



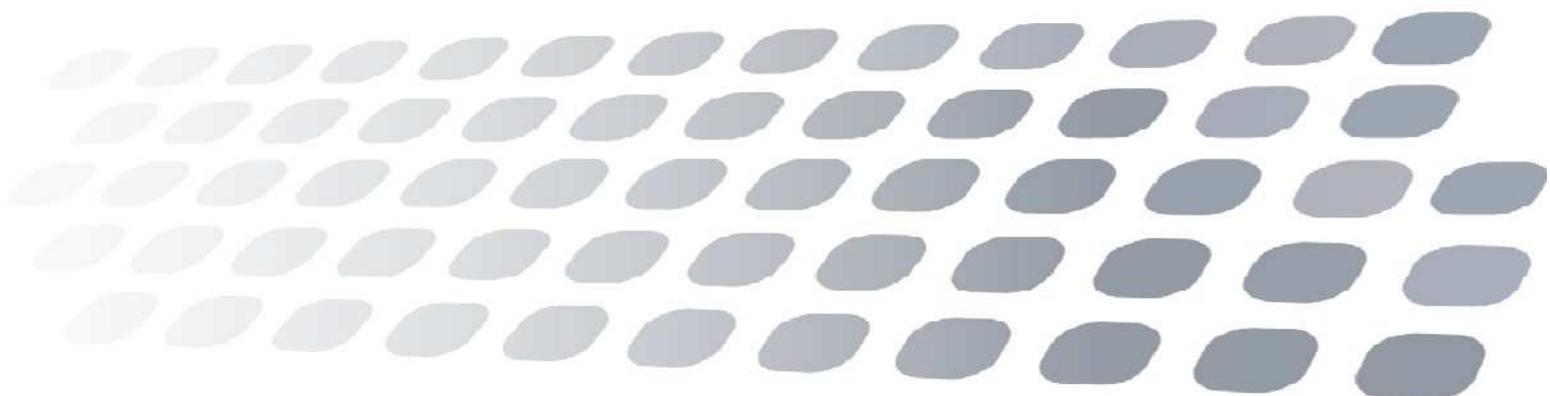
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VOL. 3, ISSUE 2, 2011  
TABLE OF CONTENTS

EDITORIAL

*Rethinking (EU) citizenship*

GIUSEPPE MARTINICO- ROBERTO CASTALDI  
I-IX

ESSAYS

*Identity vs. representation: what makes ‘the people’? Rethinking democratic citizenship through (and beyond) Carl Schmitt and Hans Kelsen*

DAVID RAGAZZONI E 1-30

*EU Citizenship, Naturalisations, and Mythical Cultural Exceptionalism in Europe Today*

DIMITRY KOCHENOV E-106-127

*“Euro-Bonds”*

*The Ruiz Zambrano judgment or the Real Invention of EU Citizenship*

LOÏC AZOULAI E-31-39

*Operation Atalanta and the Protection of EU Citizens: Civis Europaeus Unheeded?*

JORIS LARIK E- 40-66

*Protection of EU citizens abroad: A legal assessment of the EU citizen’s right to consular and diplomatic protection*

MADALINA BIANCA MORARU E- 67-105



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PERSPECTIVES ON FEDERALISM



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## Rethinking (EU) citizenship

by

Giuseppe Martinico and Roberto Castaldi

(eds.)

Perspectives on Federalism, Vol. 3, issue 2, 2011



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## Abstract

This special issue of *Perspectives on Federalism* offers a multidisciplinary collection of pieces dealing with some (selected) issues in the field of citizenship studies.

In order to investigate how citizenship has been reconceived over the years, we decided to propose a multidisciplinary itinerary where scholars interested in political and legal theory, EU, international and constitutional law produced a contribution to defining the new boundaries of this concept.

## Key-words:

European Union, EU citizenship, citizenship studies



## 1. Why an issue devoted to EU citizenship?

This special issue of *Perspectives on Federalism* offers a multidisciplinary collection of pieces dealing with some (selected) issues in the field of citizenship studies<sup>1</sup>.

Despite the heterogeneity of their subjects and perspectives, the *fil conducteur* of these works is given by the impact of European Union on the classic (national) conception of citizenship.

In order to investigate how citizenship has been reconceived over the years, we decided to propose a multidisciplinary itinerary where scholars interested in political and legal theory, EU, international and constitutional law produced a contribution to defining the new boundaries of this concept.

The EU is often considered as a laboratory of new forms of multi-level government, which overcomes and challenges traditional notions of modern politics associated with the nation-state. Indeed, the EU has been considered as the laboratory of a new federalism, precisely for being made up of nation-states with centuries old stories and identities, unlike most other federations around the world. This forces the EU to identify new institutional avenues, which to a certain extent are more coherent with federalist principles, and in particular respectful of subsidiarity.

We believe that within the EU a new kind of federal system is emerging. This requires a significant revision of many old concepts and notions with regards to citizenship, sovereignty, democracy, and other key categories of modern political thought. To express in a nutshell the challenge ahead we could say that modern political thought offers essentially monistic versions of all those concepts, adequate for the centralised nation-state, characterised by one dominant level of government, demanding absolute loyalty and identification by the citizens. Federalism and the European unification process demand new pluralistic visions of all these concepts, to reflect a multi-level system of government in a world of multiple and complex interdependence.

While scholars of federalism have focused mainly on the innovative institutional features of the EU, carefully analysing its historic development and highlighting a substantial trend in the increase of competences and/or powers of the EU, relatively little



attention has been paid to the development of a new concept of multi-level citizenship and its implications. With this issue *Perspectives on Federalism* intends to contribute to this debate.

Frequently EU citizenship has been described as a sort of “Cinderella” which does not add anything “substantive” to the “real” citizenship represented by the national one. This approach was suggested by the wording of the former Treaty on the European Community, whose Art. 17 read: “*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship*”. The nationality of a Member State is thus a prerequisite in order to obtain EU citizenship and it is for each Member State to lay down the conditions for the acquisition and loss of nationality.

The Lisbon Treaty seems to change slightly the situation, since its Art. 20 Treaty on the Functioning of the European Union (TFEU) says that: “*Citizenship of the Union shall be additional to and not replace national citizenship*”. The adjective used is different from that employed in Art. 17 TEC (“complementary” from the verb “to complement”) and gives the idea of a relative autonomy of EU citizenship from the national one.

This suggestion has been, in a way, endorsed by the Court of Justice of the European Union (CJEU) in some recent judgments and indeed 2011 will remain in the history of the European integration as the year of the delivery of the landmark *Zambrano* decision<sup>II</sup> which represents, in the words of many commentators, a revolution.

## 2. A Revolution in few pages: *Zambrano*

Since *Zambrano* will be the subject of another contribution included in the same issue of this journal<sup>III</sup>, we will limit ourselves to summing up the contents of the decision and present some considerations about the impact of this judgment.

The question originates from a preliminary reference raised ex 267 TFEU by the *Tribunal du travail de Bruxelles*.

This case concerns two Colombian citizens, Mr *Zambrano* and his wife, who moved from Colombia to Belgium with their first child. Belgian authorities rejected their application for asylum but because of the local situation in Colombia also decided not to



send them back there. Mr Zambrano and his family continued living in Belgium and in the following years applied for residence permits.

Their applications were rejected by the Belgian authorities. Nevertheless Mr Zambrano found a job in 2001 and from that year he worked and regularly contributed to the social security system. Mr Zambrano and his wife had other two children, both with Belgian citizenship. The children- and this is an important detail in the economy of the case- had never left Belgium.

When the Belgian authorities realized that Mr Zambrano was working without a work permit, they claimed that he did not have right of residence and consequently no right to work in Belgium.

Mr Zambrano went before a national court arguing he had right of residence and right to work in Belgium since his two children were Belgian and thus EU citizens. The non acknowledgement of such a right would have implied the necessity for all the components of the family (including the two children with EU citizenship) to leave Belgium.

The central question is whether the child of non-Union citizens but who has Union citizenship has the right of residence under Union law when the child has not exercised any right of free movement<sup>IV</sup>.

The Court delivered a revolutionary judgment in a few pages, characterized by a poor and obscure legal reasoning and by a certain degree of disregard for the wording of Treaties, which refer to secondary legislation when evoking the limitations and conditions laid upon the freedom of movement (Hailbronner-D.Thym, 2011, 1259).

The Court did not rely on Art. 18 and 21 TFEU<sup>V</sup> but relied rather on Art. 20 TFEU<sup>VI</sup> saying that this provision “*precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*” [para. 42 of the judgment].

The CJEU inferred from this that the situation of the two children was relevant for EU law (it did not constitute a mere international situation). As a consequence, the CJEU extended the right of residence of the children to their parents following the scheme employed in *Chen*<sup>VII</sup>. Moreover, the Court inferred from the right of residence of the children a right to work for their parents.



