the Gotha Programme’, in *Selected Writings*, Oxford: OUP, 1978, 569 (also quoted in Wolff, Jonathan, ‘Fairness, Respect, and the Egalitarian Ethos’, 27 *Philosophy and Public Affairs*, 1998, 97, 98, note 3).

What kind of substance can be used to support the ailing idea of equality, reduced to babble by formalism? When thinking about equality is it always necessary to keep in mind Amartya Sen's question: 'equality of what?'<sup>93</sup>

There is a huge debate among egalitarians as to what equality should mean and how it can be achieved, balanced with a striving to realise other ideals, such as justice, fairness and respect. The distinction between 'equality of welfare'<sup>94</sup> and 'equality of resources'<sup>95</sup> established by Ronald Dworkin and the enormous body of academic commentary it generated<sup>96</sup> has been the main direction of egalitarian thinking for quite a while, sparking bitter criticism, as it focuses on egalitarianism without critique of oppression. The state of the literature is such that there seems to be only a very illusive connection, if any at all, between egalitarian literature and real life:

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<sup>93</sup> Sen, Amartya, 'Equality of What?', in McMurrin, S.M. (ed.), *The Tanner Lectures on Human Values* (Vol. 1), Cambridge, CUP, 1980, 195. For a somewhat more radical manner of asking this fundamental question (among others) see Narveson, Jan, 'Egalitarianism: Partial, Counterproductive, and Baseless', 10 *Ratio (new series)*, 1997, 280:

Egalitarians hold that some good things should, in principle, be distributed equally among all people. *Which* good things? Why just those and not others? Why are they to be equalised only among humans and not, say, between humans and cats? And why is the equalisation to be confined within the borders of the author's State, rather than practiced all over the whole human race (at least)? (emphasis in the original).

<sup>94</sup> Dworkin, Ronald, 'What is Equality? Part 1: Equality of Welfare', 10 *Philosophy and Public Affairs*, 1981, 185.

<sup>95</sup> Dworkin, Ronald, 'What is Equality? Part 2: Equality of Resources', 10 *Philosophy and Public Affairs*, 1981, 283.

<sup>96</sup> See e.g. Dworkin, Ronald, 'Foundations of Liberal Equality', in Darwall, Stephen (ed.), *Equal Freedom. Selected Tanner Lectures on Human Values*, Ann Arbor: University of Michigan Press, 1995, 190, 223–229; Cohen (1989), 908; Kymlicka, Will, *Contemporary Political Philosophy: An Introduction*, Oxford: OUP, 1990, 73–76; Roemer, John, 'Equality of Talent', 1 *Economics and Philosophy*, 1985, 151; Barry, Brian, 'Chance, Choice and Justice' in *Liberty and Justice: Essays in Political Theory* (Vol. 2), Oxford: OUP, 1991, 142; Neal, Patrick, 'Dworkin on the Foundations of Liberal Equality', 1 *Legal Theory*, 1995, 205; Steiner, Hillel, 'Choice and Circumstance', 10 *Ratio (new series)*, 1997, 296. For criticism see Scheffler, Samuel, 'What is Egalitarianism', 31 *Philosophy and Public Affairs*, 2003, 5. See also Dworkin's exchange with Scheffler: Dworkin, Ronald, 'Equality, Luck and Hierarchy', 31 *Philosophy and Public Affairs*, 2003, 190; Scheffler, Samuel, 'Equality as the Virtue of Sovereigns: A Reply to Ronald Dworkin', 31 *Philosophy and Public Affairs*, 2003, 199; Sadurski, Wojciech, 'Welfare, Resources, and Luck-Egalitarianism', *EUI Working Papers*, LAW 2007/05, 2007. Further, see Anderson, Elisabeth, 'What is the Point of Equality?', 109 *Ethics*, 1999, 287; Wolff (1998), 97.

‘focusing on a supposed cosmic injustice [the egalitarians] lost sight of the distinctively political aims of egalitarianism’.<sup>97</sup>

Consequently, philosophical debates on egalitarianism, while shaping the meaning of some underlying concepts and providing methodological insights, can be of little immediate use at the moment for the political systems around the world seeking to readjust and approach the ideal of justice by tackling imperfection and responding to pressing problems.

### **f. Equality and respect**

Turning to the legal theorists of equality is most appropriate in light of this detachment of the pure theory of equality from the attempts to solve the pressing problems of real societies. Karst’s proposal concerning the idea of respect<sup>98</sup> and employing the notion of stigma is of assistance. Karst asserts that making a ‘claim to equality in the language of substantive right, we might speak of the right not to be stigmatised by the organised community’,<sup>99</sup> which, as Karst himself underlines, ‘is just another name for the right to be “treated as equal”’.<sup>100</sup>

This vision is obviously related to the notion of justice.<sup>101</sup> Given that stigmatising is unjust and given that justice is one of the fundamental precepts of any non-totalitarian legal order, the substantive notion of equality as a vehicle of justice can be deployed as an alternative to the formalistic vision, which failed the test. When used in the context of citizenship, respect is not deserved through wealth, brightness of the mind or the amount of decorations one has received from the local monarch. It is connected to the mere membership of the (political) community, *i.e.* to legal status alone. Consequently, the notion of dignity, of respect, is a necessary connector between equality and citizenship: ‘the primary value of respect – is the

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<sup>97</sup> Anderson (1999), 288. See also Green, Philip, ‘Equality since Rawls: Objective Philosophers, Subjective Citizens, and Rational Choice’, 47 *J. Politics*, 1985, 970.

<sup>98</sup> Karst (1983); Karst (1986); Karst (1977). Reliance on the notion of respect also informs the analysis of equality outside the framework of the concept of citizenship, in the realm of philosophical egalitarianism: *e.g.* Wolff (1998), 97; Anderson (1999), 288.

<sup>99</sup> Karst (1983), 249; Karst (1977), 5–11.

<sup>100</sup> Karst (1983), 249. See also Dworkin (1977), 227.

<sup>101</sup> For analysis see, *inter alia*, Ake (1975); Miller (1997); and Julius (2003).

notion of equal membership of the community for it is precisely the denial of equal status, the treatment of someone as an inferior that causes stigmatic harm'.<sup>102</sup> Unequal citizenship is an oxymoron, generating stigma and unease in the mistreated.<sup>103</sup> Consequently, one of the main functions of citizenship is necessarily a prohibitive one that 'forbids the organised society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant'.<sup>104</sup>

In practice, although constantly restated as the starting point of any democratic society, the idea of equality among citizens, when not lived up to, especially in the realm of the equality before the law, starts producing stigma, ruining the idea of respect necessarily connected to the notion of citizenship, and, consequently, annihilating citizenship as such.<sup>105</sup> It is submitted that the application of the principle of equality cannot be legitimately construed in such a way that it stigmatises and alienates – which a purely formalistic reading of equality does not prohibit at all, if not positively encouraging it.

Of course, any judgement about justice or equality is always a matter of degree. Working with theoretical concepts, it is indispensable to bear in mind that the actual ideals articulated by them are always beyond our reach, but it is worth striving to move our law closer to the better reflection of such ideals.<sup>106</sup> It is clear, nevertheless, that a huge practical difference can be made by embracing substantive ideals going beyond mere legalism. This would amount to the inclusion of the substantive notions of respect and, ultimately, justice, as necessary elements of

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<sup>102</sup> Karst (1983), 248.

<sup>103</sup> On the notion of stigma see *e.g.* a book by Goffmann, which Karst also refers to: Goffmann, Erving, *Stigma: Notes on the Management of Spoiled Identity*, New York: Simon and Schuster, 1963.

<sup>104</sup> Karst (1986), 25.

<sup>105</sup> The range of persons enjoying citizenship rights when in possession of this status has been growing constantly. In fact, the core dynamics of citizenship in democratic societies comes down to broadening its scope, resulting, for instance, in the enfranchisement of women and minorities. A recent judgment of the European Court of Human Rights made it clear that banning convicted criminals from voting, thus depriving them of an important citizenship right, can also be illegal according to the law of the Strasbourg human rights protection system. See, *e.g.*, ECt.HR *Hirst v. United Kingdom (No.2)*, App. No. 74025/01. For a historical perspective on this process in the context of the US citizenship see, *inter alia*, Fox, James W., Jr., 'Citizenship, Poverty, and Federalism: 1787–1882', 60 *U. Pitt. L.Rev.*, 1999, 421.

<sup>106</sup> On the practical application of ideals see *e.g.* Newfield, J.G.H., 'Equality in Society', 66 *Proceedings of the Aristotelian Society (new series)* 1965–1966, 193.

the equality analysis, going beyond purely formalistic visions and taking into account the harmful effects that formalistic judgements often produce.

### 3. EQUALITY WITHIN AND ACROSS THE LEGAL ORDERS

The dangers of formalism are amplified manifoldly when encountered in an equality analysis set in the context of complex hierarchical legal systems, making the application of substantive – as well as purely formalistic – equality ideas in the context of numerous legal orders infinitely more difficult. The EU is the case in point. Just as any other federation, it can be analysed from the standpoint of a continuous contestation of the *status quo* by the competing legal orders (a.), which has important implications on the functioning of equality in such systems (b.).

#### a. Understanding federations through conflict

As any other federal system,<sup>107</sup> the EU is marked by a continuous struggle for what is perceived as a balance of power between its constituent entities and the supranational core, as well as between the key actors at all the levels both horizontally and vertically.

Thus EU law is very much about the conflict of laws. There is no hypothetical ‘pluralism’ here – it is a ‘clash of legal orders’.<sup>108</sup> Which law is to apply? What are the principles governing the juridical position of each person, place or situation *vis-à-vis* EU law? These are the fundamental dilemmas essential for the functioning of the Union, which the ECJ is constantly

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<sup>107</sup> It has been rightly argued that ‘the fixture of the “federal” label to the European construct may not be as disputed as it once was’: Lenaerts, Koen, and Gutman, Kathleen, “Federal Common Law” in the European Union: A Comparative Perspective from the United States’, 54 *Am. J. Comp. L.*, 2006, 1. See also Schütze, Robert, ‘On “Federal” Ground: The European Union as an (Inter)National Phenomenon’, 46 *CMLRev.*, 2009, 1069; Piri, Jean-Claude, ‘L’Union européenne: Vers une nouvelle forme de fédéralisme?’, 41 *RTD eur.*, 2005, 243; Sidjanski, Dusan, ‘Actualité et dynamique du fédéralisme européen’, *Revue du marché commun*, No. 341, 1990, 655. Judge Pierre Pescatore has been pointing out the ‘caractère fédérale de la constitution européenne’ even before the formulation of the principle of supremacy by the ECJ: Pescatore, Pierre, ‘La Cour en tant que juridiction fédérale et constitutionnelle’, in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963*, Köln: Heymanns Verlag, 1963, 520, 522.

<sup>108</sup> Davies, Gareth, ‘Constitutional Disagreement in Europe and the Search for Legal Pluralism’, *Eric Stein Working Papers* (Prague) No. 1/2010, 6.

called upon to resolve. Virtually the entire body of its case law can be read through the lens of the resolution of competence disputes. As schoolbooks have it, we first had EU law as an example of international law,<sup>109</sup> then it became a separate legal order in international law,<sup>110</sup> then simply a ‘legal order’,<sup>111</sup> only later to become regarded as rooted in the ‘constitutional charter’<sup>112</sup> and acquire *Kompetenz Kompetenz*.<sup>113</sup> Transformed into a constitutional system,<sup>114</sup> the Union became a fully-fledged example of cooperative federalism.<sup>115</sup>

Naturally, the ‘European’ perspective on all these developments is not the only one, as it coexists with the “‘national constitutional order” heresy’.<sup>116</sup> In other words, it comprises a large number of national perspectives, using completely different means to explain the existing reality

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<sup>109</sup> Since the Treaties themselves were concluded under international law. For an insightful comment see Weiler, Joseph H.H., ‘Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics’ in Wiklund, Ola (ed.), *Judicial Discretion in European Perspective*, Stockholm: Kluwer Law International, 2003, 151.

<sup>110</sup> Case 26/62 *N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I, para. II B.

<sup>111</sup> Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

<sup>112</sup> Case 194/83 *Partie écologiste ‘Les Verts’ v. Parliament* [1986] ECR 1339, para. 23.

<sup>113</sup> This is true at least insofar as the Member States have forfeited their own ability to determine the scope of their competences: von Bogdandy, Armin and Bast, Jürgen, ‘The European Union’s Vertical Order of Competences: The Current Law and Proposals for Reform’, 39 *Common Mrkt. L.Rev.*, 2002, 227.

<sup>114</sup> Schütze (2009) ‘On “Federal” Ground’, 1089.

<sup>115</sup> *Id.*; Schütze, Robert, *From Dual to Cooperative Federalism*, Oxford: OUP, 2009. The dogmatic vision of the whole process, which resulted in the dismissal of federalism ideas about EU integration from continental legal literature for a long time, produced curious scholarship on ‘legal pluralism’, which, agreeing with Schütze, ‘speaks federal prose, without – as Molière’s Monsieur Jourdain – being aware of it’ (Schütze (2009) ‘On “Federal” Ground’, 1081). For an informative analysis of constitutional pluralism literature, including the main works by Kumm and Poiares Maduro see Davies (2010) ‘Constitutional Disagreement’. After careful analysis, Davies comes to the conclusion that ‘constitutional pluralism is an empty idea’ (at 1). For a summary of pluralists’ views see e.g. Avbelj, Matej and Komárek, Jan (eds.), ‘Four Visions of Constitutional Pluralism’, *EUI Working Papers* (Florence) LAW 2008/21, 2008.

<sup>116</sup> Allott (2002), 216. Although it is crystal clear that ‘such a system as Community system cannot possibly derive its everyday constitutional authority from the internal authority of [twenty-seven] separate national constitutional orders, none of which individually has authority over the total Community order’ (*Id.*) as long as the national constitutional thinking in the Member States is unable to come up with more realistic explanations of the current state of affairs, the EU legal order – which is entirely dependent on the Member States with regard to its day-to-day functioning – is held a hostage of the inward-looking dogmatism at the national level.

where EU law prevails over national law.<sup>117</sup> Notwithstanding the constant ‘constitutional conversation’<sup>118</sup> in Europe involving all kinds of actors from the *Herren der Verträge* to the courts at all levels,<sup>119</sup> such national perspectives approach the *status quo* on different terms, compared to how the EU itself does (accompanied by sympathetic national scholarship).<sup>120</sup>

As a consequence of this duality, national-level thinking about the limits of the European legal order is also quite different from self-assessment at the supranational level. The existence of two views of the same story is evident upon reading the *Solange* (I<sup>121</sup> and II<sup>122</sup>), *Maastricht*,<sup>123</sup> or *Lisbon Treaty*<sup>124</sup> decisions of the BVerfG, or decision K-18/04<sup>125</sup> of the Polish *Trybunał Konstytucyjny*, among numerous others.

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<sup>117</sup> For an analysis of the ‘national’ perspectives see e.g. Albi, Anneli and Van Elsuwege, Peter, ‘The EU Constitution, National Constitutions, and Sovereignty: An Assessment of a “European Constitutional Order”’, 29 *Eur. L.Rev.*, 2004, 745.

<sup>118</sup> See de Witte, Bruno, ‘The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty-Revision Process’, in Beaumont, Paul, Lyons, Carole, and Walker, Neil (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, 39.

<sup>119</sup> See, generally, Slaughter, Anne-Marie, Stone Sweet, Alec, and Weiler, Joseph H.H. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence*, Oxford: Hart, 1998; Martinico, Giuseppe, ‘A Matter of Coherence in the Multilevel System: Are the “Lions” Still “Under the Throne”?’ , *Jean Monnet Working Paper* (NYU) No. 16/08, 2008.

<sup>120</sup> This approach is in line with (or even part of) a broader picture involving the refusal by the national constitutional orders to be humbly subjected to international law. For analysis see e.g. Peters, Anne, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’, 3 *Vienna online J. Int’l Const’l L.*, 2009, 170. The European legal order has joined the same trend, gradually testing the international legal norms and principles against its own, frequently refusing to be automatically subjected to International law. On the latter see e.g. Case C-369/90 *Micheletti* [1992] ECR I-4239; Joined case C-402/05 P and C-215/05 P *Kadi and Al Barakaat* [2008] ECR I-6351. For an example of application of such national approach to the concept of EU citizenship see e.g. the editorial in 3 *Eur. Const’l L.Rev.*, 2007, 1, esp. at 2.

<sup>121</sup> BVerfGE 37, 271 (1974).

<sup>122</sup> BVerfGE 73, 378 (1986).

<sup>123</sup> BVerfGE 89, 155 (1993). For analysis see e.g. Weiler, Joseph H.H., ‘The State “über alles”: *Demos*, *Telos* and the German Maastricht Decision’, in Due, Ole, Lutter, Marcus and Schwarze, Jürgen (eds.), *Festschrift für Ulrich Everling*, Baden-Baden: Nomos Verlagsgesellschaft, Vol. 2, 1995, 1651; Herdegen, Matthias, ‘Maastricht Decision and the German Constitutional Court: Constitutional Restraints from an “Ever Closer Union”’, 31 *Common Mrkt. L.Rev.*, 1994, 235.

<sup>124</sup> BVerfGE 63, 2267 (2009). For analysis see e.g. Thym, Daniel, ‘In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court’, 46 *Common Mrkt. L.Rev.*, 2009, 1795. Wohlfahrt, Christian, ‘The Lisbon Case: A Critical Summary’, 10 *German L.J.*, 2009, 1277; Steinbach, Armin, ‘The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?’, 11 *German L.J.*, 2010, 367.

Agreeing with Schütze, such ‘normative ambivalence surrounding supremacy and sovereignty is better be viewed as part of the parcel of the European Union’s *federal* nature’,<sup>126</sup> it is clear at this point that the problem of hierarchy in Europe gets resolved at different levels of law with the use of *different* reasoning. While every law student knows that EU law is supreme,<sup>127</sup> for a German constitutionalist there is no question that the ‘*Grundgesetz* remains the supreme law in the land also in the age of the Lisbon Treaty’.<sup>128</sup> Consequently, ‘since one of the conventional attributes of constitutional law is that it is the highest source of law within its jurisdiction, EU law is hardly constitutional in most [member] states’.<sup>129</sup> However, this statement is probably too far-reaching, as long as the system of coexistence of the two legal orders functions smoothly and there is no open hostility between the legal orders. Mutually Assured Destruction (MAD)<sup>130</sup> is a mad strategy of course – and plenty of doomsday predictions have been made up to now – Joseph Weiler, Matthias Kumm and Gareth Davies are among those warning of the possibility of the ‘Cassandra scenario’,<sup>131</sup> coming up with perfectly logical arguments explaining why the current ‘happy situation may be temporary’,<sup>132</sup> anticipating the moment when a ‘cold war becomes hot war’.<sup>133</sup>

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<sup>125</sup> Case K 18/04 of 11 May 2005, OTK Z.U. 2005/5A, esp. para. 6.4. For a critical discussion see e.g. Chalmers, Damian, ‘Constitutional Modesty (editorial)’, 30 *Eur. L.Rev.*, 2005, 460; Kochenov, Dimitry, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008, 235–237.

<sup>126</sup> Schütze (2009) ‘On “Federal” ground’, 1081, emphasis in the original.

<sup>127</sup> Simons, Alexander, *Europäische Union für Dummies*, Weinheim: Wiley-VCH Verlag GmbH, 2005.

<sup>128</sup> Thym (2009), 1802.

<sup>129</sup> Davies (2010) ‘Constitutional Disagreement’, 3.

<sup>130</sup> Weiler, Joseph H.H., *The Constitution for Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge: CUP 1999, 320. For the explanation of the term and analysis of the doctrine outside of the world of law see Col. Alan J. Parrington, ‘Mutually Assured Destruction Revisited’, 11 *Airpower J.*, 1997, 4.

<sup>131</sup> Kumm, Matthias, ‘Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of the European Market Order of Bananas’, 36 *Common Mrkt. L.Rev.*, 1999, 360.

<sup>132</sup> Davies (2010) ‘Constitutional Disagreement’, 8.

<sup>133</sup> *Id.*, 11.



But is it not true that such conflict is woven right into the fabric of every real federation?<sup>134</sup> The good thing is that all the participants in the constant struggle are very well aware of the fragility of the MAD balance – this is precisely what makes peace durable.<sup>135</sup> As long as they are not willing to proceed to the ‘destruction’ phase, it is necessary and inevitable that they play along federal lines. The possibility to do so is always there. Indeed, ‘the principles and structures of classic constitutionalism are open enough, and unobjectionable enough, that complying with them is not a significant policy constraint for the EU and should not raise any structural problems’<sup>136</sup> – and it does not, as long as we are not talking Treaty amendment.

While regarding law in Europe as a duality, what is crucial for its study is to try to escape the dogmatic temptations offered by the legal traditions at *both* levels. The history of European integration, which Schütze convincingly reads in the light of a gradual move away from dual federalism towards cooperative federalism,<sup>137</sup> is – as in *Hazarski rečnik*<sup>138</sup> – still the same story presented by several biased narrators from a number of different, sometimes diametrically opposed, perspectives: a national one, boasting 27 slightly different stories in 23 languages, and a European one.

The only unquestionable given here is the persistence of the clash between the two legal orders, as well as the fact that the whole system proves its functionality every day with astonishing consistency – all the rest changes with the narrator. Consequently, the jurisdictional dispute should be always kept in mind as lying at the core of all the fundamental issues in need

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<sup>134</sup> For a well-documented illustration see e.g. Nevins, Allan, *Ordeal of the Union* (2 Vols.), New York: Charles Scribner's Sons, 1947 (detailed account of the civil war in the United States). After the war, the role of Federal citizenship, as well as Union vision of the interplay within the context of the duality of legal orders was reinterpreted completely: ‘during reconstruction, the theory of Lincoln and other Republicans that the federal government and the constitution were a creation, not of states, but of the people, prevailed’: Zietlow, Rebecca E., ‘Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism’, 62 *U. Pitt. L.Rev.*, 2000, 281, 310. See also Kaczorowski, Robert J., ‘Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction’, 61 *N.Y.U. L.Rev.*, 1986, 863, 867.

<sup>135</sup> Aron, Raymond, *Le grand débat: Initiation à la stratégie atomique*, Paris: Calmann-Levy, 1963.

<sup>136</sup> Davies (2010) ‘Constitutional Disagreement’, 15.

<sup>137</sup> Schütze (2009) ‘From Dual to Cooperative Federalism’.

<sup>138</sup> Pavić, Milorad, *Dictionary of the Khazars: A Lexicon Novel*, New York, Knopf, 1988.

of assessment that law in the EU<sup>139</sup> has to offer. However, this jurisdictional conflict between the legal orders should not be confused with the diverging perspectives on the essence of the Union.

## **b. Equality and fluid jurisdictional divides**

Even when it is presumed that the discrepancies between the understanding of the main principles of law throughout all the components of a complex legal system are minimal<sup>140</sup> and that each of the different legal orders can boast a largely identical set of fundamental principles,<sup>141</sup> numerous problems are still prone to arise, should rhetorically-identical principles belonging to different legal orders be applied within the confines of each particular legal order and not across the board.<sup>142</sup> This is particularly true of the principle of equality: having largely similar principles in place within the confines of different legal orders does not mean that equality can generally be safeguarded in the system as a whole, unless some clear substantive considerations reflecting the nature of the principle govern the assignment of each particular situation to a specific principle within a hierarchy of legal orders in each particular case.

Besides being products of human nature,<sup>143</sup> inequality and injustice are thus particularly prone to being generated by jurisdictional frictions in the situations where the borderlines between the legal orders form spacious grey zones. Formalism in thinking about equality is thus

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<sup>139</sup> This term is used to avoid referring uniquely to the law at the supranational level.

<sup>140</sup> In practice, such discrepancies are often far from negligible, especially in the issues which are informed by moral disagreement, rather than legal technicalities. Consider, for instance the difference in the treatment of abortion, or gay rights throughout the EU. See *e.g.* Hervey, Tamara K., and McHale, Jean V., *Health Law in the European Union*, Cambridge: CUP: 2004, 401; Kochenov, Dimitry, 'Gay Rights in the EU: A Long Way forward for the Union of 27', 3 *Croatian Ybk. Eur. L. & Pol'* y, 2007, 469.

<sup>141</sup> Which is never the case, even if seemingly the same principles are embraced rhetorically. For a telling example see *e.g.* Albi's analysis of the principle of human rights protection: Albi, Anneli, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums', 15 *Eur. L.J.*, 2009, 46. See also von Bogdandy, Armin, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union', 37 *Common Mrkt. L.Rev.*, 2000, 1307.

<sup>142</sup> For an analysis in the context of the principle of equality, see *e.g.* Meij, Arjen W.H., 'Circles of Coherence: On Unity of Case law in the Context of Globalisation', 6 *Eur. Const. L.Rev.*, 2010, 84 (comparing French and EU principles drawing on their application in the *Arcelor* saga (Case C-127/07)).

<sup>143</sup> 'If men were angels, no government would be necessary': Publius [James Madison], *Federalist* No. 51, 6 February 1788.

infinitely more dangerous in situations of jurisdictional conflict where legitimate competing authorities are involved, like the conflict shaping the Union in Europe. In such a context, formalistic egalitarianism yields results which are entirely incoherent and frequently inexplicable from the point of view of the principle itself. This is because *substantive issues of equality frequently end up dismissed as mere jurisdictional problems*. Consequently, such problems cannot be constructively addressed from the point of view of substantive equality.

The current layering of applicable law in the EU is profoundly problematic. In the context of competition between the norms belonging to the different legal orders which might legitimately claim authority to govern substantively similar situations, viewing them as essentially different merely as a consequence of the fact that different law is applied to them, substantive similarity does not play any role in assigning jurisdiction and is unable influence decisions as to which law is to apply. An oxymoronic situation is created: the application of the law, instead of following the specificity of the situations it was designed to govern, opts for ignoring such similarities. Consequently, two interconnected challenges arise.

The first is related to the porous nature of the borders between the legal orders, which eradicates the rationale of equality. This makes the principle *de facto* inapplicable both at the national and at the supranational level, both levels clearly self-describing as being rooted in the principle of equality. The ‘harshness of this arbitrary distinction’<sup>144</sup> came about as a result of a purely formalistic approach to equality embraced by the Court. The ECJ assumes, similarly to international law practice,<sup>145</sup> that any comparisons between the legal situations of EU citizens covered at a given moment by the law stemming from different legal orders is impossible.

The second, arguably more important, is related to the purely formalistic vision of equality advocated by the Court of Justice, ignoring the essence of the principle while at once policing the jurisdictional border. In the eyes of the Court, justice, fairness and respect are not

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<sup>144</sup> Pickup, David M.W., ‘Reverse Discrimination and Freedom of Movement of Workers’, 23 *Common Mrkt. L.Rev.*, 1986, 135, 154.

<sup>145</sup> See Part 5(e) *infra* for an analysis.

connected to the notion of equality at all, turning it into an empty rhetorical device to practice self-restraint, profoundly undermining European liberal values as well as the notions of citizenship both at the EU and the national level. Although dismissed by legal scholars adhering to a purely formalistic reading of the principle, this problem is becoming more and more acute for ordinary citizens.<sup>146</sup> There is a growing awareness of the fact that identical situations involving the same persons can be regulated by different legal orders virtually at random, rendering the principle of equality ‘inapplicable’ to them in the eyes of the majority of lawyers. While nationals still trust the Member States and are willing to close their eyes to the incapacity of the former to guarantee in any substantive way the observance of the legal principles stated in their national constitutions, the EU, and, in the longer term, the Member States, are bound to suffer as a result of the current situation.

#### **4. ECJ CLARIFYING THE NEW BORDERLINE BETWEEN THE LEGAL ORDERS**

The ECJ unquestionably feels the pressure of the equality rationale, which is apparent in all its recent citizenship case law. The drastic enlargement of the personal scope of EU law (**a.**) posed a very serious challenge, requiring the reassessment of previously embraced approaches to the borderline between the legal orders in the Union, also in the material sense (**b.**). The ECJ responded to the questions posed by citizenship and equality. Not only did the Court widen the confines of the material scope of the EU legal order in order to make sure that more European citizens (*i.e.* Member State nationals) are covered (*i.e.* carved out from the application of national law to them).<sup>147</sup> It also changed the main approach to what falling within the material scope of EU law actually means, necessarily making the so-called ‘cross-border situations’ ever more

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<sup>146</sup> It was difficult for British residents in Spain during the referendum on the Constitution for Europe to understand why they are not invited to vote: ‘Spain Snubs Resident Brits in European Referendum Vote’, *Telegraph*, 29 December 2004. See also Lansbergen, Anja, and Shaw, Jo, ‘National Membership Models in a Multilevel Europe’, 8 *Int’l J. Const’l L.*, 2010, 50.

<sup>147</sup> Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055; Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

elusive (c.). Most importantly, the ECJ has recently clarified that in some cases the discovery of a cross-border element is entirely unnecessary. In *Rottmann* the Court stated that

It is clear that the situation of a citizen of the Union who [...] is faced with a decision withdrawing naturalisation [...] placing him [...] in a position capable of causing him to lose the status conferred by Article 17 EC [now 9 EU] and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law.<sup>148</sup>

This was done by removing all requirements to connect being a Member State national in a Member State other than her own with the exercise of economic activity in that state<sup>149</sup> or anywhere else,<sup>150</sup> as well as by obliging the Member States to view their own citizens with dual EU nationality as foreign nationals,<sup>151</sup> thus remarkably departing from international law<sup>152</sup> (d.) and moving more EU citizens within EU law's scope, affording them a chance to be regarded, oxymoronically, as EU citizens and thus more equal than others.

As a result of the recent innovations, the problematic nature of reverse discrimination has been overwhelmingly amplified, illustrating clearer than ever the limits of legalism far removed from any substantive considerations of justice and equality (e.). Moreover, in the field of economic free movement, the Court's innovative approach resulted in shaping better coherence as far as the scope *ratione materiae* is concerned. More economically active EU citizens are now enabled to benefit more from EU law provisions than ever before (f.).<sup>153</sup>

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<sup>148</sup> Case C-135/08, *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000, para. 42 (emphasis added). For the analysis of, *inter alia*, this aspect of the case see Kochenov, Dimitry, 'Annotation of Case C-135/08 *Rottmann*', 47 *Common Mrkt. L.Rev.*, 2010.

<sup>149</sup> *E.g.* See *e.g.* Case C-152/03 *Ritter-Coulais* [2006] I-1711.

<sup>150</sup> *E.g.* Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

<sup>151</sup> *E.g.* Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>152</sup> Art. 4, The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of April 12, 179 L.N.T.S. 89, 1930.

<sup>153</sup> *E.g.* Case C-287/05 *Hendrix v. Raad van bestuur van het uitvoeringsinstituut werknemersverzekeringen* [2007] ECR I-6909.

While all these moves combined mark a new approach by the Court, helping a growing number of individuals to benefit from supranational law, they equally contribute to the further dissolution of the logical border between the two legal orders, without abandoning the purely formalistic reading of the principle of equality by the Court, thus creating important problems, undermining the essence of the meaning of citizenship adopted in any liberal society. The challenge is not merely terminological. As Europeans start discovering that citizenship (national or European) is insufficient to deserve respect or aspire for justice and that a mild caste system is being formed through presuming differences in citizens' entitlements based on incomprehensible pretexts, the resulting implications for the social cohesion in the Union can be beyond negligible (g.).

#### **a. EU citizenship and the evolution of the scope *ratione personae***

Before EU citizenship became part of the *acquis*, the delimitation between what used to be E(E)C Law and the law of the Member States was quite straightforward, marking the success of dual federalism.<sup>154</sup> Two distinct legal orders, albeit largely coexisting in the same territory,<sup>155</sup> applied to different bodies of people in different situations when assessed from the perspective of the construction of the internal market.<sup>156</sup> When applied to people, the supranational legal order held the key to the approximate meanings of worker, service provider/recipient and establishment.<sup>157</sup> With the exception of EU law rules of application *erga omnes*,<sup>158</sup> EU law was not applicable to any of the others.<sup>159</sup>

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<sup>154</sup> Schütze (2009), 'From Dual to Cooperative Federalism'.

<sup>155</sup> The overlap between the territories of the Member States and EU territory is not complete. For analysis, see Kochenov, Dimitry, 'Substantive and Procedural Issues of Application of European Law in the Overseas Possessions of the Member States of the European Union', 17 *Michigan St. J. Int'l L.*, 2008–2009, *passim*.

<sup>156</sup> Art. 26(2) TFEU.

<sup>157</sup> This is a story that any classical EU law text-book could retell.

<sup>158</sup> Such as non-discrimination on the basis of sex in an employment context, for instance, or race discrimination. For analysis, see *e.g.* de Witte, Bruno, 'The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law', 13 *Citizenship Stud.*, 2009, 515; More, Gillian, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?', in Craig, Paul, and de Búrca,

This was not the golden age of clarity and coherence, however, far from it. Jurisdictional problems abounded. The borderlines between those who would qualify, *ratione personae*, to fall within the scope of EU law and those who would not, were famously porous, and not at all susceptible to easy logical explanations as *Cowan*<sup>160</sup> and *Werner*,<sup>161</sup> among innumerable other cases, abundantly demonstrated. Therefore, while a Brit robbed in Paris could rely on EC law, a German dentist practising in Aachen but residing in the Netherlands could not.

Moreover, with regard to *ratione materiae*, only an excess of legal sophistry allowed professors and judges to save face by not stating the obvious: reverse discrimination and discrimination on the basis of nationality are too obviously connected to fail to recognise the link between the two, a fact widely noted by numerous scholars<sup>162</sup> and Advocates General

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Gráinne (eds.), *The Evolution of EU Law*, Oxford: OUP, 1999, 517; Shaw, Jo, 'Women, Work, and Care: Women's Dual Role and Double Burden in Sex Equality Law', 8 *J. Eur. Social Pol'y*, 1998, 43.

<sup>159</sup> E.g. Case 175/78 *Saunders* [1979] ECR 1129, para. 10; Joined cases 35 & 36/82 *Morson and Jhanjhan* [1982] ECR 3723, para. 16; Case C-180/83 *Moser* [1984] ECR 2539; Case C-322/90 *Steen* [1992] ECR I-341, para. 9; Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paras. 12–13; Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 19; Joined cases C-64 & 65/96 *Uecker and Jacquet* [1997] ECR I-3171, paras. 16, 19; Case C-134/95 *USSL di Bella* [1997] ECR I-195, paras. 22–23.

<sup>160</sup> Case 186/87 *Cowan* [1989] ECR I-195.

<sup>161</sup> Case C-112/91 *Werner* [1993] ECR I-429.

<sup>162</sup> For a notable early criticism see Pickup (1986), 135. Pickup concludes that

The just and common sense principle must be that the nationals of *all* Member States are entitled to the same treatment by any given Member State. To say otherwise is to promote discrimination which is, in effect, based upon the difference in nationality of the victim (at 156).

This argument has been repeated a number of times with slight variations. See also Tryfonidou, Alina, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', 35 *Legal Issues of Econ. Integration*, 2008, 43; Van Elsuwege, Peter and Adam, Stanislas, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination', 5 *Eur. Const'l L.Rev.*, 2009, 327; Van Elsuwege, Peter, and Adam, Stanislas, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'*Assurances soins flamande*', *Cahiers de droit européen*, 2008, 655, 662–678; Spaventa (2008), 36–39; Nic Shuibhne, Niamh, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?', 39 *Common Mrkt. L. Rev.*, 2002, 731; Papadopoulou, Rébecca-Emmanuèla, 'Situations purement internes et droit communautaire: Un instrument jurisprudentiel à double fonction ou une arme à double tranchant?', *Cahiers de droit européen*, 2002, 95; Nic Shuibhne (2002) 'The European Union and Fundamental Rights', 187; Poiaras Maduro, Miguel, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination', Kilpatrick, Calire, Novitz, Tonia, and Skidmore, Paul (eds.), *The Future of Remedies in Europe*, Oxford: Hart, 2000, 117; Tagaras, Haris, 'Règles communautaires de libre circulation, discriminations à rebours et situations dites "purement internes"', in *Mélanges en Hommage de Michel Waelbroeck* (Vol. 2), Brussels:

alike<sup>163</sup> – especially where the internal market is a reality and Member State borders, physically speaking, are non-existent.<sup>164</sup> Nevertheless, however imperfect, the barrier between what fell beneath the aegis of each of the scopes of the law stood high, just as the Great Wall of China, intended to impress but unable to protect. This barrier was duly defended, while all its holes and cracks, and its arbitrary placement in the territory between the legal orders tended to be ignored or downplayed.