*Zambrano* is revolutionary because it seems to abandon the distinction between static and dynamic citizens and the necessity of the of an intra-EU cross-border component to its decision.

The evident result of this decision was the extension of the scope of citizenship: does *Zambrano* represent an extraordinary decision? Probably yes. The risk of rendering the status of EU citizens of the two young people (who did not have Colombian citizenship and who would have been forced to move to Colombia with their parents otherwise) ineffective induced the Luxembourg Court to take this decision. In any case, after *Zambrano*, the CJEU took the chance to return to the issue with other judgements<sup>VIII</sup> but there are still many question marks to be clarified. We will see what the CJEU will say in the future and how Member States will react to this judicial trend.

### 3. An overview of this issue

The opening piece of this issue by David Ragazzoni highlights the changing nature (the “evolution” as he says at the beginning of the paper) of the concept of EU citizenship, beginning with the work by Thomas Marshall (*Citizenship and Social Class and Other Essays*, Cambridge University Press, Cambridge, 1950), and identifying three “sources” for such a transformation: the necessity to rethink the citizenship/identity nexus; the new concept of political representation emerging in the contemporary global democracies and the emergence of the EU. In order to appreciate the impact of these three different factors, Ragazzoni goes back to the classic debate between two giants of political and legal theory: Kelsen and Schmitt, offering thoughtful reflections on the theoretical implications of the concept of citizenship.

After this conceptual introduction to the idea of citizenship, we move to the contemporary European reality in order to appreciate the impact of the already mentioned *Zambrano* judgment on classical notions of citizenship: in his piece Loïc Azoulay investigates the rationale and the implication of what he defines a decision inspired by a “genuine European integration” touch. The argument developed by Azoulay is that, with *Zambrano*, the CJEU moved away from a concept of transnational integration in order to foster a new vision, based on the existence of bonds that encompass the whole Union. However



*Zambrano* is just one of the latest links of the jurisprudential chain that have led the CJEU to such a conclusion, as the author shows by contextualizing the decision.

Despite the richness of contributions in this area very few contributions have been devoted to the “external” dimension of the EU citizenship which is instead “explored” in this issue by Madalina Moraru and Joris Larik

In her piece Madalina Moraru deals with the issue of the protection of EU citizens “abroad”, governed by Art. 20 (2) of the TFEU, studying the new role acquired by the EU in the ambit of diplomatic and consular protection. Although the number of studies on EU citizenship is massive, the issue of the protection of EU citizens abroad has been traditionally neglected by scholars. The 2006 and 2008 Euro-barometer surveys show how EU citizens are unaware of the existence of a right to protection abroad.

In his brilliant contribution Joris Larik explores another intriguing side of the external dimension of the citizenship, showing how this dimension is still underdeveloped and arguing that it extends to the field of Common Foreign and Security and Common Defence and Security Policies. Starting from the analysis of the mandate of the *Atalanta*-the EU’s anti-piracy operation- the Author demonstrates the unexpressed potential that the EU citizenship presents in this field and demonstrates the existence of “*a widening gap between the powerful notion of Union citizenship within the Union and its present weakness outside of it. Internally, the development of Union law makes it increasingly difficult to construe nationals from different Member States as proper ‘foreigners’*”.

Eventually, in a very sophisticated and enjoyable article Dimitry Kochenov offers a lucid analysis of the premises shaping the policies of cultural integration in some liberal democracies, by starting from his “*own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of ‘cultural integration’, marked by politics divided from society*” and then contextualizing this story in the general debate on citizenship, since the “*situation of newly naturalised Member State nationals is a perfect illustration of the logical disharmony between the two legal orders in the EU, affecting the same individuals simultaneously. This duality of statuses which governs the life of every single EU citizen exemplifies the archaic logic behind naturalisation, which is never questioned by politicians and is only rarely seriously criticised by scholars*”.



Together, these pieces constitute a productive mixture of ideas which aims to foster the debate on the necessity to rethink the idea of citizenship and its connection with the nature of EU integration.

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<sup>I</sup> This issue has been made possible thanks to the intense and fruitful cooperation between the *Sant'Anna Legal Studies Programme* (STALS, [www.stals.sssup.it](http://www.stals.sssup.it)) hosted by the Scuola Superiore Sant'Anna in Pisa and the Centre for Studies on Federalism in Turin and thanks to many people who have played an important role in the organization of an initiative held at the Scuola Superiore Sant'Anna on January 23 2011 precisely on “*Rethinking citizenship*”. Although many of the papers presented in that occasion have not been published, all the participants rendered that workshop an invaluable opportunity for a debate which led to this issue of the journal.

<sup>II</sup> C-34/09, Ruiz Zambrano, [www.curia.europa.eu](http://www.curia.europa.eu)

<sup>III</sup> See the article by Azoulai included in the same issue, <http://www.on-federalism.eu/index.php/articles/97-euro-bonds-the-ruiz-zambrano-judgment-or-the-real-invention-of-eu-citizenship>.

<sup>IV</sup> Over the years the CJEU has used the concept of citizenship for eliminating discriminations based on nationality even in ambits that are not characterized by European competence.

This way the CJEU made Art. 12 TEC<sup>IV</sup> a fundamental tool of its case law in this field, that is why the Lisbon Treaty inserted Art. 18 TFEU<sup>IV</sup> (corresponding to Art. 12 TEC) the section devoted to citizenship while under the previous Treaties the principle of non discrimination was disciplined outside such a section.

Another fundamental instrument in the judicial toolbox of the CJEU has been represented by Art. 18 TEC<sup>IV</sup> which disciplines the freedom of movement of the European citizens.

It is conceived the most important right contained in the status of citizens, moreover, according to the case law of the CJEU, in order to “activate” the rights connected to the EU citizenship is necessary to exercise the freedom of movement. As we will see this point was contested by Advocate General Sharpston in the *Zambrano* case since it could pave the way to discriminations between “static” and “dynamic” citizens.

<sup>V</sup> Art. 21 TFEU: “1. *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*

2. *If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*

3. *For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament”.*

<sup>VI</sup> Art. 20 TFEU: “1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

2. *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*

(a) *the right to move and reside freely within the territory of the Member States;*

(b) *the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*

(c) *the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;*

(d) *the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.*

*These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder”.*

<sup>VII</sup> C-200/02, Zhu and Chen, ECR 2004 p. I-9925

<sup>VIII</sup> For instance McCarthy: C- 434-09, Shirley McCarthy v. Secretary of State for the Home Department, [www.curia.europa.eu](http://www.curia.europa.eu)



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**Identity vs. representation: what makes ‘the people’?  
Rethinking democratic citizenship through (and  
beyond)**

**Carl Schmitt and Hans Kelsen**

by

David Ragazzoni\*

Perspectives on Federalism, Vol. 3, issue 2, 2011





## Abstract

The concept of ‘citizenship’ has significantly evolved since the work by Thomas Marshall in 1950: the emergence of various kinds of ‘identity/difference’ politics, the transformation of political representation within our ‘glocal’ democracies and the theoretical challenges posed by the EU (especially about pivotal notions such as sovereignty, constituent power and peoplehood) questioned the traditional account of liberal democratic citizenship (sect. 0). Combining political history and theory, the present paper looks backwards to the debate between Carl Schmitt and Hans Kelsen in 1920s Weimar over the fate of parliamentary democracy to distill useful insights for rethinking citizenship via representation. Mapping their topography of democratic governments and their diverging understanding of what keeps a community of citizens together (sects. 1-2) will help developing a more sophisticated notion of ‘the people’ beyond standard dichotomies in democratic theory: namely, those of identity (Schmitt)/representation (Kelsen), constituent (Schmittian)/constituted (Kelsenian) power, substantial (Schmittian)/procedural (Kelsenian) democracy also recurring in the normative understanding of the Union (sect. 3).

## Key-words:

Democratic citizenship; political identity; political representation; parliamentary democracy; the people; Kelsen Hans; Schmitt Carl



## 0. Looking backwards from 2010s ‘glocal’ post-democracies to 1920s Weimar: why the standard account of democratic representation is not enough for fulfilling the promise of citizenship?

Since the pioneering work by T. H. Marshall<sup>I</sup> in 1950, the concept of ‘citizenship’ has undergone significant changes. What Marshall had in mind at the time was a threefold classification of the wide range of subjective rights (civil, political and social) and a precise historical account of the way they had been achieved in Great Britain. Within his hermeneutic perspective, the eighteenth century embodied the realization of civil citizenship and individual freedom (liberty of the person, freedom of speech, thought and faith, the right to own property and conclude contracts, the right to justice). The extension of the suffrage throughout the nineteenth century subsequently led to political citizenship (i.e., the right to participate in the exercise of political power), even though the principle of universal political citizenship in England was not recognized until 1918. The twentieth century finally discovered and explored the social dimension of being citizens (from economic welfare and security to the right to live a decent life according to the standards of society). In turn, each kind of citizenship developed its specific institutional forums. From courts of justice to Parliaments and councils of local government, up to the educational system and social services typical of the twentieth century welfare State. Since the shift from feudal to modern society and its competitive market economy, citizenship had been by definition a ‘developing institution’, evolving along the path ‘from Status to Contract’ and beyond.

However, as Maurice Roche pointed out already in 1992<sup>II</sup>, a variety of structural and ideological challenges have been posed to the often taken-for-granted notion of citizenship and to the model of democracy it designs. Such a claim becomes even stronger when the empirical and theoretical transformations occurring at the end of the Cold War are taken into account. Three in particular have to be mentioned.

On the one hand, as a result of the fragmentation of multinational States (e.g., the Soviet Union and Yugoslavia after 1989), political theorists have been dealing with the need for a more sophisticated exploration of the citizenship/identity nexus. The emerging tension among ethnic groups (as in 1994 Rwandian genocide) proved that the normative



definition of ‘citizen’ and ‘foreigner’ oversteps the boundaries of theory. The global trend towards democratization has developed together with the resurgence of various kinds of ‘identity/difference’ politics<sup>III</sup>. From such a perspective, the fragile negotiation between claims for equal treatment and those for the preservation of differences has become *the* political problem within our post-Fukuyama age<sup>IV</sup>. From nationalist and ethnic revivals in the countries of East and Central Europe to the former Soviet Union, from the politics of cultural separatism in Canada to social movement politics in liberal Western democracies, questioning the capacity of liberal democratic citizenship<sup>V</sup> to accommodate differences has been the main challenge to the Westphalian, traditional relation between States and individuals<sup>VI</sup>. Charles Taylor’s *Multiculturalism* (1992) and Will Kymlicka’s *Multicultural Citizenship* (1995) stand as paradigmatic examples of such debates on the background of the liberals/communitarians *querelle* throughout the last decade of the twentieth century<sup>VII</sup>.

The second macro-level transformation pertains to the concept of political representation in our contemporary ‘glocal’ democracies. Until the beginning of the 1990s, political scientists paid very little attention to the interaction between representative institutions and civil society: they were satisfied with a neo-Schumpeterian conception of democratic government as selection and organization of political elites. However, as a consequence of emerging new forms of both inclusion and exclusion (especially in the case of ethnic and ‘moral’ minorities), a radical change has occurred. As David Plotke foresaw in 1987, «the opposite of representation is not participation but exclusion»<sup>VIII</sup>. The merely electoral conception of both the democratic game and the community of citizens nurtured at the time by political theory needed to be expanded towards a wider (and wiser) understanding of the dynamic process of ‘continuity and rupture’<sup>IX</sup> representative democracy should imply. Such a goal has been only partly accomplished so far.

The third and final development has to do with the theoretical and institutional challenges posed by the emerging European Union<sup>X</sup>. Although most scholars and observers agree that the European Community has developed into a sort of *Rechtsstaat* through some process of constitutionalization, the question about what kind of polity the Union actually is has not found any definitive answer: permanently suspended between a federal state and a federation of States (as argued by German constitutional lawyers), sometimes it has resembled more a neo-feudal puzzle of multiple sovereignties, constantly affected by its original constitutional and democratic deficits. It stands as a matter of fact



that the traditional understanding of national State sovereignty and constitution-making, together with the standard notion of ‘the people’ – i.e., the conceptual triangle ‘people-State-sovereignty’ – has been deeply impacted by the lack of a clear conceptualization of popular sovereignty at the communitarian level both above and within the Constitution. Against a technocratic Europe founded on an «existential legitimation»<sup>XI</sup>, political and State theorists have tried, from different perspectives, to understand whether it is even possible or desirable to speak of a ‘European demos’; whether the notion of the ‘constituent power’ traditionally embedded within the Constitution-foundational moment has to be circumnavigated and understood either as a plural constellation of constituent (State) agencies enacting a process of intergovernmental enterprise and elite bargaining (‘the peoples of Europe’ through their respective representative institutions) or as a teleological entity to be progressively achieved through an open process of constitution making and remaking<sup>XII</sup> transcending member States (thus post-*étatist* featured)<sup>XIII</sup>, designed to lead in the end to a European, post-national and constitutional patriotism-based people<sup>XIV</sup>. The ambiguous institutional physiognomy of the Union, consisting of inter-governmental, super-national and infra-national elements and mixing elements of representative government with the executive efficiency orientation typical of ‘confederal’/‘consociational’ democracy<sup>XV</sup>, makes the overall picture even more difficult to grasp. Without a step further than the traditional understanding of representation, popular sovereignty and peoplehood, Jan Muller’s claim would prove correct: «a normative political theory of the Union cannot proceed»<sup>XVI</sup>.

Political theory, though, cannot say much without questioning political history. As Pietro Costa<sup>XVII</sup> argues throughout his superb work, intra-World War Europe and, specifically, the Republic of Weimar represent an extraordinary historical and political laboratory for grasping cleavages and continuities between two diverging notions of citizenship. The optimistic persuasion of 1789 that political order stems naturally from individual autonomy and liberty was replaced by consistent apprehension over the conditions for social stability. The Soviet Revolution in October 1917 had made conflict an indispensable feature of XX century citizenship and proved that the creation of political *Einheit* was far more complex than imagined throughout the previous decades. From such a perspective, the birth of Weimar and the confrontation in the mid 1920s between Carl Schmitt and Hans Kelsen over the anatomy of parliamentary democracy and the identity of



the democratic people offers a dark but useful paradigm for rethinking the notion of liberal democratic citizenship beyond dangerous and unilateral understandings.

Schmitt was theoretically obsessed by the systematic fragmentation of political unity due to the variety of economic and social powers permeating German society in the aftermath of the First World War and urged the political and State theorists of his time to re-examine the domain of citizenship through the link between modern States, liberal parliamentarianism and democracy. On the other hand, Hans Kelsen strongly defended the value of political indirectness and the role of party-system as the beating heart of contemporary mass democracies, and suggested a set of institutional reforms specifically aimed at providing democratic citizenship with a stronger *ex parte populi* (bottom-up) capacity to influence policy- and decision-making processes. While Schmitt did not admit any form of dissent within his ‘democracy of the equals’, Kelsen regarded the preservation of individual freedom and the protection of minorities as the main ‘essence and value’ (*Wesen und Wert*) of modern democracy.

Such two diverging interpretations result from a complex interaction between political transformation and theoretical break-ups with the *Obrigkeitsstaat* (authoritarian State) in the transition from the late Wilhelmine to the new democratic Germany<sup>XVIII</sup>.

From the beginning of the 1920s a wide struggle over methods and aims forced an entire generation of jurists and political theorists to subject their thinking on democracy and on the presuppositions for political and social citizenship to fresh examination. In particular, the new Constitution released in August 1919 under the direction of Hugo Preuss differed from the 1871 Constitution of the Empire on several levels. Not only it was the result of the German defeat in the First World War; nor was it simply authored by a State law theorist (Preuss) rather than by a politician (Bismarck). Most significantly, the constitution-making emerged as a compromise among three main political traditions: the German Social Democratic Party (SPD), the Catholic Center Party (*Zentrum*) and the German Democratic Party (DDP). Although within a federal framework, the Republic of Weimar derived its legitimacy from the German people as a whole rather than from the governments of the individual States (art. 1). However, the Weimar party system never produced stable parliamentary majorities, despite the election of the *Reichstag* on the basis of general suffrage (including women) and according to the principle of proportional voting. The party structure inherited from the Empire proved a constellation of «communities of



conviction and struggle», embodying a wide range of regional, social and religious interests<sup>XIX</sup>. Therefore, against a *Reichstag* constantly weakened by party splintering, the new Constitution enacted specific strategies for enforcing both representation and decision-making<sup>XX</sup>.

Weimar parliamentary democracy witnessed an intense debate also on the normative definition of citizenship and on the subjective rights that were implied. Kelsen, together with many State and political theorists of his time, challenged the traditional, organicistic *Volk*-based hypostatization of State order pursued by Gerber and Laband's *Staatslehre*. Such a mythical and anthropomorphic conception of the State was of no help in rethinking citizenship *vis-a-vis* the endogenous transformations of society and the simultaneous socialization and democratization of politics<sup>XXI</sup>. While de-constructing the conventional notion of *Volk*, he demanded that foreigners living in a country for work's purposes be granted equal political rights. The National Assembly indeed intensively debated the second major part of the Constitution, titled 'Basic Rights and Duties of the Germans'. As Friedrich Naumann argued in his speech at the Assembly on 31 March 1919, the *Grundgedanken* of the new constitutional text emerge lie in a wide set of *Grundrechte* capable of developing an alternative approach in the conceptualization of the rights agenda, an approach which stands between the liberal *Rechtsstaat* and the socialistic emphasis on class conflicts.