The inclusion of the concept of EU citizenship into the Treaty of Maastricht marked the commencement a new era in European integration because it eliminated this barrier altogether. Each and every Member State national became a European citizen.<sup>165</sup> Some of them moved<sup>166</sup> –

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Bruylant, 1999, 1499; Gaja, Giorgio, ‘Les discriminations à rebours: Un revirement souhaitable’, in *Mélanges en Hommage de Michel Waëlbroeck*, Brussels: Bruylant, 1999, 993, 997–998; Cannizzaro, Enzo, ‘Producing Reverse Discrimination through the Exercise of EC Competences’, 17 *Ybk. Eur. L.*, 1997, 29; White, Robin A.C., ‘A Fresh Look at Reverse Discrimination?’, 18 *Eur. L.Rev.*, 1993, 527; Jessurun d’Oliveira, Hans U., ‘The Community Case – Is Reverse Discrimination Still Permissible under the Single European Act?’, in *Forty Years on: The Evolution of Postwar Private International Law in Europe*, Deventer: Kluwer, 1990, 71; Kon, Stephen D., ‘Aspects of Reverse Discrimination in Community Law’, 6 *Eur. L.Rev.*, 1981, 75. For a magisterial analysis see Tryfonidou, Alina, *Reverse Discrimination in EC Law*, The Hague: Kluwer Law International, 2009.

<sup>163</sup> Concerning goods see e.g. Opinion of AG Mischo in Joined cases 80 & 159/85 *Nederlandse Bakkerij Stichting v. EDAH BV* [1986] ECR 3359: ‘Reverse discrimination is clearly impossible in the long run with a true common market’ (at 3375). Concerning the free movement of people see e.g. Opinion of AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, para. 46. The learned AG stated that it is ‘increasingly difficult to see why Community law should accept any type of difference in treatment which is based purely on nationality, except in so far as the essential characteristics of nationality are at stake’; Opinion of AG Sharpston in Case C-212/96 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683, paras. 117–118.

<sup>164</sup> This holds true for EU citizens in all cases – even when a physical border is present, it cannot be an obstacle to movement between one Member State and another, as long as EU citizens can identify themselves: Case C-68/89 *Commission v. The Netherlands* [1991] ECR I-2637, para. 16. Border guards are prohibited by EU law from asking any questions with regard to the purpose or the length of stay and the interpretation of the limited grounds of derogations from the right to move freely is very narrow and strict. See esp. Chapter IV of Directive 2004/38, which severely limits the possible use of such derogations.

<sup>165</sup> This did not concern those Member State nationals who were not regarded as ‘nationals for the purposes of Community law’. An express connection was thus established between the status of European citizenship and that of a Member State national *for the purposes of Community law* which is missing from the Treaties. The ECJ opted for the recognition of such connection in Case C-192/99 *Kaur* [2001] I-1237, para. 27. AG Léger was reluctant to establish such connection in his Opinion in *Kaur*, considering this issue irrelevant in a situation where the case concerned a wholly internal situation, thus inviting the Court to follow the same line, without automatically fusing the scopes of the notions of European citizen and



some not,<sup>167</sup> some of them were in another Member State legally,<sup>168</sup> others not (or not quite).<sup>169</sup>

From then on, EU citizen's personal situation or the level of intensity of her relationship with the internal market could not matter for the acquisition of the personal *ius tractum*<sup>170</sup> legal status from the supranational legal order. Although derived from the nationalities of the Member States, EU citizenship is 'un concept juridique et politique *autonome*' – as Advocate General Poiares Maduro explained – 'par rapport à celui de nationalité'.<sup>171</sup> The European federation acquired its *federal* citizenship<sup>172</sup> – a legal status independent of the citizens' intentions to benefit from EU law and their past histories. It is absolutely clear at this point that while *access* to the status of this citizenship is derivative, the same cannot be said about the status as such – with all the implications this may have for the legitimacy of the Union as a whole.<sup>173</sup>

Simply put, the EU legal order was enlarged overwhelmingly at a stroke of a pen: from less than 2.3% of Member State nationals<sup>174</sup> on 31 October 1993<sup>175</sup> to 100% on the following

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Member State national for the purposes of Community Law: Opinion of AG Léger in Case C-192/99 *Kaur* [2001] I-1237, para. 38. For analysis, see Kochenov (2009) '*Ius Tractum*', 186–190.

<sup>166</sup> Like Donatella Calfa: Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11.

<sup>167</sup> Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>168</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-209/03 *R. (on the application of Bidar) v. Ealing LBC* [2005] ECR I-2119.

<sup>169</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-2691, para. 14.

<sup>170</sup> Art. 20(1) TFEU clarifies that the acquisition of this status is derivative. For analysis see Kochenov (2009) '*Ius Tractum*', 181–186.

<sup>171</sup> Opinion of Poiares Maduro, AG in Case C-135/08 *Janko Rottmann* [2009] ECR 0000, para. 23. For the legal analysis of the interaction between the two autonomous legal concepts – that of Member State nationality and that of EU citizenship see Kochenov (2010) 'Rounding up the Circle'.

<sup>172</sup> Schönberger (2007), 79.

<sup>173</sup> Palombella, Gianluigi, 'Whose Europe? After the Constitution: A Goal-Based Citizenship', 3 *Int'l J. Const. L.*, 2005, 357, 367.

<sup>174</sup> This is the amount of EU citizens currently residing in the Member State other than their Member State of nationality. This amount includes economic and non-economic migrants. In pre-citizenship times not all these persons would be covered by EU law. The data is from: Vasileva, Katya, 'Population and Social Conditions', *Eurostat Statistics in Focus*, 94/2009, 3.

<sup>175</sup> This is the last day preceding the entry of the Treaty of Maastricht (*OJC* 191/1, 1992) into force.

day. Consequently, the ‘migrant paradigm’<sup>176</sup> was seriously challenged: ‘*any* Union citizen now falls within the [personal] scope of the Treaty, without having to establish cross-border credentials’.<sup>177</sup> The rhetoric of the ECJ claiming that the notion of EU citizenship is not designed to enlarge the scope of EU law<sup>178</sup> is obviously half-hearted. When applied to the scope *ratione personae*, however, it is simply nonsensical.

Departing from its pre-citizenship case law, which insisted on a standard involving three elements to be met in order to fall within the personal scope of the Treaty (involving a nationality for the purposes of Community law coupled with the establishment of an economic link with the internal market *and* a cross-border situation,<sup>179</sup> and with all three having to be logically connected),<sup>180</sup> EU citizenship placed *all* EU citizens within the scope *ratione personae* of the Treaties, to which the very language of Article 20 TFEU testifies. Indeed, ‘there is no mention in that Article of the need to satisfy any other requirement but that of nationality of a Member State before being able to claim citizenship rights under the Treaty or secondary legislation’.<sup>181</sup>

The Court has unquestionably embraced the renewed post-citizenship definition of the scope *ratione personae* in its case law, stating quite unequivocally that this scope includes ‘every person holding the nationality of a Member State’.<sup>182</sup> Once EU citizenship of the person is

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<sup>176</sup> Spaventa (2008), 13.

<sup>177</sup> *Id.*, 13, 18, 22.

<sup>178</sup> *E.g.* Joined cases C-64/96 & C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para. 26. For a critical assessment of this approach in the light of *Rottmann* see Kochenov (2010) ‘Annotation of Case C-135/08 *Rottmann*’.

<sup>179</sup> For detailed analysis see Spaventa (2008), 14–16. See *e.g.* Case C-419/92 *Scholz v. Opera Universitaria di Cagliari* [1994] ECR I-505, para. 9. Although Spaventa does not mention Member State nationality in her description of the test applied by the ECJ to determine the scope *ratione personae* before citizenship, presuming the presence of this element, it is necessary to mention it nevertheless. See in this respect Case C-147/91 *Criminal Proceedings against Michelle Ferrer Laderer* [1992] ECR I-4097, para. 7.

<sup>180</sup> *E.g.* Case C-112/91 *Werner* [1993] ECR I-429. For analysis, see Tryfonidou, Alina, ‘In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?’, 46 *Common Mrkt. L.Rev.*, 2009, 1591, 1592–1595.

<sup>181</sup> Spaventa (2008), 18: ‘there is no mention in that Article of the need to satisfy any other requirement but that of nationality of a Member State before being able to claim citizenship rights under the Treaty or secondary legislation’.

<sup>182</sup> Case C-224/98 *D’Hoop* [2002] ECR I-6191, para. 27.

established, the Court does not feel the need to check anything else in order to ensure that the person in question falls within the personal scope of application of EU law, thus skipping two additional steps required by the *personal scope* test predating the introduction of EU citizenship,<sup>183</sup> as well as the requirement to find the link between the two.<sup>184</sup> As a consequence of such development, both legal orders came to make *legitimate* claims of jurisdiction not only ‘over *the same* circumstances’<sup>185</sup> – but also over the same people. All Member State nationals came under EU citizenship’s wing.

### **b. ECJ in search for a clear scope *ratione materiae* test**

The recognition that all Member State nationals are EU citizens posed a number of important practical problems. The border between EU law and the national law of the Member States – which disappeared when regarded from the perspective of the scope *ratione personae* – had to be re-clarified elsewhere in a much more straightforward manner than before. Sharing the same body of citizens, the two levels of regulation needed to be absolutely clear regarding the reach of each legal order, which necessarily put additional pressure on the Court. Given that the pre-citizenship delimitation of the scopes of EU law and national law was also far from ideal,<sup>186</sup> the ECJ had to start shaping new clarity virtually from scratch.<sup>187</sup>

What was required of the Court was to come up with a just, convincing and logically justifiable test that would be universally applicable, to enable any citizen to know for sure, via application of a handful of simple and clear rules, which level of the law is to apply to her in each particular situation and why. Such a test should also avoid being overwhelmingly restrictive

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<sup>183</sup> E.g. Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paras. 59, 60; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast and R.* [2002] ECR I-7091; Case C-456/02 *Trojani* [2004] ECR I-7573; Joined cases C-502/01 & C-31/02 *Gaumain Cerri and Barth* [2004] ECR I-6483, para. 34; Case C-138/02 *Collins* [2004] ECR I-2703, para. 61; Case C-403/03 *Schempp* [2005] ECR I-6421, para. 17; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paras. 18, 19.

<sup>184</sup> See e.g. Case C-152/03 *Ritter-Coulais* [2006] I-1711.

<sup>185</sup> Davies (2010) ‘Constitutional Disagreement’, 6.

<sup>186</sup> For illustrations see, again, Case C-112/91 *Werner* [1993] ECR I-429; Case 186/87 *Cowan* [1989] ECR I-195.

<sup>187</sup> O’Gorman, Roderic, ‘The Proportionality Principle and Union Citizenship’, *Mitchell Working Papers* (Edinburgh) No. 1/2009, 2009, 1.

allowing as many citizens as possible to benefit from the liberating features of EU law, which they would invoke against the Member States.<sup>188</sup> Potentially claimed by both legal orders, EU citizens absolutely need such clarity to plan their lives.

The ECJ largely failed this difficult task. Although the issue of application or non-application of EU law came to occupy a truly central place in its recent case law, the test it endeavored to formulate can, by deduction, be read as:

EU law applies to all European citizens who, for a certain amount of time not too long ago, found themselves in a situation where at least one of their EU nationalities was not provided by their Member State of residence, or in any other “cross border situation”, either involving movement, or not.

All this, unless their situation is, by virtue of its very nature,<sup>189</sup> covered by EU law, in which case no cross-border situation is needed.<sup>190</sup> The reverse of this test is somewhat clearer: if a person is a national of her Member State of residence without possessing any other EU nationality, this can render EU law inapplicable.<sup>191</sup> The ‘test’ thus poses more questions than it provides answers for: how far can the notion of the ‘cross-border’ element be stretched? How long ago should it take place?<sup>192</sup> How long should the cross-border element persist?<sup>193</sup> Finally, what are the legitimate moral and legal grounds to exclude those who are outside the scope of the meaning of

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<sup>188</sup> See in this regard Davies, Gareth, ‘The Humiliation of the State as a Constitutional Tactic’, in Amtenbrink, Fabian and van den Berg, Peter (eds.), *The Constitutional Integrity of the European Union*, The Hague: T.M.C. Asser Press, 2010.

<sup>189</sup> Case C-135/08 *Rottmann* [2009] ECR 0000, para. 42.

<sup>190</sup> For Analysis see e.g. Davies, Gareth, ‘The Entirely Conventional Supremacy of Union Citizenship and Rights’, in Shaw, Jo (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, *EUI Working Paper* (Florence) RSCAS, 2011 (forthcoming); Kochenov (2010) ‘Annotation of Case C-135/08 *Rottmann*’.

<sup>191</sup> Kochenov (2010) ‘Rounding up the Circle’, 17–20. Activating reverse discrimination thus became one of the two main juridical functions of Member State nationalities besides providing access to the status of EU citizenship (*Id.*).

<sup>192</sup> At present it is only clear that a 17-year-long break in employment in the EU disqualifies a jobseeker from the status of a ‘worker’ in the sense of EU law: Case C-138/02 *Collins* [2004] ECR I-2703, para. 28.

<sup>193</sup> Numerous scholars referred to these problems. See e.g. Van Elsuwege and Adam (2009), 334; Martin, D., ‘Comments on *Gouvernement de la Communauté française and Gouvernement wallon* (Case C-212/06 of 1 April 2008) and *Eind* (Case C-291/05 of 11 December 2007)’, 10 *Eur. J. Migration & L.*, 2008, 372.

a ‘cross border’ situation in a Union where crossing borders, or engagement in economic activity, no longer plays any decisive role in rendering the law applicable? In other words – why this strange mental ‘reterritorialisation’ of the legal orders in a Union where physical borders are no more?

The failure to design a convincing test notwithstanding, the ECJ can be applauded for its constant attempts to address the issue. After all, there is a huge pressure from the Member States, who often refuse to admit that their nationals are, at the same time, EU citizens and can derive rights from the EU legal order in this capacity.<sup>194</sup> Working in utterly unfriendly political conditions, the ECJ has managed to redraw the pre-citizenship border between the legal orders significantly.

The Court has done so, firstly, by allowing non-economic migrants to fall within the scope of EU law, which resulted in a truly significant reshaping of the legal order of the Union. It also changed its approach to economic free movement, and to the meaning of cross border situations. It especially emphasised the meaning of second Member State nationality for the material scope of EU law. These innovations have significantly altered the essence of the notion of reverse discrimination (by making it more difficult to comprehend than before), and brought about an overwhelming enlargement of the material scope of EU law. As a result, while more EU citizens can claim rights under EU law, a clear standard to explain their ability to do so in a more or less convincing way is still missing. What does the new border look like?

### **c. Ever elusive cross-border situations**

It is now settled case law that ‘the situation of a national of a Member State who...has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation’,<sup>195</sup> which, while a positive and necessary development of itself, exemplifies the blurred nature of the border in the scope *ratione materiae* of EU law. Eleanor Spaventa is

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<sup>194</sup> See Part 5 *infra* for an analysis of this point.

<sup>195</sup> *E.g.* Case C-403/03 *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, para. 22.

right when she submits that ‘no national rule falls *a priori* outside the scope of the Treaty, since movement is enough to bring the situation within its scope’.<sup>196</sup> Such movement need not be connected with any physical travel in space.

Simple residence in a Member State other than your Member State of nationality moves you into the scope *ratione materiae* of EU law no matter whether you worked in that other state, like Mr. Baumbast,<sup>197</sup> or simply resided there working in your Member State of nationality, like Mr. Hendrix,<sup>198</sup> or even without working altogether, like the little Catherine, who never worked and never moved anywhere from the UK.<sup>199</sup> Moreover, what if your EU citizen-wife left you and moved out of your Member State? – you need not fear, you are still covered.<sup>200</sup> The latter situation changes, however, should your wife be American or Swiss,<sup>201</sup> adding to the confusion.

Although not always enlightening and frequently far from clear, the case law makes two fundamental points. Firstly, any economic engagement within the internal market does not necessarily play a role in shaping the material scope of EU law. Secondly, the meaning of the notion of ‘cross border situation’ is so technical that it has nothing to do with borders. Clearly, approaching the material scope of EU law in a narrower sense would be to go against the very spirit of European integration: The Union embarked on making borders between the Member States irrelevant for citizens and businesses alike. It would have effectively made EU law inapplicable to economically non-active citizens, which is hardly in line with what the Treaties seem to require.

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<sup>196</sup> Spaventa (2008), 14.

<sup>197</sup> Case C-413/99 *Baumbast v. Secretary of State for the Home Department* [2002] ECR I-7091. For critical analysis see Dougan, Michael, ‘The Constitutional Dimension to the Case Law on Union Citizenship’, 31 *Eur. L.Rev.*, 2006, 613.

<sup>198</sup> Case C-287/05 *D.P.W. Hendrix v. Raad van bestuur van het uitvoeringsinstituut werknemersverzekeringen* [2007] ECR I-6909; Case C-213/05 *Wendy Geven v. Lend Nordrhein-Westfalen* [2007] ECR I-6347; Case C-212/05 *Gertraud Hartmann v. Freistaat Bayern* [2007] ECR I-6303. For analysis see O’Brien, Charlotte, ‘Annotation of Case C-212/05 *Hartmann*, Case C-213/05 *Geven*, Case C-287/05 *Hendrix*’, 45 *Common Mrkt. L.Rev.*, 2008, 499.

<sup>199</sup> Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

<sup>200</sup> Case C-403/03 *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, para. 22.

<sup>201</sup> On this point see Spaventa (2008), 21, note 34.

Ultimately, all it takes is to have some history of moving around in the Union, or a discrepancy between (one) of your EU passports and your Member State of residence in order to fall within the material scope of EU law.<sup>202</sup> On a lucky day, even the potential provision of services somewhere outside of your Member State of nationality, as in *Carpenter*, could also be taken seriously (or not) by the Court.

The delimitation of the scope *ratione materiae* has become a game of chance. A history of travelling somewhere on vacation, or the current nationality of your former wife is amusingly fundamental to the determination of which law is to apply to *you*. The divide between lunacy and common sense here is very vague; indeed, it is so thin that it tends to be invisible at times, severely undermining the legitimacy of the Court's reasoning. Why not make the law applicable to your child depend on the colour of your mother in law's second car?