As a result of the progressive expansion of the suffrage, Parliament became under Weimar the primary *locus* where citizens could be provided with their own political representation. Through the medium of parliamentary arenas, democratic citizenship was enabled to mirror the multiple groups of social and economic interests permeating civil society. 1920s political theory was then called upon to confront the following questions: are democracy and representation mutually compatible? Is political representation substantiated either by univocal acclamation or dynamic and pluralistic judgement? Was de Maistre – the Catholic Counter-Revolutionary conservative so much praised by Schmitt – making a correct claim when arguing that the people are a sovereign which cannot exercise sovereignty<sup>XXII</sup> or, rather, the realization of political autonomy by the people under representative democracy involves something more beyond both constitutional-founding and normal, institutionalized politics? These prove still extremely relevant issues for any attempt to rethink democratic citizenship today.



Drawing on Castiglione and Warren's empirical studies<sup>xxiii</sup>, contemporary democratic theory has assumed a standard paradigm of representation defined by four normative criteria:

- a) it lies on a 'principal/agent', asymmetric relation between territorial constituencies and their representatives;
- b) it is territorially based as it inscribes popular sovereignty and State power within a precise portion of territory;
- c) through the medium of electoral mechanisms, it calls for a certain degree of political responsiveness and accountability from both institutions and elected agents;
- d) universal suffrage introduces the crucial idea of political equality within the framework of representative governments.

However, we believe that features a) and b) no longer help interpreting the evolution of political representation within contemporary 'glocal' democracies. At the same time, features c) and d) have been progressively weakened by new challenges deriving from the evolution of political parties and from the emerging of new forms of public spheres. It is a matter of fact that «the changing political landscape of democratic representation»<sup>xxiv</sup> has come to include a variety of transnational, extra- and non-territorial actors (from the UN and the World Bank to the EU itself), as well as a wide range of social movements and untraditional civil society institutions. Maurizio Fioravanti and, most recently, Nadia Urbinati have proposed a threefold classification of representational paradigms (juridical, institutional and political), respectively leading to three different models of democracy<sup>xxv</sup>, i.e. direct, electoral and representative<sup>xxvi</sup>. Throughout the following pages we will specifically focus on *representative* democracy and question the way it shapes citizenship through a comparative analysis of the arguments developed by Schmitt and Kelsen on the fate of parliamentary institutions and democratic societies in 1920s Weimar. More than a clash of theoretical and institutional attempts to analyse the emerging mass party-State, their confrontation provided twentieth century constitutionalism and democratic theory with an intricate question concerning the way citizenship is imagined, shaped and practiced<sup>xxvii</sup>: does the democratic Constitution of Weimar involve a corporatist or an individual kind of representation? What is representative (parliamentary) democracy really about in the end: individuals or corporate interests?



The following two sections will respectively examine the two authors' topography of democratic governments, together with their diverging understanding of what keeps a community of democratic citizens together. Alongside the paths developed mainly by Rosanvallon, Urbinati and Canovan<sup>XXVIII</sup>, the concluding remarks will then try to elaborate some suggestions for rethinking democratic citizenship *via* representation and to develop a more sophisticated notion of 'the people' beyond the constituent (Schmittian)/constituted (Kelsenian) power dichotomy.

## 1. Re-politicizing democracy: Volkdemokratie and substantial homogeneity towards an existential conception of citizenship

Are we citizens only when we periodically cast our ballot and elect our institutional representatives? Or does active democratic citizenship involve something more?

Democracy – Schmitt claims – rests logically on a series of identities. In this series belong the identity of governed and governing, sovereign and subject, the identity of the subject and object of State authority, the identity of the people with their representatives in parliament, the identity of the state and the current voting population, the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws)<sup>XXIX</sup>.

When imagined as an overlap between political will and the rule of law, normative democracy raises in turn two crucial questions:

- 1) Where and how does the political will-formation occur? Are both institutional and civil society procedures involved?
- 2) How does the emergence of a majoritarian consent over policy options deal with dissent? Does pluralism *per se* constitute a mortal threat to the 'identity' of a political community? How inclusive should a democratic people be in the attempt to accommodate diversity while, at the same time, promoting their widely shared values and traditions?<sup>XXX</sup>

Both sets of questions, respectively pertaining to the domains of political will and political identity, are framed by Schmitt within the threefold crisis (involving democracy, parliamentarianism and the modern State) highlighted in the 1926 preface to *Parlamentarismus*<sup>XXXI</sup>.



As for the first question, Schmitt, together with Kaufmann and Smend, argues against the «undemocratic conception»<sup>xxxii</sup> so widely spread in political and State theory at the beginning of the 1920s (e.g., Weber, Jellinek and Kelsen). Conceiving the democratic citizen as a *Privatmann* expressing his/her will through a system of secret ballots is both a cultural misunderstanding and a political mystification. The concept of citizenship pertains to the domain of public, not private law: only when talking and (inter)acting in the sphere of publicity, are political atoms turned into democratic individuals.

“The people” is a concept in public law. The people exists only in the sphere of publicity. The unanimous opinion of one hundred million private persons is neither the will of the people nor public opinion. The will of the people can be expressed just as well and perhaps better through acclamation, through something taken for granted, an obvious and unchallenged presence, than through the statistical apparatus that has been constructed with such meticulousness in the last fifty years<sup>xxxiii</sup>.

Against the outdated heritage of 1860s and 1870s liberalism, the twentieth century – Schmitt claims – has witnessed the severance between liberal individualism and democratic trends, together with the consolidation of mass democracy. In the age when «old truths have got lost», concepts such as ‘democracy’, ‘liberalism’ and ‘rationalism’, all connected with the tradition of parliamentarianism as *government by discussion*, must be radically re-examined. This applies especially to the multidimensional concept of citizenship. If ‘the people’ can live and act only *au grand jour*, overcoming the proto-liberal (Hobbesian) distinction between *forum interni* and *forum externi*, then the principle of political indirectness embodied by Parliaments means *per se* the death of democracy in its ‘vital’ meaning. Parliamentary arenas prove the grave of democratic politics as far as they replace open and effective deliberation among deputies with party bargaining. The political representation of citizens in turn degenerates into a ‘polycratic’ (mis)representation of economic interests<sup>xxxiv</sup>. According to Schmitt, the death of ‘the political’ within the domain of democratic citizenship – i.e., the erosion of the *Freund/Feind* distinction<sup>xxxv</sup> – derives from the ‘Romantic’, liberal passion for headless and endless discussion typical of the bourgeoisie (‘clase discutidora’, as Donoso Cortés names it). Democracy must instead re-found and preserve the existential unity of the people. How? By eradicating democratic citizenship from the soil of ‘a-political’ liberalism and substantially re-politicizing it. The



simultaneous flows running through the veins of mass democracies at the beginning of the XX century – i.e., the expansion of the suffrage and the eruption of social conflict – have unveiled the degeneration of Parliaments into artificial machineries theoretically supported by «moldy greats» (Bentham, Mill and Guizot).

Schmitt's critique of 1860s-1890s liberalism in the face of acclamation also emerges from the provocative, yet often ignored, 1927 treatise on *Volksbegehren und Volksentscheidung*. The third and last section of the treatise is specifically devoted to explaining the juxtaposition between *acclamatio*, an «eternal phenomenon of every political community», and secret ballot, typical of parliamentary liberalism. One year later, in *Die Verfassungslehre* (1928), Schmitt emphasizes once again what he considers the paradox of political representation. For he believes that a democratic people cannot be represented: they must be *present*, as they can acclaim only when physically assembled in one place at the same time.