Consequently, all the recent progress notwithstanding, EU citizenship failed to introduce more coherence into the structure of European law, something that it has clear potential to do.<sup>203</sup> While stating this, it is necessary to bear in mind that it is nothing but the current state of the law right in the middle of the highly dynamic process of articulation of a new fundamental status for all Europeans. Consequently, the Court is not to be blamed too much for the strange vagueness of seemingly illogical rules. Agreeing with Kenneth Karst, 'in any period of constitutional creativity, the construction of a coherent doctrine can be expected to lag behind the Court's innovative decisions'.<sup>204</sup> Doctrinal consistency will come.

#### **d. The effects of double EU nationality**

The whole maturing process of EU citizenship can be presented – paraphrasing Advocate General Tesouro – as a departure from the principles of the 'romantic period of international

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<sup>202</sup> Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

<sup>203</sup> This was expected by scholars that 'citizenship [can become] the *leitmotiv* or driving force of coherence in EC law': Bengoetxea, Joxerramon, 'The Scope for Discretion, Coherence and Citizenship', in Wiklund, Ola (ed.), *Judicial Discretion in European Perspective*, Stockholm: Kluwer Law International, 2003, 48, 72.

<sup>204</sup> Karst (1977), 1.

law'.<sup>205</sup> It famously took off in *Micheletti*<sup>206</sup> with turning down the incoherent and logically inexplicable 'genuine links' rule originating in the ICJ's *Nottebohm* case,<sup>207</sup> which resulted in an absolute prohibition for the Member States

to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.<sup>208</sup>

In *Garcia Avello* the Court went on further. Namely, it clarified that Member States are not free to ignore other EU nationalities of their own citizens residing in their territory – which international law undoubtedly allows, if not mandates.<sup>209</sup> Consequently, *Garcia Avello*<sup>210</sup> is not only about a possibly wholly internal situation and longer names that the King of the Belgians would certainly frown upon.<sup>211</sup> It is about finding Spaniards and Europeans where Belgian law, along with international law, could only see Belgians. While this development is certainly in line with the whole *raison d'être* of European integration, it blurred the lines between the two legal orders in Europe even further, creating more interpenetration between them in a previously non-obvious way.

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<sup>205</sup> Opinion of AG Tesouro in Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 5.

<sup>206</sup> Case C-369/90 *Micheletti* [1992] ECR I-4239 para. 10. The outcome of this case could be predicted after Case 136/78 *Ministère Public v. Auer* [1979] ECR I-437, para. 28. See also Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para. 39. For analysis see Kochenov (2009) '*Ius Tractum*', 181–182 (and the literature cited therein).

<sup>207</sup> ICJ *Liechtenstein v. Guatemala (Nottebohm)* (1955) ICJ Reports 4. To see the incoherence of the judgment, see the Dissenting Opinion of Judge Klaestad and the dissenting opinion of Judge Read. For analysis see the literature recommended in Bleckmann, Albert, 'The Personal Jurisdiction of the European Community', 17 *Common Mrkt. L.Rev.*, 1980, 467, 477 and note 16.

<sup>208</sup> Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para. 39.

<sup>209</sup> So-called 'master nationality rule': Art. 4, The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of April 12, 179 L.N.T.S. 89, 1930. The article reads as follows: '... a State may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses'. As a consequence, during the stays in one of the States of nationality, another nationality, should you have one, usually lies dormant.

<sup>210</sup> Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>211</sup> In fact, the Government did not even propose that the King consider allowing the change of surnames. 'The Government takes the view that there are insufficient grounds to propose to His Majesty the King that he grant you the favour of changing your surname': Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613, para. 18.



It is great, of course, that the Member States are forced to see the other, previously safely ignored, side of the identity of those persons whom they legitimately regarded as their own. In addition to potentially reducing the number of silly and inexplicable national rules – like those at issue in *Garcia Avello* – the move away from international law also contributed to protecting the rights of all dual EU nationals residing in the EU.<sup>212</sup> All of them are now within the scope *ratione materiae* of EU law whatever happens. This development is thus in line with *Micheletti* and *Kadi*,<sup>213</sup> serving the interests of ordinary citizens, often forgotten by national-level sovereigns and always by international law.<sup>214</sup>

#### **e. Reverse discrimination: a bigger problem than before**

The ground-breaking change in the law related to the introduction of the concept of EU citizenship, in two respects only made the problem of reverse discrimination more acute.<sup>215</sup> Firstly, the instances of reverse discrimination were multiplied as a consequence of the drastic expansion of the scope *ratione personae* of the Treaty, unavoidably resulting in a growing number of situations covered by EU law. Secondly, reverse discrimination also entered the domain of horizontal situations,<sup>216</sup> increasing the number of occurrences of this phenomenon

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<sup>212</sup> For an analysis of this issue, see Kochenov, Dimitry, ‘Dual Nationality in the EU: An Argument for Tolerance’, 17 *Eur. L.J.*, 2011. In general on this issue see Spiro, Peter J., ‘Dual Citizenship as Human Right’, 8 *Int’l J. Const’l L.*, 2010, 111 (and the literature cited therein).

<sup>213</sup> Joined case C-402/05 P and C-215/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351. For criticism see e.g. de Búrca, Gráinne, ‘The European Court of Justice and the International Legal Order after *Kadi*’, *Jean Monnet Working Paper* (NYU) No. 01/09, 2009.

<sup>214</sup> The most recent developments in the case law, especially Case C-135/08 *Rottmann* [2009] ECR 0000 signal a departure from the well-tested approach of the ECJ to assess the rules of international law critically. For analysis of these issues see Kochenov, Dimitry, ‘Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters’, in Shaw, Jo (ed.), ‘Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?’, *EUI Working Paper RSCAS*, 2011 (forthcoming); Kochenov (2010) ‘Annotation of *Rottmann*’. See also Davies (2010) ‘Humiliation of the State’.

<sup>215</sup> For a critique of reverse discrimination in the context of the EU citizenship concept, see Tryfonidou (2009) ‘Reverse Discrimination in EC Law’, 129–166; Kochenov (2009) ‘*Ius Tractum*’, 212–213; Tryfonidou (2008) ‘Reverse Discrimination: An Incongruity’; Van Elsuwege and Adam (2008), 678–683; White (1993).

<sup>216</sup> Case C-281/98 *Angonese* [2000] ECR I-4139, annotated by Lane, Robert and Nic Shuibhne, Niamh, ‘Annotation of Case C-281/98 *Angonese*’, 37 *Common Mrkt. L.Rev.*, 2000, 1237. See also Nic Shuibhne (2002) ‘The European Union and Fundamental Rights’, 190–192.

even further. Consequently, although previously it would probably have been justifiable to consider reverse discrimination as an exceptional manifestation of the interplay between the legal orders, it gradually became so widespread that such a characterisation could no longer be legitimate.

The problem of reverse discrimination was first tackled by the ECJ in the context of the free movement of goods. In fact, the customs union seems to be the only area of EU law where this problem is more or less resolved.<sup>217</sup> As a result of impressive developments in the case law in this area, increasingly many instances which would have still been regarded as differentiated treatment in wholly internal situations some twenty years ago, fall within the scope of EU law, be it selling potatoes from Jersey in England,<sup>218</sup> moving around Carrara marble,<sup>219</sup> or taxing imports to the nearby<sup>220</sup> or remote regions of the Member States.<sup>221</sup> The Court unequivocally stated that '[EU law] cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State'.<sup>222</sup>

The same relaxation of reverse discrimination has not, as of yet, happened with regards to the legal position of EU citizens, notwithstanding the fact that problems abound here. Unfortunately, the ECJ is still kinder to products than it is to people.<sup>223</sup> This became particularly clear after it refused to make use of an opportunity to start treating people crossing internal

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<sup>217</sup> Van Elsuwege and Adam (2008), 661. For a detailed overview of this area see Gormley, Laurence W., *EU Law of Free Movement of Goods and Customs Union*, Oxford: OUP, 2009.

<sup>218</sup> Case C-293/02 *Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board* [2005] ECR I-9543, para. 79.

<sup>219</sup> Case C-72/03 *Carbonati Apuani Srl v. Comune di Carrara* [2004] ECR I-8027, para. 22.

<sup>220</sup> Joined cases C-485 & 486/93 *Maria Simitzi v. Dimos Kos* [1995] ECR I-2655.

<sup>221</sup> Case C-163/90 *Legros et al.* [1994] ECR I-4625, paras. 16, 17. For detailed analysis see Tryfonidou, Alina 'The Overseas Application of Customs Duties Provisions of the TFEU', in Kochenov, Dimitry (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, 2011; Slotboom, Marco, 'L'application du traité CE au commerce intraétatique: le cas de l'octroi de mer', *Cahiers de droit européen*, 1996, 9.

<sup>222</sup> Joined cases C-321–324/94 *Criminal proceedings against Jacques Pistre et al* [1997] ECR I-2343, para. 44. See also Case C-448/98 *Guimont* [2000] ECR I-10663, paras. 21–24.

<sup>223</sup> Unlike what Jukka Snell submits. See Snell, Jukka, 'And Then There Were Two: products and Citizens in Community Law', in Tridimas, Takis, and Nebbia, Paolisa (eds.), *European Union Law for the Twenty-First Century. Rethinking the New Legal Order* (Vol. 2, *Internal Market and Free Movement Community Policies*), Oxford: Hart, 2004, 49.

borders in the same way as it treats marble stone, which Advocate General Sharpston suggested in *L'assurances soins Flammande*.<sup>224</sup> The case concerned the deprivation of Walloons working in Flanders or *Brussel-capitale* regions of Belgium of the possibility to benefit from an additional social security entitlements established by the local government in a situation when any EU citizen able to demonstrate a cross-border situation was covered. To agree with Advocate General Sharpston, there is

something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States<sup>225</sup>

Theoretically, it can be claimed that each legal order could have legitimate expectations to be taken into account when the other is making judgments about equality – their citizens are the same people, after all. In practice, in the majority of cases this does not happen, although exceptions are well known.<sup>226</sup> Some jurisdictions are constructed in such a way that accommodating considerations stemming from other legal orders – however legitimate – is virtually impossible if the law is treated seriously. Moreover, it is reasonable to expect the legal order where the perceived problems originate in the first place to deal with them. In the Union this legal order is undoubtedly the supranational one,<sup>227</sup> and the problem is undoubtedly within its scope.<sup>228</sup> Consequently, expecting national legal orders to deal with problems they did not

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<sup>224</sup> Opinion of AG Sharpston in Case C-212/96 *Government of the French Community* [2008] ECR I-1683.

<sup>225</sup> *Id.*, paras. 143–144 (emphasis added).

<sup>226</sup> See e.g.: Italian *Corte Costituzionale*, sentenza 16-30 dicembre 1997, No. 443, para. 6: ‘nel giudizio di eguaglianza affidato a questa Corte non possono essere ignorati gli effetti discriminatori che l'applicazione del diritto comunitario è suscettibile di provocare’.

<sup>227</sup> Gaja (1999), 998: ‘la discrimination trouve déjà sa source dans la règle communautaire telle qu’elle est interprétée par la Cour. D’après cette interprétation la règle communautaire confère des droits à certaines personnes et non pas à d’autres en raison de la nationalité de ces derniers’. See also Cannizzarro (1997), 17; Poiares Maduro (2000), 117, 128.

<sup>228</sup> For detailed assessment see Tryfonidou (2009) ‘Reverse Discrimination in EC Law’, 232: ‘one thing is certain: reverse discrimination is, indeed, a problem that falls within the scope of EC Law’.

create out of niceness and ‘sincere cooperation’ probably means expecting too much.<sup>229</sup> The decision taken by the Belgian Constitutional Court in the same *L’assurances soins flammande* case is a telling example of this. While the ECJ, having refused to apply the EU principle of equality to what it perceived to be an example of a wholly internal situation, implied that the Belgian national principle of equality should do the job,<sup>230</sup> the Belgian Constitutional Court, for formalistic reasons reminiscent of those also guiding ECJ’s actions, did not take it into account,<sup>231</sup> as to do so would have undermined the whole division of competences between the component parts of that highly complex federation.<sup>232</sup> The presumption that the national legal systems of the Member States are well-equipped to resolve the problems with equality that originate in the EU legal order<sup>233</sup> – which empowers some of its citizens while neglecting the others – is thus unfounded.

In recent years the Court finally started approaching reverse discrimination in situations where citizens are involved. It is moving in small steps.<sup>234</sup> Proceeding from defending the rationale of the internal market and equality between EU citizens in cases where a worker is discriminated against in the Member State of nationality, having exercised free movement

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<sup>229</sup> Art. 4(3) TEU. On this principle see e.g. Temple Lang, John, ‘Article 10 EC – The Most Important “General Principle” of Community Law’, in Bernitz, Ulf, Nergelius, Joakim, and Cardner, Cecilia (eds.), *General Principles of EC Law in a Process of Development*, The Hague: Kluwer Law International, 2008, 75; Gormley, Laurence W., ‘Some Further Reflections on the Development of General Principles of Law within Article 10 EC’, in Bernitz, Ulf, Nergelius, Joakim, and Cardner, Cecilia (eds.), *General Principles of EC Law in a Process of Development*, The Hague: Kluwer Law International, 2008, 303; Temple Lang, John, ‘Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EU Treaty’, 27 *Fordham Int’l L.J.*, 2004, 1904.

<sup>230</sup> Case C-212/96 *Government of the French Community and Walloon Government* [2008] ECR I-1683. For analysis see Van Elsuwege and Adam (2008), 655.

<sup>231</sup> Belgian *Cour Constitutionnelle* Judgment 11/2009 of 21 January 2009. For enlightening analysis, demonstrating how limited the options of the *Cour Constitutionnelle* were, see Van Elsuwege and Adam (2009), 335–337.

<sup>232</sup> See in general Uyttendaele, M., *Précis de droit constitutionnel belge: Regard sur un système institutionnel paradoxal*, Brussels: Bruylant, 2005; Vandelanotte, J., Bracke, S., and Goedertier, G., *België voor beginners: Wegwijs in het Belgisch labyrint*, Bruges: Die Keure, 2008 (advised by Van Elsuwege and Adam (2009), 329, note 7).

<sup>233</sup> See e.g. Spaventa, Eleonora, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context*, The Hague: Kluwer Law International, 2007, 128.

<sup>234</sup> For a wonderful summary of this developments see Van Elsuwege and Adam (2008), 665–669; Tryfonidou (2009) ‘Reverse Discrimination’.

rights,<sup>235</sup> it turned to students who in Pushkin's words 'uchilis' ponemnogu, / Chemu-nibud' i kak-nibud''<sup>236</sup> are travelling around studying without obtaining any qualifications,<sup>237</sup> finally abandoning any economic connection with the internal market altogether. Whether really 'quite arbitrary'<sup>238</sup> or not, the situation with reverse discrimination in the area of EU citizens' free movement in the EU, although unfortunately remote from any however minimal idea of justice, can clearly be characterised as considerably 'less stalwart'<sup>239</sup> than before.

All in all, although it is of course shocking from the point of view of common sense, to see that 'la citoyenneté européenne ou le principe générale de l'égalité de traitement sont insuffisants, aux yeux de la Cour de justice pour étendre le bénéfice des libertés de circulation aux situations purement internes',<sup>240</sup> the Court has made several important steps in its recent case law – as described above – which allowed it to mitigate the problem to some extent. Although the Court has thereby helped a number of individuals to ascertain their rights originating in the EU legal order, it has also diluted the rules governing the application or disapplication of EU law to particular situations. In a situation where virtually anyone in the Union can fall within the personal scope of its law but without this fact being sufficient for the Court to start applying equal treatment, the precise configuration of the material scope becomes a particularly sensitive issue.

The more there are people whose connection with EU law, even though confirmed by the Court, is really tenuous in terms of logic and common sense, the more there are others, in

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<sup>235</sup> E.g. Case 115/78 *Knoors* [1979] ECR 399, para. 30. See also, *inter alia*, Case C-61/89 *Bouchacha* [1990] ECR I-3551; Case C-19/92 *Kraus* [1993] ECR I-1663; Case C-234/97 *Fernandez de Bombadilla* [1999] ECR I-4773.

<sup>236</sup> Pushkin, Aleksandr S., 'Jevgenij Onegin', in *Sobranije sochinenij v desiati tomakh* (Vol. 4), Moskva: Gosudarstvennoje izdatel'stvo khudozhestvennoj literatury, 1959, 2. [We all meandered through our schooling / haphazard; (so, to God be thanks, / it's easy, without too much fooling, / to pass for cultured in our ranks)]; Pushkin, A.S., *Eugene Onegin* (transl. Ch. Johnston), London: Penguin Classics, 1977, 2.

<sup>237</sup> Case C-281/98 *Angonese* [2000] ECR I-4139.

<sup>238</sup> Opinion of AG Fennely in Case C-281/98 *Angonese* [2000] ECR I-4139, para. 9.

<sup>239</sup> Nic Shuibhne (2002) 'The European Union and Fundamental Rights', 191. See also van der Steen, I., 'Zuiver interne situaties: geen omwenteling, wel inperking', *Nederlands tijdschrift voor europees recht*, 2008, 310.

<sup>240</sup> Van Elsuwege and Adam (2008), 658.

similarly hypothetical situations, not recognised by the Court as falling within the scope of EU law. Both groups are composed of EU citizens in the Union where equality and non-discrimination on the basis of nationality are hailed as fundamental principles of greatest importance. Random choice of law can only cause disappointment, just as any other injustice.

In the current context, the conclusion reached by David Pickup, who, writing 25 years ago, saw the current developments coming, still holds today: ‘this “half-measure” irritates as much as it soothes’.<sup>241</sup> A number of Advocates General concur.<sup>242</sup>

#### **f. New approach and its impact on economic free movement**

The development of EU citizenship predictably also had an impact on the fundamental economic freedoms. Here too the material scope of EU law has seen considerable enlargement. The ECJ established that in order to be considered an economic migrant and thus benefit from *lex specialis* provisions as opposed to general EU citizenship clauses, it is no longer necessary to prove any intention to contribute to the internal market, which is a welcome development, rightly moving a considerable array of situations within the scope of *lex specialis* provisions of the Treaty, which are potentially more attractive, in terms of the rights they grant, compared with Part II TFEU.

The previous, intention-based approach consisted of applying EU law only to those who, in the eyes of the Court, *intended* to contribute to the internal market. This could be done, for instance, by moving to another Member State<sup>243</sup> with an ‘economic goal’ in mind – not for any other reason.<sup>244</sup> Because of the casuistically narrow view of the internal market, which could

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<sup>241</sup> Pickup (1986), 154.