People and public exist together: no people without public and no public without the people. By its *presence*, specifically, the people initiate the public. *Only the present, truly assembled people are the people and produce the public.* [...] They cannot be represented, because they must be *present*, and *only something absent, not something present, may be represented.* *As a present, genuinely assembled people, they exist in the pure democracy with the greatest possible degree of identity.* [...] only the genuinely assembled people [...] can *acclaim* in that they express their consent or disapproval by a simple calling out, calling higher or lower, celebrating a leader or a suggestion, honoring the king or some other person, or denying the acclamation by silence or complaining.<sup>xxxvi</sup>

Moving from 1926 Erik Peterson's monograph on the development of *acclamatio* throughout the history of Christianity, Schmitt dates the birth of democracy back to the «scientific discovery of acclamation». Through the institutional formulas of representative democracy, the indirect procedures of secret ballots and the atomization of citizenship, 'the people' as a monolithic entity becomes dissolved. Schmitt argues that democratic citizens do not need technical expertise for expressing their consent or disapproval: as «crucial bearers of political life», fed with «bold political instincts», they only need to manifest their «vital immediateness». Against the logic of liberal universalism, supporting a deliberative (parliamentary) vision of democracy as a government based upon representation and discussion, Schmitt calls for a decision-based democracy. Citizens of any authentically political community are those able to say 'yes' or 'no' through an immediate act of



*Entscheidung* and ready physically to eliminate (*vernichten*) dissent when perceived as a threat to their homogeneity. Can this be labeled ‘democratic citizenship’? We do not believe so. Rather, the claim we make is that Schmittian *acclamatio* cannot involve at the same time a politics of both presence and ideas<sup>xxxvii</sup>. Civic dialogue and the art of democratic confrontation (John Dewey), the dynamic interaction between politics and memory, laws and culture that can provide democratic citizens at the same time with individual liberty and the preservation of pluralism<sup>xxxviii</sup>: all this is missing from Schmitt’s topography of democratic citizenship. The term ‘citizen’ is not part of his political vocabulary: he thinks of democracy as the domain of ‘the people’. From such a perspective, he is not that far from the democratic skepticism running through 1920s North-American political theory. As Walter Lippmann vividly argues in 1922 *Public Opinion*<sup>xxxix</sup>, «genuinely assembled people» just say ‘yes’ or ‘no’ to a limited spectrum of options. They do not think nor deliberate: they just acclaim. Precisely at the beginning of the second preface of *Parlamentarismus*, he claims that every actual democratic form of government requires, «first, homogeneity and, second – if the need arises –, elimination or eradication of heterogeneity»<sup>xl</sup>. As an identitarian *Gemeinschaft*, Schmittian democracy lives through the perpetual acclamations of an *ethnos*-founded *demos* kept together by univocal decisions. According to Schmitt, the concept of ‘the foreigner’ reacquires its proper meaning when read beyond the color-blind, universalistic veil of liberalism and rooted back again in the domain of ‘the political’. What liberal theorists, in line with the 1789 principles, imagine as a ‘democracy of mankind’ proves just an ideological *factio*:

[...] the “current usage” of “universal suffrage” implies [that] every adult person, simply as a person, should *eo ipso* be politically equal to every other person. *This is a liberal, not a democratic, idea; it replaces formerly existing democracies, based on a substantial equality and homogeneity, with a democracy of mankind. This democracy of mankind does not exist anywhere in the world today. If for no other reason than because the earth is divided into states, and indeed mostly into nationally homogeneous states, which try to develop democracy internally on the basis of national homogeneity and which, besides that, in no way treat every person as an equally entitled citizen.* Even a democratic state, let us say the United States of America, is far from allowing foreigners to share in its power or its wealth. Until now there has never been a democracy that did not recognize the concept “foreign” and that could have realized the equality of all men.<sup>xli</sup>



‘Volksdemokratie’ is the term used by Habermas for defining such an «existentialist conception of the democratic decision-making process»<sup>XLIH</sup>. As the famous commentary on these pages by Leo Strauss (1932) explains, the emphasis on the individual as a *terminus* both *a quo* and *ad quem* within the liberal understanding of citizenship has led to the agony of ‘the political’ as a series of Friend/Foe distinctions along the sequence of specific *Zentralgebieten*. In the domain of ‘the political’, people do not face each other as abstractions, but as politically interested and determined entities: as citizens, governors or governed, politically allied or opponents: «in any case, in political categories». When political theorists stand for the equality of all persons as such, they are not arguing for democracy but for a certain kind of liberalism, not for a State form but for an individualistic-humanitarian ethic.

We now move to the second set of questions raised at the beginning of this section: the issue of pluralism and the protection of minority rights, i.e., the flexibility of the legal and political borders of liberal democratic citizenship. Does the recognition of pluralism irremediably lead to relativism? How can we recognize group and minority differences without jeopardizing the unity of our political, Constitution-based communities? These are crucial normative questions for any political theory aiming at either strengthening or weakening the liberal side of liberal democratic citizenship. They challenge the feasibility of a democratic liberal space in combining the quest for equality and the preservation of differences. We believe that democratic society is no Newtonian space. Rather, it is an historical, dynamic and perpetually evolving creation, «layered with the sediments of time»<sup>XLIH</sup> and open to both external (ethnic, linguistic) and internal (ideological, cultural, religious...) diversity. Testing the quality of a liberal democratic definition of citizenship means to challenge it through the experience both of foreigners (those who are not (yet) citizens) and of dissenters (those, within the *demos*, sharing a different set of values or opinions). At the beginning of the 1920s Schmitt calls upon German jurisprudence and political theory to rethink the internal and external dimension of contemporary mass democracies, together with the Westphalian configuration of the international landscape. *Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff* (1924) begins precisely with contesting the classical tripartition of politics proposed by Aristotle in *Politics* V (i.e., monarchy, aristocracy, democracy and their specific degenerations). The consolidation of mass parties, the irruption of social conflict at the institutional level, the configuration of



ideological pluralism in terms of parliamentary conflicts, together with the progressive expansion of the suffrage, stand as macro-signals of the multiple changes occurring in the underground of European democracies throughout the 1910s and 1920s. Within this framework, Schmitt emphasizes the shift from the nineteenth century State, ascribing political representation on the basis of *Besitz und Bildung* (property and education), to the twentieth century *totaler Staat*. Within this new configuration of power, the State/society antinomy at the heart of any bourgeois Constitution has collapsed: the disintegration of society into a constellation of economic interests affects the institutional arenas and significantly weakens the *Einheit* of the German people. How to rethink, then, the political unity of multi-class democratic States<sup>XLIV</sup> and their highly fragmented public spaces? Are the British pluralists (G. D. H. Cole and H. Laski) right when claiming that contemporary democratic citizens are trapped by a «plurality of loyalties»? How to make pluralism a positive resource for, rather than a threat to, contemporary mass-party democracies? Both Schmitt and Kelsen believe that these are basic questions for any renewed theory of citizenship in the aftermath of the First World War.

Schmitt touches on such issues in the second preface to *Parlamentarismus* (1926) when elaborating on the concept of ‘substantial equality’ *vis-à-vis* the progressive expansion of the suffrage<sup>XLV</sup>. Two years later *Die Verfassungslehre*, while providing a more sophisticated definition of democracy as a ‘mixed constitution’ based on the principles of both identity and political representation, still emphasizes national homogeneity as the peculiar feature of democratic citizenship. The reference to a common language, shared historical destiny, traditions, goals and hopes are crucial factors for preserving the ‘equality of the equals’ within national borders<sup>XLVI</sup>. This is the reason – Schmitt claims – why the Weimar Constitution states that «all Germans» (rather than all ‘persons’) «are equal before the law» (art. 109 RV), in line with the formulation provided by the Swiss Federal Constitution in 1874, the Japanese Constitution in 1889 and the French Declaration of the Rights of Man and of the Citizen in 1789 when discussing political rights in connection with those of the State (articles 6 and 13).

However, many scholars (particularly William Scheuerman and David Dyzenhaus<sup>XLVII</sup>) have stressed the theoretical flaws of such an interpretation of political (as opposed to liberal) democracy. A broad consensus has developed among Schmitt’s interpreters in downplaying his attempt to reify citizenship and to bypass the ontological



pluralism of any liberal-constitutional democratic government in the name of an existential conception of politics. When no form of dissent is tolerated within the *demoi*, then – as Kelsen points out – political philosophy faces significant problems from a normative perspective. For the univocal ‘we’ animating Schmittian democracy proves incompatible with the idea of a self-critical citizen partaking in politics and its processes of both political will- and public opinion-formation<sup>XLVIII</sup>. When designed as monolithic, static wholes banishing pluralism from their own boundaries, democracies cease to be liberal. Rethinking democratic citizenship means to develop normative criteria – e.g., egalitarian reciprocity, voluntary self-ascription and freedom of exit and of association<sup>XLIX</sup> – ensuring positive cultural contestation together with the flourishing of individual autonomy and individuality. How does Kelsen’s understanding of representative democracies contribute to this task?

## 2. Minority rights and majority rule: Kelsen and the three P’s of democratic indirectness (people, Parliament, parties)

Hans Kelsen wrote about the nature and the limits of modern democracies from the 1920s to the mid 1950s. After his departure from Prague in 1940, he taught firstly at Harvard and later at Berkeley. By combining the Austrian neo-Kantian tradition with the empiristic and neo-Positivist trends animating North-American culture in the aftermath of the Second World War, he developed a unique methodological approach. As the 1955 essay *Foundations of democracy* proves, Kelsen always believed that a strong correlation existed between power configurations and world views within human societies. While democracy *stricto sensu* relies upon ideological pluralism and the valorization of difference, autocracy presupposes a monistic kind of *Weltanschauung*<sup>I</sup>. In *Forms of governments and conceptions of the world* (1933) he claims: «the fight in which democracy wins over autocracy is essentially a fight in the name of critical reason against ideologies, which are founded on the irrational instincts of human soul»<sup>II</sup>. If it is true that any theory of democracy plays with three variables – i.e., popular sovereignty, political equality and political liberty<sup>III</sup> –, then Kelsen’s understanding of democratic citizenship faces two macro-questions:

1) Who is the people deliberating and critically acting within the public-political sphere? How inclusive should the democratic space be in order to preserve a shared set of



values while, at the same time, allowing cultural contestation and individual self-determination? What can Kelsenian democracy tell us about the civil and political rights of those not *ex ante* belonging to the citizenry either *jure soli* or *jure sanguinis* but entering into a specific community at an advanced moment of their own lives? These are crucial questions for understanding how ‘democratic’ a liberal democratic citizenship should be in Kelsen’s opinion and whether he succeeds in making the two phases of representation and deliberation dynamically interact;

2) if the Kelsenian *demos* does not presuppose any kind of ethnic homogeneity and it does not speak the language of hard nationalism, how does its physiological pluralism affect the political will-formation? This question addresses the role and efficiency of party systems in connecting political representation with intra- and extra-parliamentary deliberation and decision-making. It pertains to the political means modern democracies should be endowed with for educating democratic individuals into active and self-critical citizens.

Such issues constantly emerge throughout Kelsen’s democratic theory writings from the 1920s to the 1960s. Contrary to Schmitt, he acknowledges that liberal parliamentarianism and modern mass democracy share a common destiny: «the failure of the former is *ipso facto* the failure of the latter»<sup>LIII</sup>. The parliamentarian framework stands as the only possible form the idea of democracy can have within the contemporary social context. Political representation and indirectness are thus conceived by Kelsen not as *vulnera*, but as essential features in the plot of modern democratic citizenship. For Parliaments not only ensure that relevant political issues are expeditiously discussed and resolved, in accordance with a «structural logic of social bodies»<sup>LIV</sup>. Far beyond, they constitute the only possible ‘compromise’ (a key-word in Kelsen’s analysis of parliamentary democracy) between the notion of political liberty and the principle of labor differentiation imposed by modern nation States.

This leads to the third basic premise of Kelsen’s democratic theory. Contrary to the Schmittian one, Kelsenian democracy is a liberty-, not an homogeneity-based kind of democracy. In the fight against the «torture of heteronomy», in the combination of the quest for liberty with the «anti-heroic» notion of equality, Kelsen discovers the ‘essence and value’ of modern democracy<sup>LV</sup>. Following the path disclosed by Constant and Condorcet, Kelsen recalls that the idea of liberty has undergone a crucial «semantic transformation»



throughout the centuries. Freedom conceived as the political self-determination of the citizen, as his direct participation to the emergence and expression of the general will (the ancients' 'positive' conception of liberty), has been eroded and substituted by a 'negative' understanding of the individual/community relation. Contrary to the Athenian *agora*, modern democracies are built upon liberty, not upon freedom. They have further developed the Hobbesian separation between *forum interni* and *forum externi*<sup>1,VI</sup> and the liberal need to preserve the value of individuality in the age of mass democracy. The shift from «liberty within anarchy» to «liberty within democracy» – i.e., from natural to civil liberty – is, for Kelsen, together with Kant and Rousseau, the positive contribution to democracy provided by modern contractualism. In the attempt to achieve equality within liberty – a difficult compromise when referred to the dynamic sphere of citizenship – Kelsen argues against the principle of unanimity in the name of the majoritarian principle. The latter is the closest approximation to the idea of freedom that can be imagined within the framework of contemporary mass-party democratic States.

The very essence of liberal democratic citizenship precisely lies in the chance different groups are given to confront each other and to compete for power. Contrary to Schmitt's *Freund/Feind* politics, no entified, monolithic truths are admitted in Kelsen's democratic theory. Appreciating and preserving the invaluable contribution of dissent to the flourishing of each and every citizen is what makes Kelsenian democracy work. Democratic men and women are called to the practice of compromise in their everyday life, not only as deputies and representatives in the institutional arenas but also as members of an ontologically pluralistic civil society. From this point of view, every exchange, every cont(r)act stands as a compromise: 'compromising' means «putting aside what divides in favor of that which unites». Kelsenian liberal democratic citizenship does not imply any substantial homogeneity nor the artificial quest for a community of *Blut und Boden* (blood and land). On the contrary, constraints on majority actions and the defense of individual liberty and equality become indispensable normative requirements within and outside democratic institutions. While Schmitt portrays Parliaments as places of bargaining among socio-economic interests, Kelsen appreciates their multi-vocal composition. As «collective organisms democratically elected by the people on the basis of a universal, equal right of suffrage», they pursue political will-formation through decisions taken by majority rule. The majority principle differs indeed from the tyranny of the majority as far as it allows the



development of opinions and counter-opinions through a dialectical method. Kelsen properly recalls what Rudolf Smend argued in two short articles published in 1919 and 1923<sup>LVII</sup> when tracing the genealogy of parliamentary deliberation back to the Medieval civil trial. Already at the time – Smend argues – there was the rationalistic belief that only through dialectical confrontation among different opinions, «particles of reasons that are strewn unequally among human beings gather themselves and bring public power under their control»<sup>LVIII</sup>. When properly applied, parliamentary procedures, based on philosophical relativism, create the guarantees that the different groups of interests represented in Parliament can raise their voice and mirror the ‘dynamic/dialectic’ structure of authentically democratic civil societies. Parliaments and wider public arenas thus share mutual recognition, protection of minority rights and dialectic, compromise-oriented procedures as normative and methodological features of any deliberation they host. Only when the representative and the deliberative moments of politics are connected in a perpetual interaction, can liberal democratic citizenship be enacted<sup>LIX</sup>.

Of course, to be effectively applied, the principle of the majority presupposes a certain degree of agreement between the parts involved in the (political, civil, religious, cultural etc.) confrontation. How pluralistic, then, should democratic pluralism be? In revisiting Kant’s international theory (specifically his conceptualization of national units as the main actors of inter-State relations) Kelsen points to cultural and linguistic commonness as the necessary foundation of a (relatively) homogeneous citizenship. It is noteworthy that, throughout the same years, Herman Heller argues for the creation of a welfare state precisely in order to contain social heterogeneity. From the Kelsenian perspective, though, socio-economic inequalities, pointed out by Marx’s critique as the main tool for political oppression in the hands of ‘bourgeois democracy’, can never downgrade democracy *vis-à-vis* dictatorship (be it by a class or by the *Führer*):

If, as precisely the Marxist critique of so-called bourgeois democracy underlines, what matters is the real distribution of power, then the system of parliamentary democracy, with its two essential groups, according to the majority-minority principle, is the ‘true’ expression of the current society’s division in two classes. And if there is any form that offers the chance not to lead this strong opposition, which one can lament, but not deny, into a catastrophe by way of bloody revolution, but to balance it out peacefully and slowly, it is this form of parliamentary democracy [...].<sup>LX</sup>



In particular, Kelsen rethinks the notion of citizenship by unveiling the structural link between the *demos*, political associations and parliamentary system in contemporary mass democracies. People, parties and Parliaments (the ‘three Ps’) are strictly connected in the way Kelsen revisits the notion of democracy against the background of European public law<sup>LXI</sup>. What does he exactly have in mind, though, when speaking of ‘the people’?

Together with the notion of ‘popular sovereignty’ (replacing individual liberty as a consequence of the hypostatization of the ‘State-person’), ‘the people’ is conceived as a juridical fiction. It is «an ethical-political postulate that political ideology assumes as real»<sup>LXII</sup> as far as «all its members are obedient to the same juridical State order». The “people” exists only from a juridical and normative perspective.

However, when political theorists question the engagement of electors into active citizenship and political mobilization, they refer to a misleading and slippery notion of ‘the people’. Citizens can be either subjects or objects with regards to the exercise of democratic power; they can be either *pouvoir constituant* or *pouvoir constitué*. Even within a radical kind of democracy, those endowed with political rights are just a restricted part of the whole population. Moreover, not everyone feels the urge to vote, even though he/she is a citizen entitled to exercise such a precious right and duty. Nor do those actually voting cast their periodic ‘paper stone’<sup>LXIII</sup> in the ballot-box all displaying the same level of awareness, unbiased information and critical understanding of what has been occurring around them. In line with the democratic disenchantment expressed throughout the same years in the US by Lippmann and Lowell, Kelsen calls for a more precise and realistic understanding of the multi-level notion of ‘democratic people’. He recalls the recent constitutional evolution in Soviet Russia as a particularly relevant example for political and State theory: by providing foreign citizens coming to Russia seeking a job with full civil and political equality, the Soviet Constitution has for the first time diverted the notion of citizenship from that of nationhood. However, as Kelsen points out again drawing on the Soviet context, the evolution of citizenship does not always lead to a pacific and constructive management of class conflict.