<sup>242</sup> See e.g. Opinion of AG Léger in Case C-152/03 *Ritter-Coulais* [2006] I-1711, para. 57; Opinion of AG Fennelly in Case C-281/98 *Angonese* [2000] ECR I-4139, para. 9.

<sup>243</sup> For a good summary of the orthodoxy, see e.g. Tryfonidou (2009) ‘In Search of the Aim’, 1592–1595.

<sup>244</sup> Case C-293/03 *My* [2004] ECR I-12013.

apparently be limited by *intentions*, some economically active Member State nationals would not fall within the scope *ratione materiae* of EU law.<sup>245</sup>

Upon the introduction of EU citizenship and the enlargement of the personal scope of supranational law to cover virtually everyone, the intention-based reading of the internal market is no longer acceptable. After all, it is overwhelmingly clear that your *actual* contribution to the internal market, which is economic activity in the area without frontiers that the Treaties have created,<sup>246</sup> cannot change depending on the direction of your movement, even if you really believe that any movement is a logically justifiable requirement in this context at all. Neither does it depend on the dreams of the new life you might have at the moment when you decide to go to another Member State.

Consequently, those workers who moved residence, not jobs, quite logically ended up covered by the economic free movement provisions.<sup>247</sup> The Court moved away from exercising an *ultra vires* activity of reading citizens' minds towards assessing the facts – a welcome development disappointing some commentators.<sup>248</sup> It is incontestable that *de facto* it is impossible to change the economic nature of someone's activity by swapping the places of employment and residence, however 'counterintuitive'<sup>249</sup> this might seem to some.

The Courts' new approach treats all economic activities with a cross-border element differently from all *non-economic* activities within the scope *ratione materiae* of EU law, which is much simpler and far more logical than the sophistry that predated this vision. It is impossible

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<sup>245</sup> Consider an example of those who work in their home state and move abroad for the purpose of residence, not employment: Case C-112/91 *Werner* [1993] ECR I-429 (overruled by Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711).

<sup>246</sup> Art. 26(2) TFEU.

<sup>247</sup> E.g. Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711. See also Case C-227/03 *A.J. van Pommeren-Bourgon diën* [2005] ECR I-6101; Case C-287/05 *Hendrix* [2007] ECR I-6909; Case C-213/05 *Geven* [2007] ECR I-6347; Case C-212/05 *Hartmann* [2007] ECR I-6303.

<sup>248</sup> E.g. Tryfonidou (2009) 'In Search of the Aim', 1591, esp. at 1598; O'Brien (2008) 'Annotation'; Poiares Maduro (2000), 123–127.

<sup>249</sup> O'Brien, Charlotte, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity', 33 *Eur. L.Rev.*, 2008, 643, 654.

to agree with Charlotte O'Brien<sup>250</sup> and Alina Tryfonidou<sup>251</sup> in this context, who criticise the Court, going as far as to state that 'the more appropriate assessment of a migrant whose State of work remains unchanged is arguably under Article 18 EC [Art. 21 TFEU]'.<sup>252</sup> If there is *lex specialis* dealing with economic activities and the economic activity of those who change Member State for the purpose of residence while working in their Member State of nationality is as uncontested as the existence of the cross-border situation in such cases: to apply general EU citizenship provisions here would amount to a *contra legem* interpretation of the Treaties. This view, which – although embraced by the Court, seems to be unpopular in the doctrine craving to see more citizens and fewer worker-citizens – is supported by Oxana Golynger: 'it seems appropriate to classify Union citizens who exercised their right to free movement under Art. 18 EC but remained employed or took up employment elsewhere in the Community as Community workers'.<sup>253</sup> As a result of the introduction of EU citizenship, coupled with the reinterpretation of the substance of 'economic activity' by the ECJ in the recent case law, it is currently enough to be in the right place at the right time: intentions to contribute to the internal market project rightly do not matter in a situation when integration has moved beyond a purely economic rationale, and to which, *inter alia*, the very enlargement of its personal scope testifies.

All in all, however, the *ratione materiae* borderline between the supranational legal order and the legal order of the Member States is more elusive today than ever, bringing about countless important questions which the Court cannot answer at the moment, and undermining the logic of citizenship making its way to the core of the principles of EU law since Maastricht.

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<sup>250</sup> O'Brien (2008) 'Annotation'.

<sup>251</sup> Tryfonidou (2009) 'In Search of the Aim'.

<sup>252</sup> O'Brien (2008), 'Annotation' 505.

<sup>253</sup> Golynger, Oxana, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration', in Halpin, Andrew, and Roeben, Volker (eds.), *Theorising the Global Legal Order*, Oxford: Hart, 145, 151.



### **g. ‘Equality’ without substance**

Once several virtually identical situations end up qualified as falling within the auspices of two (or, indeed, more)<sup>254</sup> legal orders, a formalistic line is drawn between them, *presuming* difference, rather than looking at the facts and sticking to the ideals of respect, justice and fairness. All this is to the detriment of the interests of ordinary citizens caught in the void between the tectonic plates of different legal orders. Butter-makers lose business,<sup>255</sup> Communist teachers are unemployed<sup>256</sup> and Walloon workers go uninsured.<sup>257</sup> The naturally biased empty definitions of ‘like’ and ‘unlike’ which are construed to be blind to what actually matters for those who are discriminated against, are thus particularly harmful in the grey areas bordering the confines of the legal orders. There is no place for respect where the jurisdictional borders eliminate the very possibility of making equality claims and where the status of citizenship as such does not count.

As Kent Greenwalt reports, ‘people having to decide how to treat others frequently begin with some doubt over exactly what treatment is appropriate for whom’.<sup>258</sup> In the EU this basic deliberation never took place with regard to the situation of those who are formally regarded as regulated by different legal orders, the flexibility of the line separating them notwithstanding. The argument for the current formalism is purely dogmatic.<sup>259</sup> In fact, virtually no-one seems to

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<sup>254</sup> The specificity of the sub-national regulation should also be taken into account. See *e.g.* Kochenov, Dimity, ‘Regional Citizenships in the EU’, 35 *Eur. L.Rev.*, 2010, 307.

<sup>255</sup> Case 98/86 *Mathot* [1987] ECR 809.

<sup>256</sup> Case 180/83 *Moser v. Land Baden-Württemberg* [1984] ECR 2539. In this early reverse discrimination case analysed by Pickup (1986), the ECJ clarified that a teaching refused employment in his Member State of nationality because of his membership in the Communist party does not fall within the scope of Community law.

<sup>257</sup> Case C-212/96 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683. For analysis see *e.g.* Van Elsuwege and Adam (2009), 327; Dautricourt, Camille, and Thomas, Sebastien, ‘Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?’, 34 *Eur. L.Rev.*, 2009, 433; Van Elsuwege and Adam (2008), 655.

<sup>258</sup> Greenwalt (1983), 1171.

<sup>259</sup> Tagaras (1999), 1538. With regards to purely internal situations he writes:

C’est dire qu’il n’existe pas d’argument en faveur de la non-applicabilité des règles communautaires aux situations internes? Si, un argument essentiellement dogmatique, celui

have ever been interested in the substance of the situation at all,<sup>260</sup> somehow presuming that such a formalistic split between the legal orders is the only, even if not the just way to assess reality: ‘jurisdiction is prior to substance’.<sup>261</sup> However, jurisdiction is not a given, as it is seemingly legitimately claimed by two or more legal orders at any given time, a fact that commentators tend to downplay. All the situations regarded as vested in different legal orders, however porous the border, are dismissed as incomparable without the slightest hesitation. The overwhelming ease with which the border between the legal orders moves to and fro<sup>262</sup> only makes the sense of injustice more acute, since it is overwhelmingly clear that the ECJ can always move such borders in any direction whatsoever by reference to the fundamental principle of equality. Too bad the principle is meaningless in such situations.

Consequently, the current state of affairs falls short of any substantive idea of equality, since equality tends to be applied separately at two different levels. Particular citizens’ lives are virtually randomly assigned to one legal order or another. Considerations of respect and justice play no role in this process. With virtually no logically predefined boundary between the two legal orders in many cases, nor any sound substantive principle to govern the drawing of such a

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qui exclut l’application des règles de libre circulation aux situations internes par la simple considération que ces situations ne sont pas ‘envisagées’ (*Id.*).

<sup>260</sup> The remarkable work of Andrew Williams provides a notable exception in this regard.

<sup>261</sup> Davies, Gareth, ‘EU Citizenship’, in Chalmers, Damian, Davies, Gareth and Monti, Giorgio, *European Union Law* (2<sup>nd</sup> ed.), Cambridge: CUP, 2010, 463.

<sup>262</sup> It would be a misconception to state that the jurisdictional border only moves in one direction. Since the change in the nature of European federalism from dual to cooperative, it is only natural that there is more sharing of responsibilities between the two legal orders – which can also be observed in practice. In fact, the Member States are often called upon to regulate some issues which previously would have been considered the holy cows of supranational competence and vice versa. Such loosening of the supranational grip can be observed *inter alia* in the area of free movement of economically active persons. Not only does the Court *de facto* allow its Member State counterparts to participate in defining the notion of a worker, it also allows for nationality discrimination in some cases where it was squarely prohibited before. The notion of ‘real links’ with the Member State of residence is used as a pretext. Not all such developments should be praised, since they obviously violate the Unity of EU law. See *inter alia* Case C-94/07 *Andrea Raccanelli v. Max-Planck-Gedellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939, 37; Case C-213/05 *Geven* [2007] ECR I-6347. For analysis see e.g. O’Brien, Charlotte, ‘Social Blind Spots and Monocular Policy Making: The ECJ’s Migrant Worker Model’, 46 *Common Mrkt. L.Rev.*, 2009, 1107; O’Leary, Síofra, ‘Developing an Ever Closer Union between the Peoples of Europe?’, *Mitchell Working Paper* (Edinburgh) No. 6/2008, 2008, 14–24.

boundary – which would go beyond the self-referential rhetoric of cross-border situations that has little to do with citizens’ lives – the principle of equality *de facto* ends up not applied at all. Andrew Williams seems absolutely right in this respect, stating that:

[t]he principles which the ECJ proceeded to develop through its case law have not been based on fundamental values that have any coherence, even though the consistent use of the rhetoric of certain values might suggest otherwise.<sup>263</sup>

That the current state of the law is antithetical even to a virtually meaningless minimalistic standard is equally clear. The surprising fact that the EU is one of the very few democracies on Earth where the formalistic idea of equality, which is so basic and universally accepted as to be considered meaningless by most commentators, teaches us something: it is necessary *convincingly* to define what is like and what is unlike at least – what never happened in the EU with the porous border between the legal orders.

If the taxes you pay depend, out of all things, on the nationality of a former wife who left the country, it is probably the right time to start a serious debate about the substance of the equality principle, given its current state of development in the Union. One thing is clear. Having stepped into the citizenship world, the EU is still unable to cope with its birth defect, *i.e.* its strong market bias, which is logically inexplicable in the new situation. The overview of recent developments in the ECJ’s case law provided *supra* thus entirely confirms the statement made by Joseph Weiler that:

L’aspetto problematico di questa giurisprudenza è che precisamente omette di compiere la transizione concettuale da una libera circolazione basata sul mercato ad una libertà basata sulla cittadinanza.<sup>264</sup>

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<sup>263</sup> Williams (2009), 560–561.

<sup>264</sup> Weiler (2009) ‘Nous coalisons des Etats’, 82. Weiler comes to this conclusion based on the analysis of the political side of the essence of citizenship, but the same also holds true, as demonstrated *supra*, when the analysis considers the principle of equality.

While Wojciech Sadurski could be right in characterising the concept of ‘equality before the law’ – which is the narrowest possible vision of Karst’s formal equality – as ‘redundant’,<sup>265</sup> since ‘equal treatment of individuals from the point of view of a given legal rule is nothing other than the treatment of those individuals in accordance with the rule’,<sup>266</sup> in the EU, once again, even this *most* basic standard cannot be claimed to be met, since too many rules – either belonging to the national, or to the EU level – cannot boast a clear material scope of application as a result of the rivalry between the legal orders and the random allocation of the border between them, which usually falls so far short of any substantive standards as to be explicable by nothing other than internal market orthodoxy. This state of affairs has far-reaching implications for the whole spectrum of other key principles of law, as well as the very idea of liberalism lying at the core of European legal culture, marked by the fusion of liberty and equality.<sup>267</sup> Indeed, as Sotirios Manolkidis has remarked, ‘what is really surprising is that the Treaties lack a general norm guaranteeing “the equal protection of the laws” for all persons in the EU’.<sup>268</sup> Was even a minimal idea of equality not among the ideals embraced by the founders? From the analysis above it is apparent that formal equality, however frequently proclaimed as a general principle of law, failed to take root in the EU. Consequently, the organisation is building on an ‘institutional ethos that lacks reasonable coherence *and* moral purpose’.<sup>269</sup> The current state of the Union is deeply troubling.

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<sup>265</sup> Sadurski (1998), 69.

<sup>266</sup> *Id.*

<sup>267</sup> See Wollheim (1955–1956), 281. To substantiate this point, Wollheim refers to de Ruggiero, Guido, *The History of European Liberalism*, London: OUP, 1927, 51.

<sup>268</sup> Manolkidis, Sotirios, ‘The Principle of Equality from a Comparative Constitutional Perspective: Lessons for the EU’, in Dashwood, Alan and O’Leary, Síofra (eds.), *The Principle of Equal Treatment in EC Law*, London: Sweet and Maxwell, 1997, 80. 99.

<sup>269</sup> Williams (2010), 18 (emphasis in the original).

## 5. IN SEARCH OF THE CAUSES OF CURRENT PROBLEMS

In search for the reasons behind the current state of equality in EU law, this section turns to the preservation of sovereignty of the Member States as an interest apparently *competing* with liberty, equality and justice (a.). It is suggested that fundamental principles of law are sacrificed in the EU for the sake of the preservation of their national-level equivalents, which cannot, however, fulfil their function in a legal-political environment marked by cooperative federalism (b.). The attempts to preserve the local constitutional ideals of the Member States in such a context are leading nowhere, rather creating numerous problems and resulting in the emergence of a ‘constitutional evil’<sup>270</sup> (c.) that would be wrong for the Union blindly to uphold (d.). In this situation, legal formalism coupled with the demonstrable inability on the part of the Member States to adapt their sovereignty rationale plays against the citizens of the Union and obstructs the emergence of the substantive principles of law, and undermines the ideal of justice, profoundly corrupting the system. In this sense, the EU is not far removed from international law, which provides the worst example of legalism deprived of defensible humanistic principles (e.).

### a. Sovereign reasons behind legalistic formalism

European legal formalism cannot in itself be the main reason for the departure from the idea of equality in the European Union. It should rather be viewed as a reflection of some other overwhelmingly important interest or value. Agreeing with Sir Isaiah, equality is not alone: ‘certain other ends must be striven for, such as happiness, virtue, justice, progress in the arts and sciences, the satisfaction of various moral and spiritual wants, of which equality, of whatever kind, is only one’.<sup>271</sup>

What is the other interest that outweighs the principle of equality in the EU? Even without venturing into the rarefied ethical foundations of the Union in Europe, as exposed by

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<sup>270</sup> Balkin (1997).

<sup>271</sup> Berlin (1955–1956), 318.

Williams,<sup>272</sup> it is clear that the current situation of equality in the EU does not promote justice, virtue or respect.<sup>273</sup> High esteem for any of these important values cannot be among the causes of the current problems with the principle. Equality did not end up empty under pressure from substantive values. It seems that the ideal of equality is departed from in the name of the ‘national competences’, which is a very weak interest in the context of the options provided by Berlin. Moreover, it is purely procedural in nature.

In a liberal democratic society competences are to be understood in a utilitarian sense as tools to improve people’s lives. Should they not be used to advance a legitimate interest firmly anchored in the substantive idea of the good, any recourse to them as a value in itself, justifying departure from such interest, seems unfounded.<sup>274</sup> In this context it is deeply problematic to present the preservation of national-level regulation of certain issues as an interest in itself, which would be worth protecting notwithstanding the negative effects of its practical application on the lives of EU citizens who are deprived of one of the main principles of law in substance and left with mere rhetoric.<sup>275</sup> Most significantly, allowing for such an important role to be played by a purely procedural principle, virtually regarded as an end in itself hurts the Member States themselves, as they are already not in a position to ensure equality among their own nationals, many of whom are formally regarded as falling within the material scope of EU law, even when living in the territory of their Member State of nationality. The Belgian example originating in *L’assurances soins flammande* exemplifies this point.

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<sup>272</sup> Williams (2010).

<sup>273</sup> See, generally, *Id.*; Williams (2009); Weiler (2009) ‘Nous coalisons des Etats’. In fact, as Weiler, argues (using political participation of EU citizens as a test case), the EU is even seems to undermine the stated values: ‘[N]el suo *modus operandi* [l’Unione europea] curiosamente milita contro le stesse virtù che sono necessarie per realizzare quei valori [*i.e.* democrazia, prosperità e solidarietà, diritti umani, stato di diritto] e che dovrebbero esserne la conseguenza’ (Weiler 2009), 83.

<sup>274</sup> Carens, Joseph H., ‘Citizenship and Civil Society: What Rights for Residents?’, in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books, 2002, 100, 115.

<sup>275</sup> Drawing a parallel with Weiler once again, equality is profoundly undermined in the EU alongside the other facet of citizenship, *i.e.* that of political participation: Weiler (2009) ‘Nous coalisons des Etats’.

Sooner or later, the EU is bound to step in to help Member State nationals/EU citizens and the Member States to preserve the ideals of equality and justice. Of course, another solution is obviously possible – *i.e.* to oblige the Member States themselves to ensure equality in all cases where the development of EU law results in its deterioration. However, such obligation *de facto* reduces to nothing less than the elimination of a cherished jurisdictional boundary. In addition, such an approach will not resolve the problems rooted in the redoubling of the principle of equality, as national and EU-level principles, even if interpreted identically, will remain the products of different legal systems, leaving open a possibility for friction.