This is exactly where the role of mass political parties emerges<sup>LXIV</sup>. Rethinking the evolution of citizenship inevitably calls into question the institutional expression of social conflicts within and outside Parliaments. Along with Schmitt, Kelsen claims that mass



democracy *per se* means the erosion of the State/society antinomy due to the synergic socialization and democratization of politics. Contrary to Schmitt, though, he believes that parliamentary arenas must mirror the ‘polyarchy’ of civil society in order politically and visually to represent its various economic and social interests. As he vividly puts it, «the boosts coming from political parties are like many subterranean streams feeding a river that comes to surface only within the popular assembly or the Parliament, where it flows within one single bed»<sup>LXV</sup>. Unlike Schmitt, who polemically interprets parties as the main reason for the fracturing of political unity<sup>LXVI</sup>, Kelsen defends the role they play in the fight for expanding civil, political and social rights within indirectness-based democracies. While the former claims: ‘no State without people, no people without acclamations’, the latter replies: ‘no democracy without Parliament, no Parliament without parties’. A full liberal democratic citizenship will be finally achieved only when, through a specific set of parliamentary reforms, the hostility towards parties and parliamentary representation is overcome<sup>LXVII</sup>.

### 3. From 1920s Weimar back to 2010s post-democracies: rethinking citizenship via representation. Concluding (not yet conclusive) remarks

What has hitherto been recalled paves the way for an overall rethinking of the structural transformations of liberal democratic citizenship both through and beyond Schmitt and Kelsen. This last section aims specifically at offering some concluding remarks in the attempt to revisit, from a fresh perspective, the multifaceted notion of ‘the people’ which has so far emerged. Moving from different interpretations of the democratic *demos*, Schmitt and Kelsen developed two widely diverging topologies of democracy.

On the one hand, the former portrayed the democratic people mainly as *pouvoir constituant* within the exceptional, super-legal constitution-making<sup>LXVIII</sup>; on the other, Kelsen emphasized more the institutionalized, procedural side of democratic citizenship when the *demos* subjects itself to laws and is turned into *pouvoir constitué*. In turn, he also casted light on the invaluable contribution of political bodies in providing the constellation of social and economic interests with institutional representation. We suggest that the dichotomy between the two approaches needs to be overcome by moving towards a more sophisticated understanding of democratic citizenship through a renewed notion of



representation founded on a dynamic and perpetual interaction between political will and political opinion. Not only should the idea of occasional constitution-making (a constitutional ‘big bang’) be replaced with that of ‘constitutional evolution’ as an overarching process evolving through time (an evolutionary, not a revolutionary happening)<sup>LXIX</sup>. Most importantly, we should get reacquainted with the idea that ‘the democratic Leviathan’<sup>LXX</sup>, i.e., the citizens living and acting within democracy’s universe, can draw on a wide spectrum of means for making their voice heard other than voluntaristic acclamations and/or institutional procedures. Spontaneous forms of popular self-mobilization also contribute to the physiognomy of democratic citizenship within our contemporary representative governments. In his 1928 *Verfassungslehre* Schmitt himself argues (in an ambiguous, sometimes confusing way) that the political unity of democracy, stemming from both the principles of identity and representation, is framed within a threefold relation between the democratic people and its Constitution, depending on whether the former exists ‘prior to’ and ‘above’, ‘within’ or ‘beside’ the latter<sup>LXXI</sup>. This third concept (the people “beside” the Constitution) refers to the *demos* neither as a *pouvoir constituant* nor as a *pouvoir constitué*. Rather, the people is here conceived as a non-institutionally organized entity expressing political judgment through the multiple channels at its disposal in the democratic public sphere<sup>LXXII</sup>. As Kalyvas has argued (partially followed by Muller<sup>LXXIII</sup>), when divested from the visceral anti-liberalism Schmitt endows it with, his claim also helps illuminating the complex anatomy of popular sovereignty within our indirectness-based democracies, while at the same time disclosing unexpected hints for better coping with some European Union conundrums (especially on sovereignty and constitution-making<sup>LXXIV</sup>). By transposing Bodin, Hobbes and Rousseau’s conceptions of sovereign power into the language of modern constitutionalism through Sieyès<sup>LXXV</sup>, not only does he partially revise the idea of an *ethnos*-founded *demos* preserving its own homogeneity through an existential conception of politics (as stated in *Parlamentarismus*). He goes further in reminding us that, even after the democratization of the constituent power, the democratic sovereign and its underground presence can never be abolished in constitutional democracies. However, he failed to elaborate further his threefold democratic citizenship design: by banishing public deliberation and collective (self)reflection, downgrading his perception of alternative venues for the citizens to express themselves to a passive, shouting and useless gathering of people. Moreover, due to his



mythologized interpretation of liberalism, he was not able to appreciate the invaluable contribution of political parties to the fulfillment of citizenship. He equated democratic politics with speechless applause and sacrificed the political value of liberty to the preservation of substantive homogeneity. In turn, he dismissed the emancipative potential of democratic citizenship embodied by extra-institutional forms of self-representation and the proliferation of public spheres for political will-formation. Reading Schmitt's democratic theory *vis-à-vis* Kelsen can contribute to disclosing some relevant hints for rethinking 'the people' beyond the identity/representation, constituent/constituted power, substantial/procedural democracy dichotomies, hints useful for the 'chercher le peuple' normative attempts at the European level. Getting reacquainted with the third body of the 'democratic Leviathan' – i.e., with the extra-parliamentary side of politics and the set of social movements keeping democratic citizenship alive beyond its institutionalized framework – proves useful in the sense that:

- a) at the institutional design level, it helps to overcome the schizophrenia of a dualistic model of democracy: far from the simplistic alternative between a substantive (Schmittian) and a procedural (Kelsenian) kind of democratic government, a renewed theory of citizenship and popular sovereignty should also put an end to the poor image of the democratic people as either a primordial, *ex nihilo* and 'over-politicized' energy (outside and above the Constitution) or a semi-dormant actor within a 'depoliticized' and procedures-intoxicated polity<sup>LXXVI</sup>;
- b) with and against Schmitt, it provides the people with self-representational means to express their political will alongside the constituted powers without threatening the democratic order; when applied to the European level, as Muller has pointed out, this reading would require amending the substantial and metaphysical aspects of the Schmittian understanding of the *pouvoir constituant* towards the conceptualization of the European peoples as an inherently plural constituent power capable of making its voice heard as a constellation of self-representing and self-represented publics (what Schmitt, in *Die Verfassungslehre*, refers to as 'apocryphal acts of sovereignty')<sup>LXXVII</sup>;
- c) with and against Kelsen, it reminds us that popular sovereignty does not emerge only through party representation and regularly held elections. Contrary to a neo-Schumpeterian conception of democracy, contemporary *demos* maintain an underground,



extra-institutional self-conscience that can emerge when the two domains of representation and judgment, political will and public opinion(s) are constantly inter-connected. The ‘continuity/rupture’ movement in the exercise of political judgment enables representative politics to supersede an existential and voluntaristic conception of the will<sup>LXXVIII</sup>, to fulfill the promise of political liberty<sup>LXXIX</sup> and to make democratic, self-critical citizens out of isolated electors and political atoms.

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<sup>I</sup>Marshall 1950. For a philosophical analysis of the concept of ‘citizenship’, see also Veca 1990.

<sup>II</sup>Roche 1992: 1-8.

<sup>III</sup>Connolly 1991. On the identity/difference nexus, see the excellent work by Benhabib 1996.

<sup>IV</sup>We refer to Fukuyama’s claim that the universalization of Western liberal democracy as «the final form of human government» after 1989 meant *per se* «the end point of mankind’s ideological evolution»: Fukuyama 1989; Fukuyama 1992.

<sup>V</sup>Throughout the paper we often refer to the notion of ‘liberal democratic citizenship’ (rather than that of ‘democratic citizenship’) in order to emphasize the equal consideration each individual is entitled to as the minimal normative criterion of post-Rawlsian liberal theories of democracies. See Lehning 1997; Lehning 1998.

<sup>VI</sup>Cfr. Zolo 1994: 3-46.

<sup>VII</sup>Taylor 1992; Kymlicka 1995.

<sup>VIII</sup>Urbinati-Warren 2008.

<sup>IX</sup>I owe such an evoking expression to Urbinati 2005.

<sup>X</sup>For thought-provoking perspectives over the notions of European constituent-power, *demos* and citizenship within the wider and highly debated framework of the European constitution-making, see Lehning 1997; Muller 2000; Henry- Loretoni 2004; Riekman-Wessels 2006; Lindhal 2007; Walker 2007; Dyzenhaus 2007.

<sup>XI</sup>On such an instrumental and functionalist argument at the EU level in addition to Weber’s threefold articulation of the concept of ‘legitimacy’, see Muller 2000: 1778.