Gareth Davies is absolutely right in comparing States with human beings when speaking of the promises they make but cannot keep<sup>276</sup> – but is EU citizenship one of these promises? Given the duality of approaches to the current juridical reality in Europe, marked by a clash of visions which can potentially grow into a fully-fledged conflict (oh Cassandra!), the constant erosion of the actual visible border between the two legal orders in Europe, each building on its own legitimacy considerations, risks to amplify the confusion by pushing the legal orders in question one step further towards the mutually assured destruction which Joseph Weiler wrote about years ago.<sup>277</sup>

### **b. Sacrificing fundamental principles for local dogmas**

The recent *Lisbon Treaty* decision of the BVerfG<sup>278</sup> provides an excellent illustration of the dangers of the currently dominant approach to the balance of power in the EU, and represents a step towards the disturbing MAD outcome. Before the *Lisbon Treaty* the majority of the national Constitutional visions of the coexistence between the legal orders built around the idea of acceptance of the legal order of the Union as technically superior with certain reservations, which mostly revolved around claims about protection of fundamental rights or highly

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<sup>276</sup> Davies (2010) ‘Constitutional Disagreement’, 8.

<sup>277</sup> Weiler (1999), 320.

<sup>278</sup> BVerfGE 63, 2267 (2009).

theoretical *dēmos* considerations, branded in the literature as a ‘malaise allemande’.<sup>279</sup> An awkward exception was the Polish case, where the *Trybunał Konstytucyjny* simply denied any possibility that EU law could take precedence when weighed against a norm of the Polish Constitution<sup>280</sup> – a radical assertion which can probably be explained by the fact that the *Trybunał* was a true novice in EU judicial cooperation matters when delivering its decision. It could have failed to grasp the obvious truth that ‘from the perspective of maintaining Member State sovereignty the whole institutional design of the Communities was fatally flawed at the outset’.<sup>281</sup> But who would expect such a *coup de naïveté* from the BVerfG?

What the BVerfG did in *Lisbon Treaty* was to go beyond the human rights rhetoric as such, aspiring to protect ‘national autonomy’ in the broadest possible sense. It brought up a totally different discourse, hinting at the possible ‘limits of European integration’<sup>282</sup> in terms of the sheer scale of delegated competences, with no regard to concrete fields,<sup>283</sup> to ensure that Germany remains in command of national competences of ‘substantial political importance’.<sup>284</sup> Unlike its Czech counterpart,<sup>285</sup> the BVerfG refused to specify where the limit lies,<sup>286</sup> leaving itself an arguably unlimited room for manoeuvre. In such a context, when the idea of national sovereignty coupled with a particular national understanding of democracy is ‘turned into an extremely broad tool for policing the spread of EU law’,<sup>287</sup> any attempt by the Union to shape

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<sup>279</sup> Peters, Anne, ‘European Democracy after 2003 Convention’, 41 *Common Mrkt. L.Rev.*, 2004, 70. In the *Lisbon* judgment the BVerfG changed its approach to *dēmos*, probably under pressure from the literature criticizing its previous approach, as Thym (2009) suggested (at 1818).

<sup>280</sup> Case K 18/04 of 11 May 2005, OTK Z.U. 2005/5A, esp. para. 6.4.

<sup>281</sup> Shapiro, Martin, ‘The European Court of Justice’, in Craig, Paul, and de Búrca, Gráinne (eds.), *The Evolution of EU Law*, Oxford: OUP, 1999, 321, 329.

<sup>282</sup> Thym (2009), 1795; Steinbach (2010), 368; similarly, Davies (2010) ‘Constitutional Disagreement’, 9.

<sup>283</sup> Steinbach (2010), 372–384.

<sup>284</sup> BVerfGE 63, 2267 (2009) para. 246. In fact, such wording is very well aligned with the TEU text after Lisbon. The problem, as usual, arises at the interpretation stage. The second part of Art. 4(2) TEU reads as follows: ‘[the Union] shall respect [Member States’] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security...’.

<sup>285</sup> Ústavní soud, Decision No. Pl. ÚS 19/08 of 26 November 2008. For analysis see Bříza, Petr, ‘The Czech Republic: The Constitutional Court on the *Lisbon Treaty* Decision of 26 November 2008’, 5 *Eur. Const’l L.Rev.*, 2009, 149.

<sup>286</sup> Thym (2009), 1800.

<sup>287</sup> Davies (2010) ‘Constitutional Disagreement’, 9.



clear substantive approaches to equality and justice, intervening on behalf of *its own* citizens, can be viewed as crossing the precious threshold of national autonomy and thus be subjected to what BVerfG terms as ‘Identitätskontrolle’.<sup>288</sup>

In fact, European citizenship as such is boldly dismissed by Karlsruhe as ‘nothing which culturally or normatively precedes the current Treaty law’<sup>289</sup> – a view as limited as it is traditionally German. The BVerfG again engaged in political moralism disguised as legal argument, mistakenly embracing the presumption of mono-cultural citizenship<sup>290</sup> – which never existed in reality,<sup>291</sup> however hard the states tried to impose it within the confines of their ‘imagined communities’.<sup>292</sup> Viewed from Benedict Anderson’s perspective, the European ‘Costituzione senza popolo’<sup>293</sup> is not an exception in being a polity without a nation, but a reflection of the state of affairs when state-imposed uniformisation is absent.<sup>294</sup> This reading is what the German court does not want to and probably genuinely cannot see, blinded by the doctrinal thinking which has little to do with reality stretching *Begriffsjurisprudenz* to the extremes. The BVerfG defends a position which is, to agree with Daniel Thym, ‘decidedly one-sided’.<sup>295</sup>

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<sup>288</sup> BVerfGE 63, 2267 (2009) para. 240.

<sup>289</sup> BVerfGE 63, 2267 (2009) para. 348.

<sup>290</sup> For an argument for multiculturalism, see Kymlicka, Will, *Multicultural Citizenship*, Oxford: OUP, 1995.  
<sup>291</sup> This is because citizenship can be presented as evolution/struggle for recognition both of formerly ignored groups (women, gays, racial minorities, the poor) and of new forms of rights. See also Sypnowich, Christine, ‘The Culture of Citizenship’, 28 *Politics & Society*, 2000, 531 (disagreeing with Kymlicka on the point of promoting minority cultures, but arguing for a general state obligation to ensure that all ‘live well’, including a guarantee of cultural tolerance).

<sup>292</sup> Anderson, Benedict, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2<sup>nd</sup> ed.), London: Verso, 1991. See also Smith, Anthony D., *The Ethnic Origin of Nations*, Oxford: OUP, 1986.

<sup>293</sup> Scoditti, Entico, *Costituzione senza popolo: Unione europea e nazioni*, Bari: Edizioni Dedalo, 2001. One might also, following Joseph Weiler, characterise European integration through the notion of ‘European constitutional federalism’: Weiler, Joseph H.H., ‘In Defence of the *Status Quo*’ (2003), 7, or, simply, federalism, as Schütze has demonstrated in a convincing way: Schütze (2009) ‘From Dual to Cooperative Federalism’.

<sup>294</sup> For a notable account of the (failed) uniformisation efforts taken by states, see Scott, James, *Seeing Like a State*, New Heaven: Yale University Press, 1998. See also Sissenich, Beate, *Building States without Society*, Lanham, MD: Lexington Books, 2007.

<sup>295</sup> Thym (2009), 1804.

Indeed, ‘nowhere is a common identity sufficient to give rise to new forms of governance’.<sup>296</sup> When the BVerfG assumes the unity of the *dēmos* as a precondition for authority, it ignores the fact that this sequence is almost never observed in practice. Indeed, the contrary is true.<sup>297</sup> In the US, one of the main goals of Publius was to ‘convince the readers [of the Federalist Papers] that the United States was indeed a unified nation’.<sup>298</sup> The young Italian Republic recognised the need to ‘make the Italians’.<sup>299</sup> Similarly in Asia, Sun Yatsen based the Chinese identity of Han, Manchus, Mongols, Muslims and Tibetans not on ‘history, or culture, or ethnicity, but the fact of their coinhabiting the national territory’.<sup>300</sup> Practically speaking, however, it is abundantly clear that ‘the unity of people is indeed a kind of “fiction”, insofar as it is neither a fact nor a material thing’.<sup>301</sup> While States themselves are products of ideas, to agree with Philip Allott, one can nevertheless expect them, through the highest judicial organs for instance, to establish a minimal reality check on the theories they deploy. Especially, when such theories can undermine the dignity of individuals through providing pretexts to ever-powerful authorities to deprive them of equality and respect.

Keeping the BVerfG’s *Identitätskontrolle* approach in mind, it is difficult to disagree with Gareth Davies that ‘even conventional socio-economic EU legislation may, just by virtue of its accumulated mass and effect, become a constitutional issue, perhaps even without any particular issue being notably offensive or odd’.<sup>302</sup> The problem is that the people whom Member States define as their nationals are also legitimately recognised by the Union as EU citizens and can derive rights from EU law that protect them in that capacity from the claims of

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<sup>296</sup> Sissenich, Beate, ‘Justification and Identity in European Integration’, 14 *Constellations*, 2007, 347, 349. Reversely, ‘democratic unity requires neither cultural nor moral homogeneity but first and foremost compatibility of political attitudes and continuous political dependency’: Chwaszcza, Christine, ‘The Unity of People, and Immigration in Liberal Theory’, 13 *Citizenship Stud.*, 2009, 451.

<sup>297</sup> For profound analysis see e.g. Chwaszcza (2009), 451 (and the literature cited therein). See also Weiler (2003) ‘In Defence of *Status Quo*’, 9.

<sup>298</sup> Fox Jr. (1999), 434.

<sup>299</sup> Palombella (2005), 360.

<sup>300</sup> Horowitz, Richard S., ‘International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century’, 15 *J. World History*, 2005, 445, 482.

<sup>301</sup> Chwaszcza (2009), 452.

<sup>302</sup> Davies (2010) ‘Constitutional Disagreement’, 9.

the Member States.<sup>303</sup> The EU thus becomes an important resource for its citizens, as without it, their horizon of opportunities would be infinitely narrower. This does not only concern the increase in the number of every Member State nationals with rights to work and reside in a particular territory by factor 27, but also concerns the possibilities of invoking EU law against the unwanted rules stemming from his or her Member State of nationality.<sup>304</sup> While the Member States emerge as losers as a result of such an arrangement, citizens and the EU unquestionably benefit from it. In the words of Gareth Davies,

Pushing the citizen closer to the EU might be achieved by pulling the citizen further away from the state. The EU might seek to undermine the citizen-state relationship in order to create a constitutional space that it can occupy. To win the citizen away, it might humiliate the state.<sup>305</sup>

Virtually any federation, as it matures, limits the power of its constituent entities – and the EU is not an exception. In this sense, ‘the European Union is uniquely European in the same sense that other federalisms are uniquely American, German, or Swiss’.<sup>306</sup> While allowing EU citizens to realise the benefits of the new order, the ECJ has been very sensitive to the Member States’ concerns so far – its treatment of the principle of solidarity is a great example of this.<sup>307</sup> A fair share of the problems currently plaguing the Union of citizens stem from this same sensitivity. The EU is approaching the point when the two main doctrinal visions of what it actually is are becoming virtually impossible to reconcile with justice, equality and respect for its own citizens. Convergence between the two visions of the essence of the Union is a pressing need.

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<sup>303</sup> Case 115/78 *Knoors* [1979] ECR 399; Case C-370/90 *Singh* [1992] ECR I-4265; Case C-224/98 *D’Hoop* [2002] ECR I-6191; Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613; Case C-291/05 *Eind* [2007] ECR I-10719; Case C-127/08 *Metock et al.* [2008] ECR I-06241. Similarly see Joined cases C-11&12/06 *Morgan and Bucher* [2007] ECR I-9161.

<sup>304</sup> For an analysis see Kochenov (2010) ‘Rounding up the Circle’.

<sup>305</sup> Davies (2010) ‘The Humiliation of the State’.

<sup>306</sup> Schönberger (2007), 64.

<sup>307</sup> For an analysis see Barnard, Catherine, ‘EU Citizenship and the Principle of Solidarity’, in Spaventa, Eleanor and Dougan, Michael (eds.), *Social Welfare and EU Law*, Oxford: Hart, 2005, 157.

### c. Constitutionalism vs. the citizens: The problem of the ‘constitutional evil’

That such convergence is not within reach unless actively mediated is abundantly clear. The most significant point in this regard is that the clash between the understandings of the essence of the law in Europe is that it is more than a theoretical dispute of the tiny group of lawyers shaping the debate. It directly affects, usually negatively, citizens’ lives.

While the obvious task of the BVerfG is to protect the Basic Law – just as would be expected of any other Constitutional Court – it is not at all clear at this point, whether trying to use national constitutional ideology (or law, should one prefer the term) to try to block the development of the Union by blackmailing it into more ‘sensitivity’ is in the interests of the citizens themselves, whom the German constitution was created to help and protect. It is no secret that faithfulness to a Constitution inescapably poses the problem of ‘constitutional evil’,<sup>308</sup> which J.M. Balkin defines as ‘the possibility that the Constitution is responsible, directly or indirectly, for serious injustices’.<sup>309</sup> Blocking EU development does not only mean protecting national democracy, the rule of law, and whatever else is considered important at a particular moment.<sup>310</sup> It also means to dismiss European citizens as Member States nationals, as well as to continue to insist on the tenability of the highly problematic reality of the present, where citizenship, respect, equality and justice, as well as common sense, are sacrificed on the altar of Member State autonomy.

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<sup>308</sup> Balkin (1997), 1704.

<sup>309</sup> *Id.*, 1706.

<sup>310</sup> Other considerations range from anti-gay sentiment to banning abortions. Extreme examples aside, Weiler is right that both empowering an individual against the public authority and empowering the public authority against the individual are valid political choices. Given the current state of the Union in Europe, however, the individual is unquestionably at the centre-stage, so the freedom of the Member States to deviate from this main paradigm adopted by the Union is infinitely limited: Weiler, Joseph H.H., ‘Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space’, in Kastoryano, Riva and Emmanuel, Susan (eds.), *An Identity for Europe: The Relevance of Multiculturalism in EU Constitution*, New York: Palgrave Macmillan, 2009, 73, 78. In this context, the possibility of backlash in reaction to the EU’s paradigm is obviously possible. See also Davies (2010) ‘The Humiliation of the State’. See also Part 6 *infra*.

Such a vision, while perfectly legitimate when regarded through the myopic perspective of national constitutionalism, is something that can be entirely contrary to what citizens actually need. Playing a national card means degrading the achievements and potential of European citizenship, which ultimately results not only in the protection of ephemeral national values, but also in stripping citizens of important rights and diminishing their opportunities – a high price to pay for alignment with national constitutional dogmatism. It can be argued that the interest in the preservation of state autonomy, taken by the BVerfG virtually to its absolute extreme, is actually not absolute at all.<sup>311</sup> It should be weighed against the interest in empowering of EU citizens through the European legal order – an idea which BVerfG clearly does not welcome at all.<sup>312</sup> Writing about the impact of EU law on the lives of ordinary Europeans, Stine Jørgensen is absolutely correct in emphasising that ‘in the eyes of the citizens welfare benefits, freedom of movement and the principle of non-discrimination all support and supplement the legal position of the individual’.<sup>313</sup> It is certain that it does not matter at all to ordinary citizens which legal order protects them, as long as their rights, including a right to be recognised as a citizen and treated in a fair and just manner, are secured, moving the emphasis from the context of the perceived conflict between the Member States and the EU into the sphere of a different opposition, between the individual and the public authorities.<sup>314</sup>

Sovereign states, as so often before in history, refuse to notice humble human beings, who are now empowered to seek protection against States by the supranational law in Europe. As long as citizens are not put at centre stage it is unlikely that the MAD option on the horizon will ever recede. The body of EU citizens is by far the most important thing that the two legal orders in Europe actually have in common. Indeed, not only the states themselves, but also the

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<sup>311</sup> Which BVerfG *de facto* recognised through the principle of ‘openness to integration’: BVerfGE 63, 2267 (2009) para. 221.

<sup>312</sup> BVerfGE 63, 2267 (2009) para. 216, refusing to recognise that what it calls ‘the principle of democracy’ can be weighed with other legal interests.

<sup>313</sup> Jørgensen, Stine, ‘The Right to Cross-Border Education in the European Union’, 46 *Common Mrkt. L.Rev.*, 2009, 1567, 1567. See, similarly, Davies (2007), 2–3.

<sup>314</sup> Weiler, Joseph H.H. and Lockhart, N.J.S., “‘Taking Rights Seriously’ Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence”, 32 *Common Mrkt. L.Rev.*, 1995, 51 (Part 1) and 579 (Part 2), 621.

integration project between them exist by definition for the wellbeing of EU citizens. Failure to acknowledge this is to appease obsolete ghosts under the shabby banners of *Identitätskontrolle*, while passing the costs on to the citizens whom the legal orders share. Citizens remain the ones who lose the most in the current situation.

#### **d. How sensitive to hermeneutic foibles should supranational law be?**

The fundamental principles of law present in all systems are often exaggerated and overblown if not fetishised through the concept of the Constitutional traditions of the Member States. Agreeing with Joseph Weiler, ‘defending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges voting against four’.<sup>315</sup> The EU itself is a product of four judges voting against three in *Van Gend*, as the rumors have it.<sup>316</sup>

Any ‘constitutional tradition’, when put in normal human language, is just a corpus of myths containing, expectedly, a bunch of extremely non-unique rules. However glorified, we know that any ‘Constitutional tradition’ is rooted in simple human activity and there is absolutely nothing, essentially, to distinguish it from any other similar set of rules based on the same key ideas, which is why the French constitutional tradition is not necessarily better than the German, the Irish or the Polish ones. It is an open question how far the sacrifices for the sake of the preservation of such constitutional traditions can reasonably be expected to go.

Putting mythologies aside, any European state – just like any other state anywhere else – can boast of an impoverished consciousness, ‘concentrating on state rather than human interests, wielding sovereignty that was not conferred by society but rather authoritatively imposed on

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<sup>315</sup> Weiler, (2003) ‘In Defense of the *Status Quo*’, 17. This foible has a twin sister – that of the particularity of the national (citizenship) culture which each of the Member States dutifully trumpets. For critical analysis, see Joppke, Christian, ‘Immigration and the Identity of Citizenship: The Paradox of Universalism’, 12 *Citizenship Stud.*, 2008, 533; Kochenov, Dimitry, ‘*Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, *EUI Working Paper* (Florence) RSCAS, 2011/06, 2011; Kochenov (2010) ‘Rounding up the Circle’, 6–12 (and the literature cited therein).

<sup>316</sup> Vauchez, Antoine, ‘The Transitional Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity’, 16 *Eur. L.J.*, 2010, 1, 12.

it’.<sup>317</sup> While this is not to advocate the futile notion of the wholesale abandonment of the current system, it needs to be restated, at least occasionally, that there is also a down-to-Earth reality behind the solemn terminology of multi-volume state theories. Philip Allott and Joseph Weiler are right to remind us what the world of constitutionalism *actually* is, behind the veil of the all-encompassing ideology, totally accepted throughout the world. What else is ‘constitutional patriotism’ then, if not ‘the last refuge of a scoundrel?’<sup>318</sup>

If European integration, notwithstanding its rightly praised ‘principle of Constitutional tolerance’<sup>319</sup> results in the death of a couple of postulates inherent in the national Constitutional traditions, however fundamental for particular Member States, this can be frowned upon but also welcomed: paraphrasing Jeremy Waldron, who needs ‘Disneylands’?<sup>320</sup> In fact, such occasional dismissal of national rules is a necessary consequence of the day-to-day functioning of the integration project. It covers all the spheres of the law – from sanctification of bird-killing<sup>321</sup> and the ‘swan song[s] of the vanishing ideology of nationhood’<sup>322</sup> – *i.e.* interpretation of the notion of a *Volk* in order to have as little overlap between legal ideology and social facts<sup>323</sup> as possible<sup>324</sup> – to strict child-naming conventions.<sup>325</sup> Adoration of such rules – which objectively speaking can also be evil<sup>326</sup> – and setting out to protect them whatever the cost, is not a constructive exercise,

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<sup>317</sup> Scobbie, Iain, ‘Slouching towards the Holy City: Some Weeds for Philip Allott’, 16 *Eur. J. Int’l L.*, 2005, 299, 304.

<sup>318</sup> Weiler, Joseph H.H., ‘Human Rights, Constitutionalism, and Integration: Iconography and Fetishism’, in Kastoryano, Riva and Emmanuel, Susan (eds.), *An Identity for Europe: The Relevance of Multiculturalism in EU Constitution*, New York: Palgrave Macmillan, 2009, 103, 106.

<sup>319</sup> Weiler, (2003) ‘In Defence of *Status Quo*’, 18.

<sup>320</sup> Waldron, Jeremy, ‘Minority Cultures and the Cosmopolitan Alternative’, 25 *U. Mich. J.L. Reform*, 1992, 751. Although Waldron focuses on minority cultures, his argument can be transposed into the realm of constitutional traditions without losing much of its force: ‘immersion in the traditions of a particular community in the modern world is like living in a Disneyland and thinking that one’s surroundings epitomize what it is for a culture really to exist’ (*Id.*, 751).

<sup>321</sup> Case C-76/08 R *Commission v. Malta* [2009] ECR I-0000.

<sup>322</sup> Benhabib, Sheyla, *The Rights of Others: Aliens, Residents and Citizens*, Cambridge: CUP, 2004, 207.

<sup>323</sup> Carens (2002), 110: ‘What makes a person a member of society ... cannot depend on the state’s own categories and practices. It depends instead on the social facts’.

<sup>324</sup> For the analysis of the Maastricht Treaty provisions on the local elections for all EU citizens overruling two notorious judgments of the BVerfG see Shaw (2007), 198–208; Benhabib (2004), 207–210.

<sup>325</sup> Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>326</sup> Balkin (1997), 1703.

although ‘à la mode’.<sup>327</sup> The same applies to the desire to preserve as many of them as possible – the thinking behind the *Identitätskontrolle*.

After all, ‘whenever we set out to find “the law”, we are able to locate nothing more attractive, or more final, than ourselves’.<sup>328</sup> Even if the assault on such Constitutional traditions is not among the ‘secret dreams’ of the Union’s creators, as an ambassador suggested,<sup>329</sup> integration coupled with globalisation pressures will necessarily bring in change, which is inescapable and should not be presumptively frowned upon.<sup>330</sup> No real identity is static, dynamism playing an essential part in the thought surrounding the idea. The Union, having prohibited acting disrespectfully towards national identities,<sup>331</sup> will thus only watch them evolve as the Member States struggle *not* to coordinate a number of overwhelmingly important fields, such as the military or national citizenships, drastically undermined by the lack of coordination for the sake of the preservation of national sovereignty – *i.e.* the ‘illusion of control’.<sup>332</sup>

The same illusion is also present in the field of national culture, not merely constitutional traditions. Culture, as Theodor Adorno correctly emphasised, is always about control,<sup>333</sup> and the Union can be praised for limiting the Member States’ ability to exercise such control. The EU supplies its citizens with the most dangerous weapon in the realm of state-mandated culture<sup>334</sup> – the freedom to choose.<sup>335</sup> This does not only concern the place where to live, but also an ability

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<sup>327</sup> Weiler, (2003) ‘In Defence of *Status Quo*’, 16: ‘to protect national sovereignty is passé; to protect national identity by insisting on constitutional specificity is à la mode’.

<sup>328</sup> Leff, Arthur Allen, ‘Unspeakable Ethics, Unnatural Law’, 6 *Duke L.J.*, 1979, 1229.

<sup>329</sup> Richardson, John, ‘The European Union in the World – A Community of Values’, 26 *Fordham Int’l L.J.*, 2002, 12, 23.

<sup>330</sup> For an examples in the field of Member States’ nationalities see Kochenov (2010) ‘Rounding up the Circle’; Rostek, Karolina and Davies, Gareth, ‘The Impact of Union Citizenship on National Citizenship Policies’, 10 *EIoP* 5, 2006, 1 (also reprinted in 22 *Tul. Euro. Civ. L.F.*, 2007, 89).

<sup>331</sup> Art 4(2) TEU stipulates that ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.

<sup>332</sup> For discussion see Kochenov (2010) ‘Rounding up the Circle’, 20–22.

<sup>333</sup> Adorno, Theodor, *The Culture Industry*, London: Routledge, 1991, 107.

<sup>334</sup> For the criticism of state-approved constructs of culture in the context of naturalisation legislation see *e.g.* Kochenov (2011) ‘*Mevrouw de Jong*’ (and the literature cited therein).

<sup>335</sup> Will Kymlicka formulated this connection with abundant clarity: ‘our current ends are not always worthy of our continued allegiance, and exposure to other ways of life helps us make informed judgments about



to be immune from the culture claims of the Member State of residence.<sup>336</sup> Bad news for patriotic populists, as EU citizens are free to choose their own language, culture and state, free from any bullying on the part of their Member State of residence.<sup>337</sup> To make sure that this freedom does not evaporate as EU citizenship matures, it is necessary to ensure that it remains a ‘nondogmatic, open belonging [which] springs from heterogeneous motivations and admits diverse visions of Europe’.<sup>338</sup> The liberating function of the European federation is thus particularly important for those able to appreciate freedom.<sup>339</sup>

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what is truly valuable’, Kymlicka (1995), 92. It is true that ‘members of a culture who have an interest in protecting it often have in mind measures that will discourage individuals from exercising their capacity to choose’: Sypnowich (2000), 536.

<sup>336</sup> Art. 16(1), Directive 2004/38, *OJ L* 158/77, 2004. It is impossible to agree with Weiler in this context, who seems to disapprove of this freedom, speaking of the ‘ghettoisation’ of migrants. In Weiler’s view ‘la Corte dissuade dall’integrazione dei migranti nelle loro comunità ospiti’ (Weiler (2009) ‘Nous coalisons des Etats’, 82; see also Jessurun d’Oliveira, Hans U., ‘Europees burgerschap: Dubbele nationaliteit?’, in van Ballegooij, Wouter F.W. (ed.), *Europees Burgerschap*, The Hague: T.M.C. Asser Press, 2004, 120, 122).

Contrary to Weiler’s vision, such an approach seems to be one of the main achievements of the Union to date, as it requires the Member States of residence to leave migrant EU citizens alone and not bother them with the local visions of culture and community, which States impose on their citizens and migrant third country nationals (see Kochenov (2011) ‘*Mevrouw de Jong*’). Consequently, EU law necessarily promotes tolerance and destroys tightly-woven ‘communities’, either national, or local, weary of outsiders, necessarily confronting local prejudices and improving people’s lives in the long run. AG Jacobs’ view in his Opinion in Case C-148/02 *Garcia Avello* [2003] ECR I-11613, following the rationale opposing Weiler’s and Jessurun d’Oliveira’s, exemplifies the EU’s approach:

The concept of ‘moving and residing freely in the territory of the Member States’ is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly related of even continuous, movement within the single ‘area of freedom, security and justice’, in which both cultural diversity and freedom from discrimination [are] ensured (para. 72).

<sup>337</sup> Here the difference between the rights of EU citizens and third country nationals is manifold, as the latter are asked to pass ever more elaborate culture and language tests not only for naturalisation, but also in order to acquire residence: For details see Kostakopoulou, Dora, ‘Matters of Control: Integration Tests, Naturalisation Reform and Probationary Citizenship in the United Kingdom’, *J. Ethnic & Migration Stud.*, 2010 (forthcoming); Bauböck, Rainer, and Joppke, Christian (eds.), ‘How Liberal Are Citizenship Tests’, *RSCAS Working Paper* (EUI) No. 2010/41, 2010; Joppke, Christian, ‘Beyond national models: civic integration policies for immigrants in Western Europe’, 30 *W. Eur. Pol.* 2007, 1. For a scrupulous country-by-country analysis see van Oers, Ricky, Ersbøll, Eva, and Kostakopoulou, Dora (eds.), *A Re-definition of Belonging?*, Leiden: Brill, 2010; Kochenov (2011) ‘*Mevrouw de Jong*’.

<sup>338</sup> Palombella (2005), 383. See also Kochenov (2010) ‘Rounding up the Circle’, 5–6.

<sup>339</sup> See in this respect Ortega y Gasset, José, ‘Unity and Diversity of Europe’ in his *History as a System: And Other Essays toward a Philosophy of History*, New York: W.W.Norton, 1961, 43, esp. 57.

National constitutional traditions, cultures and principles can only be viewed in their dynamics. The sacrifices one would expect to be made for them in a Union where, whether one wants it or not, all these concepts are by definition infinitely more similar compared with the outside world, should not be exaggerated, especially when their foibles are such that they require putting the legitimate interests of EU citizens to one side. Any such claim, any such sacrifice, has to be scrutinised with the greatest suspicion.

#### **e. The worst example of legalistic formalism: International law**

International law, with its general blindness to the individual is a perfect illustration of what happens when the foibles of sovereignty and constitutionalist exceptionalism are fetishised to the absolute. By recognising the sovereignty of states, international law makes it impossible to pay serious attention to inequalities between the nationals of different states: ‘equality within and between societies [remains] a neglected issue’.<sup>340</sup> It is still possible to see the vestiges of this problematic aspect of international law when analysing the application of equality in the Union. Although physical borders between EU Member States are mostly non-existent, political borders continue to abound.<sup>341</sup> These borders correspond, most importantly, to what is going on in the world of ideas, in people’s minds.<sup>342</sup>

The idea of citizenship is entrenched in the notion of attachment to states. While profoundly libertarian as long as you are one of the citizens within the borders of a state, citizenship cannot but demonstrate its true nature as a ‘feudal privilege’<sup>343</sup> when analysis is extended to several states, not one. Coupled with the main postulate of external sovereignty

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<sup>340</sup> Kingsbury (1998), 599. For a discussion of this issues from a non-legal perspective, see Miller (1998), 202; Blake, Michael, ‘Distributive Justice, State Coercion, and Autonomy’, 30 *Philosophy and Public Affairs*, 2002, 257; Moellendorf, Darrel, ‘Equal Respect and Global Egalitarianism’, 32 *Social Theory and Practice*, 2006, 601.

<sup>341</sup> Bauböck (1997), 1.

<sup>342</sup> Philip Allott provides a fascinating account of one idea that shaped contemporary world in the most fundamental ways, blaming de Vattel, who ‘made the myth of the state of nature into the metaphysics of the law of nations’ for the current injustices and ‘mere anarchy’ of international relations: Allott (2002), 58 and 57 respectively.

<sup>343</sup> Carens (1987), 252; Shachar and Hirschl (2007), 253.

presenting states as equal,<sup>344</sup> citizenship becomes instrumental in dividing the world into ‘container societies’,<sup>345</sup> and perpetuating inequality through drastic discrepancies in the opportunities that come with different citizenships at birth – compare Danish and an Eritrean citizenship, for instance. In a situation where ‘97 out of every 100 people acquire political membership [citizenship] via circumstances beyond their control’,<sup>346</sup> the just and libertarian nature of distribution of citizenship as such necessarily comes to be contested, simply because once the whole world, not Guatemala or, say, Liechtenstein, provides the scope for citizenship and equality analysis, all the postulates held to be true about citizenship at the national level collapse instantly: it becomes a tool for the perpetuation of inequality, ‘a formidable barrier to both mobility and opportunity’.<sup>347</sup> The thinking about sovereignty, another postulate of modern law, is equally flawed, being responsible for ‘theoretical incoherence and practical impotence of International law’<sup>348</sup> which is as obvious as it is unchangeable in the short to medium term,<sup>349</sup>

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<sup>344</sup> Shachar, Ayelet, ‘The Worth of Citizenship in an Unequal World’, 8 *Theoretical Inquiries in Law*, 2007, 367, 379; Kingsbury (1998), 600. Kingsbury discusses three major ways in which the theory of sovereignty has relieved international lawyers of the necessity to think about sovereignty. These are related to 1. Sovereign equality of states; 2. Exclusive jurisdiction of states in dealing with their internal problems; 3. The use of the theory of sovereignty to justify tacit consent which is deemed to have been expressed by people *vis-à-vis* applicable norms of international law (at 600–601). Equality between States is a rather novel invention in international law, as it came to replace ‘empirical criteria of state building [only] around the Second World War’: Kayaoglu, Turan, ‘The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality’, 51 *Int’l Stud. Q.*, 2007, 649, 655.

<sup>345</sup> This term is used by Peggy Levitt and Nina Glick Schiller in ‘Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society’, 38 *Int’l Migration Rev.*, 2004, 1002. One of the consequences of contemporary reality is also in the fragmentation of legal thought. On this issue see Twining, William, ‘Implications of “Globalisation” or Law as a Discipline’, in Halpin, Andrew, and Volker, Roeben (eds.), *Theorising the Global Legal Order*, Oxford: Hart, 2009, 39.

<sup>346</sup> Shachar (2007), 367.

<sup>347</sup> *Id.*, 368. The consequence of how the theory of society is entrenched in our minds is a totally biased vision of the world, which also has direct implications on thinking about equality. Richard Miller provides an obvious example of this:

in the United States, most reflective, generally humane people who take the alleviation of poverty to be an important task of government think they have a duty to support laws that are much more responsive to neediness in the South Bronx than to neediness in the slums of Dacca. This patriotic bias has come to play a central role in the debate over universalist moralities’ (Miller (1998), 203).

<sup>348</sup> Allott, Philip, *Eunomia*, Oxford: OUP, 1990, 302.

though theoretical attempts are being made to change the nature of international law, by re-tuning it to the requirement that it meet human needs, not those of States. This is being done via the idea of ‘Global Constitutionalism’.<sup>350</sup>

At present, however, international law, instead of tackling the obvious problems which systemic inequality represents, accepts it as a given, since it is one of its main foundations.<sup>351</sup> Once common citizenship and a *common* principle of equality has been created, however, as in the Union in Europe, the continuation of this practice is very problematic. Philip Allott is right to diagnose the death of diplomacy in Europe:<sup>352</sup> international law (*i.e.* order inside – anarchy outside) in the classical sense does not apply here anymore: anarchy is replaced by supranationalism.<sup>353</sup>

## 6. CONCLUDING REMARKS

The EU is falling victim of its own structure and objectives, coupled with the profound inflexibility of the fundamentals of its design. Never actually aspiring to embrace a certain

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<sup>349</sup> Notwithstanding lonely voices appealing for reason, like that of Philip Allott, calling for a ‘revolution not in the streets but in the mind’: Allott (1990), 257. See also his *Health of Nations* (2002).

<sup>350</sup> See, especially, the works by Anne Peters: Peters, Anne, ‘The Merits of Global Constitutionalism’, 16 *Indiana J. Leg. Stud.*, 2009, 397; Peters, Anne, ‘Humanity as the A and Ω of Sovereignty’, 20 *Eur. J. Int’l L.*, 2009, 513.

<sup>351</sup> Suggestions have been made to address this problem, but they have not been successful so far, as for the majority of people, living in the world of states, the problem itself is non-obvious – indeed, it is simply non-existent. See *e.g.* Shachar (2007), 370; Shachar and Hirschl (2007).

<sup>352</sup> Allott, Philip, ‘The European Community Is Not the True European Community’, 100 *Yale L.J.*, 1991, 2485, 2491:

The essence of the phenomenon of the European Community is that the development of the interrelationship of the nations of Western Europe has been put into the same framework of their national social development. Or, to put it another way, the well-being of all the peoples of Western Europe became part of the common concern of each of the peoples of Western Europe. Or, to put it still another way, the interrelationship of the nations of Western Europe was democratised. Such is the generic nature of the European Community. Such is the possibility of its future. Democracy replaces diplomacy. European values at their highest complete the highest national values.

<sup>353</sup> See also Palombella (2005), 377, who makes a point very similar to Allott’s.

substantive theory of justice, the EU has been constantly evolving around purely utilitarian considerations of peace, prosperity and economic rationality. As Andrew Williams brilliantly explained, the Union has never gone as far as embracing any substantive legal principles going beyond the self-referential ideology of the interpretation of its founders' intent.<sup>354</sup> Equality is just one among a number of important principles to have suffered (a.). The deficiencies outlined have rich potential to undermine the development of the Union in the future, if not its very existence. However, in remedying them, extra-legal factors also need to be taken into account (b.)

### **a. Design errors or a misunderstanding?**

The emptiness of the stated principle of equality is not exceptional in the Union context, if we are prepared to inspect the system of EU law with a critical eye. It falls all too readily within the general picture of the problematic nature of EU law painted, *inter alia*, by Andrew Williams<sup>355</sup> and Joseph Weiler.<sup>356</sup> The main problem here is that EU law has an underlying philosophy, which 'appears to be based on a theory of interpretation (of original political will) rather than a theory of justice'.<sup>357</sup> Concerns about effectiveness and striving to achieve the Treaties' goals have overshadowed the idea of justice itself. Freedom, democracy, the Rule of Law and equality, for that matter, is 'encouraged in so far as it is related to achieving the aim of the common market'.<sup>358</sup> Prof. Weiler even went as far as to claim that this state of affairs corrupts individuals who become increasingly accustomed to the operation of the system which, in essence, compromises two main principles of democracy, those of responsibility and representation.<sup>359</sup> Based on the above analysis, equality can safely be added to the list.

In the words of Andrew Williams, the EU evolved around the principle of effectiveness, which includes 'a weak notion of virtues that have together been used as a substitute for any

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<sup>354</sup> Williams (2009), 549.

<sup>355</sup> *Id.*

<sup>356</sup> See, *inter alia*, Weiler (2009) 'Nous coalisons des Etats', 51.

<sup>357</sup> Williams (2009), 549, 569.

<sup>358</sup> *Id.*, 567.

<sup>359</sup> Weiler (2009) 'Nous coalisons des Etats', 60–61.

“strong” ethical, or ideal, foundation’.<sup>360</sup> In this context, the Union’s vision of equality and citizenship is but another illustration of the *nature* of EU law, where ‘inspiration has come from a confused interpretative approach, *not* an ethical position’.<sup>361</sup> It is truly puzzling that the EU is often not even expected to base its positions on fundamental principles that enjoy any substance other than the self-referential integration project. Clearly informed by the objectives of the Treaties, what is referred to as ‘fundamental principles’ by the ECJ is confined in fact to a subordinate position. In a way, the law in the Union seems to be a result of the general proceduralisation of effectiveness concerns, rather than building on any sound determination of the meaning of the foundational principles and underlying values. However, how could such foundational principles be contemplated when any *vrai* political process or culture is absent? The Court seems to be the only institution free (but preferring not) to move into this unchartered territory, which necessarily implies a number of problems.<sup>362</sup>

Consequently, it seems that the current state of citizenship and equality should not be regarded as surprising. It would be incorrect, however, to present it as merely a design error. Notwithstanding the far-reaching goals in the preambles of the founding Treaties, the European integration project was not designed, legally speaking, to function – as it does – as a ‘competitor to, rather than a complement of national constitutionalism’.<sup>363</sup> The problems related to the meaning of equality and other fundamental principles of EU law from which the Union currently suffers could not have been as acute in the pre-citizenship Union. It seems that it is only the creation of EU citizenship, accompanied by the drastic expansion of the scope *ratione personae* of the Union<sup>364</sup> and coupled, quite naturally, with the profound mutation of its material scope,<sup>365</sup> which brought to light the current deficiencies. Following the overwhelming change in the potential scale of the Union’s involvement in the lives of ordinary people and its growing role as

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<sup>360</sup> Williams (2009), 551.

<sup>361</sup> *Id.*, 552 (emphasis added).

<sup>362</sup> Weiler (2009) ‘Nous coalisons des Etats’, 81–82.

<sup>363</sup> Davies (2010) ‘The Humiliation of the State’.

<sup>364</sup> See Part 4(a) *supra*.

<sup>365</sup> See Part 4(a) to (f) *supra*.

a competitor of the Member States through its role as a protector of individuals who ended up within the scopes of both legal systems, the very paradigm of European integration has changed.

The ethical foundations of the founding Treaties gradually become inadequate,<sup>366</sup> just as the efforts of the Court to make sense of the new reality come across as wildly insufficient to meet the challenges posed by the Union that has evolved. The current situation is thus not a design error, but a failure of adaptation in an atmosphere where profound change in the context of European integration demands a rethinking of its fundamentals.

What seemed irrelevant and marginal in the days of the founding of the Union is now capable of undermining the core of the main principles governing the operation of *both* the Member States and the Union alike.<sup>367</sup> Economic considerations coupled with self-referential Treaty-rhetoric of an ‘ever-closer Union among the peoples of Europe’<sup>368</sup> are not enough – and any deeper considerations of justice are simply not there. The study of equality and citizenship in the Union is a great case in point – one example among many.<sup>369</sup> What is abundantly clear at the moment is that the EU is entering dangerous terrain and desperately needs to adapt to the new circumstances. All the recent Treaty revisions, as well as the Court in all its recent case law, are missing the key point which is to instruct such adaptation. Looking for procedural solutions and rhetorical fixes is not enough.<sup>370</sup> the adoption of substantive values to supply the essence of the constantly restated principles of law is urgently required.<sup>371</sup> Clearly, ‘[a] polity governed by a legal system based on a philosophy that eschews justice in its formulation will be unlikely to survive in the long term particularly when faced with extreme tensions’.<sup>372</sup>

It is most unfortunate that the choice of whether to apply EU law is more often than not based on totally flawed assumptions which cannot have any rational explanation beyond the

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<sup>366</sup> Weiler (1999), 256, 257.

<sup>367</sup> Part 3(b) *supra*.

<sup>368</sup> Recital 13 of the EU Treaty Preamble.

<sup>369</sup> See also, in general, Weiler (2009) ‘Nous coalisons des Etats’; Williams (2010); Davies (2010) ‘The Humiliation of the State’.

<sup>370</sup> Part 4(b) *supra*.

<sup>371</sup> See Part 4(g) *supra*.

<sup>372</sup> Williams (2009), 572.

historical. The integration project clearly suffers from the inertia of the economic thought which preceded Maastricht, where Community rights were reserved for workers and other economically active Member State nationals moving around. While this rationale of integration is currently not the most important by far, the inertia of short-sightedness remains, poisoning the unimaginative present. Presently, with the EU being so much more than a ‘market’, and with citizens, finally, being recognised as so much more than merely factors of production, benefiting from free movement cannot be legitimately presented as a choice, felt to be temporarily superior to the default – namely, enjoying your stay at home. The Union is mature enough to guarantee equality before the law to its citizens.

As of now, however, the state of the law is highly problematic. While the fact that the EU facilitates movement can only be applauded – as well as the EU’s contribution towards the elimination of countless meaningless rules at the Member State level<sup>373</sup> – nobody can reasonably argue that such movement should be regarded as an objective behind the Union’s creation, that it should be *required* as such, or that it is morally superior to staying at home. Furthermore, the seemingly meaningless rules of the Member States might be extremely important in the national context, representing the cherished outcomes of the practical functioning of national democracies.<sup>374</sup> Removing them significantly undermines state authority<sup>375</sup> in a situation where the EU, although viable in its self-entrusted role of *El Libertador* of citizens from the Member States – could actually turn out to be morally bankrupt, which would make it impossible for it to come up with better working rules than those trashed at the national level, triggering a backlash.<sup>376</sup> Instead of occupying the ‘liberated’ constitutional space, the EU might be merely creating vacuum, undermining the existing structures without providing viable alternatives.

From the point of view of common sense, the consequences of the decision to move as opposed to those of a decision not to move should be exactly the same. Indeed, this actually

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<sup>373</sup> See Part 5(d) *supra*.

<sup>374</sup> Weiler (2009) ‘Fundamental Rights and Fundamental Boundaries’, 74.

<sup>375</sup> Davies (2010) ‘The Humiliation of the State’.

<sup>376</sup> See *Id.* for the discussion of this point.



seems to have been the initial thinking behind the introduction of the prohibition of discrimination on the basis of nationality into the founding Treaties. That those who moved, making a legitimate choice, should not be penalised as a result, given that moving is in no way different from when the other obvious choice is made (*i.e.* not to move) – neither of the two being in any way superior to the other. The second choice, although often an easier one, is equally legitimate.

As we have seen, this is not how EU law functions, however. Besides offering opportunities, EU law takes a doctrinal stance – it does not only empower but also unjustly divides its citizens. This automatically also divides the nationals of each of the Member States. The belief that the status of EU citizenship is not enough to benefit from supranational law and that some ‘cross border element’ needs to be present is entirely unjust, since it penalises one of the two equally legitimate choices by drawing an entirely arbitrary distinction between two classes of EU citizens, which ‘cannot be objectively justified’.<sup>377</sup> The fact that the essence of the notion of the ‘cross border element’ is very dynamic and even elusive, making the drawing of a clear border between the national and EU legal orders impossible at times,<sup>378</sup> only adds to the fundamental injustice inherent in EU law as it stands.

There should be ways to deal with the ethical hollowness of the EU enterprise, which has necessarily spread to the Member States. Although it has been demonstrated that the approach to law not involving taking principled stances – the one marked by the global ‘shift from a culture of authority to a culture of justification’<sup>379</sup> – can be truly viable as it has the potential ‘to transfer a debate over values into a debate over facts, which is easier to resolve’,<sup>380</sup> sooner or later values are bound to resurface, legitimately aspiring to uncover true substance in the principles of law. It is hardly possible to have justice in a merely procedural system which does not adopt ethical stances informed by underlying values clearly defined or commonly assumed as a result of the

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<sup>377</sup> White (1993), 532.

<sup>378</sup> Part 4(c) *supra*.

<sup>379</sup> Cohen-Eliya, Moshe and Porat, Iddo, ‘Proportionality and the Culture of Justification’, *Am. J. Comp. L.*, 2011 (forthcoming).

<sup>380</sup> *Id.*

democratic process.<sup>381</sup> This point, also advanced by Stavros Tsakyrakis<sup>382</sup> and Joseph Weiler<sup>383</sup> is totally ignored in the EU at the moment.

## **b. Equality, respect and real life**

Presuming that equality and democratic representation could be two evenly important ways to start addressing the deficiencies of the current situation in the EU as far as EU citizenship, Member State nationalities and the substance of legal principles is concerned, the equality route would probably be easier to follow, compared to the democracy route, in order to start the process of change, *i.e.* of the adaptation of Union law to the new reality following the paradigm shift in the integration project brought about by the growing importance of EU citizenship and the explosion of the personal scope of EU law.

As has been demonstrated *supra*, equality is not easy to rely on, given the potential hollowness of the principle.<sup>384</sup> As has been suggested, the idea of respect could provide a starting point concerning the necessary minimal filling of this principle, to ensure that the principle of equality starts working for citizens and the Union alike.<sup>385</sup> The EU legal system has to overcome its self-referential and economic-procedural character in order to ensure its successful development, if not its survival. Benjamin Cardozo's words that '[a]ppeal to origins will be futile, their significance perverted, unless tested and illuminated by an appeal to ends'<sup>386</sup> apply to the EU perfectly. Only by having embraced the ends of, *inter alia*, equality and justice, not merely economic prosperity and Treaty-based objectives narrowly interpreted by the Court, can

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<sup>381</sup> For a strong argument against relativism in the defence of values see Tsakyrakis, Stavros, 'Proportionality: An Assault on Human Rights?', *Jean Monnet Working Paper* (NYU) 09/2008, reprinted in 7 *Int'l J. Const. L.*, 2009, 468. For discussion see also Khosla, Madhav, 'Proportionality: An Assault on Human Rights?: A Reply', 8 *Int'l J. Const. L.*, 2010, 298; Tsakyrakis, Stavros, 'Proportionality: An Assault on Human Rights?: A Rejoinder to Madhav Khosla', 8 *Int'l J. Const. L.*, 2010, 307.

<sup>382</sup> Tsakyrakis (2008); Tsakyrakis (2010).

<sup>383</sup> As follows from his unpublished paper on values and virtues in European integration.

<sup>384</sup> See Part 2(d) *supra*.

<sup>385</sup> See Part 2(f) *supra*.

<sup>386</sup> Cardozo, Benjamin, *The Growth of the Law*, 1924, New Haven: Yale University Press, 1924, 106–107 (as quoted in Karst (1977), 5).

the EU continue its development. It will take to admit that there are higher considerations than the Treaty text; that interpretation and legal formalism are not everything.

Embracing the ideal of respect as one of those considerations will require making substantive analysis of the principles of law a necessary element both at the stage of the application of the law and of the assignment of jurisdiction. Theoretically, no revolution in the text of the primary law is required to start the necessary transformation. The ECJ is in a position to adopt a substantive view of the principle of equality in line with the texts in force today. However, the new application of the principle will automatically mean a profound change in the Union as we know it: rhetorical explanations of what is ‘alike’ and what is ‘different’ will be replaced by a substantive equality test which will be for the Court to design and to apply. Once the explanations of why the law does not apply to your particular situation move beyond the tautological ‘because the law does not apply to it’, the idea of EU citizenship can be gradually saved from its ongoing erosion – which would also mean, once again, saving the nationalities of the Member States as well, as long as the two are inseparable in the modern Union in Europe.<sup>387</sup> Starting with equality will obviously be merely the first step, to be followed by a necessary transformation of the EU’s approach to other principles of law, including, especially, democracy. In the end, it is more than doubtful whether the Court will be able to accomplish all this alone – a change in the mentality of the EU Institutions and the Member States alike also seems to be required.

Should this change never occur, however, the gap between the values on which the Union is proclaimed to be founded and the actual functioning of the Union will only grow, acquiring dangerous proportions. Moreover, since the Member States have *de facto* lost control of the situation and cannot prevent the erosion of the national-level equivalents of all the principles in question – which are, needless to say, fundamentally important in the national systems<sup>388</sup> – the legitimacy of the Member States will suffer to the same degree as that of the Union in the long

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<sup>387</sup> See Part 5(d) *supra*, as well as Kochenov (2010) ‘Rounding up the Circle’.

<sup>388</sup> See Part 5(b) *supra*.

run. In painting this negative scenario it is impossible to fail to mention that the idea of citizenship, rhetorically present at both levels of law in the Union, will be transformed even further, should no serious steps towards reform be taken, moving away from the ideals of equality, justice, democratic representation and responsibility, *i.e.* away from what citizenship by definition entails.

The time to start planning reform is now. All the steps taken so far, including the innovative reading of the confines of the material scope of EU law by the Court and endless proclamations of more and more rights which, as rightly noted by Joseph Weiler, Europeans do not need,<sup>389</sup> predictably failed to yield any tangible results. While the lists of rights abound, the actual rights enjoyed by Europeans are being eroded. The problems with the principle of equality outlined above has triggered a situation where speaking of a citizenship of equals is impossible in Europe. Instead of fixing the problem, scholars and politicians point to the vague and unclear jurisdictional divide separating the law of the Union and that of the Member States. In the end, the Union does not only pretend to know better what the citizens could ever want<sup>390</sup> – after all, EU democracy functions as any other in the best traditions of the ‘Ralph’s pretty-good grocery’<sup>391</sup> – but it also announces that equality and justice are by definition beyond reach, because the legal system of the Union in Europe is ‘built like this’ – and the Court, in celebration of self-restraint, concurs. That this state of the Union has no future is clear to many. What is equally clear, however – especially in the light of the last referenda – is that the Union is awfully difficult to reform.

The reason for this lies not only in the lack of understanding that reform is needed among the Institutions and the Member States. Problematically, the general societal understanding of the paradigm-shift in the Union has failed to keep pace with legal-political reality. It seems that numerous citizens, as well as Member State institutions – including their highest courts – still

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<sup>389</sup> Weiler (2009) ‘Nous coalisons des Etats’.  
<sup>390</sup> On the state of democracy in the EU see *Id.*  
<sup>391</sup> Mueller (1992).

inhabit a dream world which overlooks the changed role of the Member States in the Union,<sup>392</sup> let alone that of Member States' nationalities.<sup>393</sup> As long as the general understanding of the new *status quo* is not there, the ECJ seems to be the only Institution in Europe able to bring about the commencement of the required change.

At the same time, it takes general popular understanding to make what the ECJ is bound to do a success. While the Eurostat polls show that EU citizens expect more of the EU,<sup>394</sup> even in the areas where the Union is absolutely not competent to act – confusing the Union and the Member States – the same polls equally demonstrate that nationals of the majority of the Member States have not come to terms with the fact that their states of nationality are in the majority of cases prohibited from discriminating on the basis of nationality.<sup>395</sup> Citizens themselves will eagerly discriminate, should they be given the chance.<sup>396</sup> In essence, although the law can push socioeconomic developments in a certain direction, guaranteeing the desired results is not always easy and takes time. Consequently, discrimination going on at the Union level through the case law of the ECJ – which randomly assigns people to different legal orders and fails to adopt any substantive vision of equality, preferring instead to rely on purely procedural fixes to the current problems – is perfectly mirrored at the level of human interactions: the Greeks prefer the Greeks.

As has been demonstrated above, equality among citizens, in essence, is a moral stance based on presenting differences between people as irrelevant.<sup>397</sup> Although EU citizens living outside their Member State of nationality are, technically speaking, not quite foreigners

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<sup>392</sup> See Part 5 *supra*.

<sup>393</sup> For analysis see Kochenov (2010) 'Rounding up the Circle', 20–22.

<sup>394</sup> See e.g. Morgan, Glyn, 'European Political Integration and the Need for Justification', 14 *Constellations*, 2007, 332.

<sup>395</sup> For analysis see Davies, Gareth, "'Any Place I Hang My Hat?'" or: Residence is the New Nationality', 11 *Eur. L.J.* 1, 2005, 43, 55.

<sup>396</sup> For detailed analysis of this point see Gerhards, Jürgen, 'Free to Move?: The Acceptance of Free Movement of Labour and Non-Discrimination among Citizens of Europe', 10 *Eur. Societies*, 2008, 121, 135.

<sup>397</sup> See Part 2(b) and (c) *supra*.

anymore,<sup>398</sup> for the Swedes, it seems quite relevant (illegally) that Latvians are Latvians,<sup>399</sup> and for Finns, that Estonians are Estonians.<sup>400</sup> It takes the intervention of the ECJ to ‘teach the trade unions a lesson of good behaviour on the dance floor’.<sup>401</sup>

All in all, however, similar patterns emerge at both levels: either before the ECJ or in the streets of Paris, EU citizenship is, fundamentally, a citizenship without respect. Going beyond formalism, law in the European Union badly needs the justice and equality for citizens at both the EU and national levels that is currently missing. Of course, one can live without either – who was it who said that Doctor Angelicus was right in stating that ‘a law that is not just [is] no law at all’?<sup>402</sup>

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<sup>398</sup> Kochenov (2010) ‘Rounding up the Circle’, 9.

<sup>399</sup> Case C-341/05 *Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet et al.* [2007] ECR I-5751.

<sup>400</sup> Case C-438/05 *International Transport Workers’ Union Federation et al. v. Vikingline ABP et al.* [2007] ECR I-7779. For elegant analysis in the post-enlargement context see Belavusau, Uladzislau, ‘The Case of *Laval* in the Context of the Post-Enlargement EC Law Development’, 9 *German L.J.*, 2008, 1279.

<sup>401</sup> Belavusau (2008), 2307.

<sup>402</sup> St. Thomas Aquinas, *Summa Theologica* (the Fathers of the English Dominican Province, trans. (1912)), Raleigh NC: Hayes Baton Press, 2006, 1866.

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