<sup>XII</sup>Walker 2007 discloses four hypotheses on the concept of a European constituent power: non-constituent



constitutionalism (echoed in the international Treaty-based EU); constitutional skepticism (stressing the miscategorization, the ‘category error’ of ascribing the constitutional label to the European enterprise); constitutional vindication (claiming that a European constituent power is already more or less realized within the emergent constitutional form); finally, post-constituent constitutionalism, recognizing the initial *vacuum* of a supranational constituent power while, at the same time, defending the urgency and positive contribution of its subsequent development.

<sup>xiii</sup>On the tension between identity and interdependence in contemporary, post-State-centered constitutionalism dealing with a highly fragmented, multilevel and polycentric order, see Carrozza 2007.

<sup>xiv</sup>On the notion of ‘constitutional patriotism’, framing citizenship within a shared sense of values rather than ethnic origin or common history, see Habermas 1992.

<sup>xv</sup>See Weiler 1999: 270-284; on the conundrums of European citizenship, see Weiler 1999, 324-357.

<sup>xvi</sup>Muller 2000: 1777.

<sup>xvii</sup>Costa 1999-2001.

<sup>xviii</sup>As Erich Kaufmann wrote in 1927: «The experiences that our nation, and we along with it, have had in war, in collapse, in revolution, and under the Versailles Treaty, domestically and in foreign policy, have shaken us violently awake and led to immense self-reflection» (in Jacobson-Schlink 2002: 4).

<sup>xix</sup>Jacobson-Schlink 2002: 12. Such an «historical handicap on German parliamentarism» (*infra*: 12, n. 15) proved self-evident throughout the history of Weimar: from 1919 to 1933 no *Reichstag* lasted until its regular end term.

<sup>xx</sup>Far beyond the initial intentions of the Constitution’s fathers, the President was given a considerable agglomerate of power: from the right to appoint and dismiss the Chancellor and to dissolve the *Reichstag*, to the whole set of emergency powers provided by Article 48.

<sup>xxi</sup>As the *Hauptprobleme der Staatsrechtslehre* (1911), *Das Problem der Souveränität* (1920) and the *Allgemeine Staatslehre* (1925) prove, Kelsen builds on both the epistemological concept of ‘substance’ developed by Cassirer, Mach and Avenarius and Vaihinger’s theory of fictions to renew the juridical and theoretical notions of ‘State’ and ‘democracy’ in relation to social conflict.

<sup>xxii</sup>De Maistre 1965.

<sup>xxiii</sup>Castiglione-Warren 2006, *Rethinking Democratic Representation: Eight Theoretical Issues*, Paper presented at the Centre for the Study of Democratic Institutions, University of British Columbia (in Urbinati-Warren 2008: 387-390).

<sup>xxiv</sup>Urbinati-Warren 2008, 389.

<sup>xxv</sup>Held 1987.

<sup>xxvi</sup>Fioravanti 1990; Urbinati 2006 (especially 17-59); Urbinati 2009 (especially 33-47). For a classic and still influential account of representation, see Pitkin 1967; for a mapping of and critical elaboration on the main theories of political representation in recent democratic theory, see Saward 2010.

<sup>xxvii</sup>For diverging opinions on the need (and theoretical utility) for contemporary democratic theory to critically engage with Schmitt’s critique of liberalism, see Galli 2000; Richter 2000. While the former pinpoints the «elements of a theory of a ‘living constitution’ and the people’s constituent power» embedded within Schmitt’s political thought, the latter invites contemporary political theorists to leave any Schmittian spectrality aside and turn to the idea of a ‘liberal republicanism’ (a third-way between communitarians and liberals); on both, see Urbinati 2000.

<sup>xxviii</sup>Precise references to Rosanvallon and Urbinati’s works will be made throughout the following pages. For an excellent re-conceptualization of ‘the people’ in representative democracy and its pathologies (with special emphasis on populist appeals), see Canovan 1999; Canovan 2002; Canovan 2005.

<sup>xxix</sup>Schmitt 1988b: 26.

<sup>xxx</sup>Thought-provoking considerations on this point in Kiss 1998.

<sup>xxxi</sup>Schmitt 1988b: 15-16 (my emphasis).

<sup>xxxii</sup>Schmitt 1988b: 16.

<sup>xxxiii</sup>Schmitt 1988b: 16.

<sup>xxxiv</sup>Schmitt derives the term ‘polycraty’ from the work of Johannes Popitz, prominent financial expert in 1920s Weimar and Prussian Minister of Finance after 1933: see Schmitt 1931a; Schmitt 1931b. For an overview of Popitz’s State theory, see Kennedy 2004: 26-32.

<sup>xxxv</sup>Cfr. Schmitt 1932.

<sup>xxxvi</sup>Schmitt 2008: 272.

<sup>xxxvii</sup>Phillips 1996.



xxxviii Urbinati Nadia, 2010b.

xxxix On this point see Lippmann 1922; Lippmann 1925; Lowell 1921. Both Lippmann and Lowell are quoted in Schmitt's *Volksbegehren und Volksentscheidung*; Schmitt refers to Lippmann's *Public Opinion* also in the second preface of *The Crisis of Parliamentary Democracy*.

xl Schmitt 1988b: 9.

xli Schmitt 1988b: 20-21 (my emphasis).

xlii Habermas 1998: 133. As Muller 2000 recalls, it is plausible that Schmitt's connection between democracy and homogeneity provided a sort of sub-text to the German Constitutional Court's *Maastricht* decision: see *Maastricht Decision*, BVerfGE 89, 155-213 (1993). On this point see both Grimm 1995 and Habermas 1995 (the latter reprinted also in Habermas 1998: 155-161).

xliii Ignatieff 2000: 58.

xliv Giannini 1986: 69. See also Cassese 1994; Carrozza 2006.

xlv Schmitt 1988b: 9-10, 16.

xlvi On this matter see also Schmitt 2008: 258-264.

xlvii Among the most critical and acute analyses of Schmitt's theory of democracy, see Dyzenhaus 1998; Kennedy 1985; Kennedy 2004; McCormick 1997; Mouffe 1999; Scheuerman 1995; Scheuerman 1999; Azzariti 2005.

xlviii Pasquino 1999: xvi argues correctly that the mere criterion of national homogeneity proves insufficient, both historically and theoretically, when defining democracy. After 1848 – he recalls – the major threat to European States has come from within their borders, specifically in the form of class- (rather than ethnic) conflict. The Marxist struggle between the bourgeoisie and the proletarians in mid-nineteenth century Europe proved that groups sharing the same portion of territory and belonging to the same nationality could still face each others as strangers and foes<sup>1</sup>. Moreover, when the developments subsequently occurred in the nationhood/citizenship nexus are also taken into consideration, Schmittian democracy proves ideologically unilateral and normatively flawed.

xlix Benhabib 2002.

l Kelsen emphasizes such correlation in many of his political theory writings: see in particular Kelsen 1958 and Kelsen 1955 (especially *Democrazia e concezioni della vita*: 137-144, and *Assolutismo e relativismo nella filosofia e nella politica*: 441-453).

li Kelsen 1982, 49-50 (my translation).

lii Gavazzi 1984.

liii Kelsen 1984: 174, 157.

liv Kelsen 1984: 52.

lv Kelsen 1984: 39-40.

lvi This juxtaposition is polemically discussed by Schmitt in his 1938 essay *Der Leviathan in der Staatslehre des Thomas Hobbes*.

lvii We refer to *Die Verschiebung der konstitutionellen Ordnung durch die Verhältniswahl* (1919) and *Die politische Gewalt in Verfassungsstaat und das Problem der Staatform* (1923).

lviii Schmitt 1988b: 35.

lix On this specific point see the fundamental contributions by Manin 1997; Rosanvallon 2000; Urbinati 2009; Urbinati 2010a; Urbinati 2010c.

lx Kelsen 1955 (my translation).

lxi Kelsen 1984: 50-51.

lxii See Costa 2001 (vol. IV): 21.

lxiii This definition of the ballot paper, developed by Engels, has been recalled by Przeworsky 1999: 49, and, more recently, by Urbinati 2005: 197 and Urbinati 2009: 53.

lxiv For an introduction to political party system (with special reference to the Italian context), see Rossi 2007; see also Katz 1988. For a positive evaluation of political partisanship in contemporary political theory, see Rosenblum 2008 (review by Runciman 2010).

lxv Kelsen 1984: 55 (my translation). On the relevance of party representation in Kelsen's theory of democracy, see Mersel 2006.

lxvi Cfr. Schmitt 2008: 275-276: «There is no democracy without parties, but only because there is no democracy without public opinion and without the people that are always present as the people. [...] The Weimar Constitution recognizes no parties. It mentions the word only once in a disapproving sense in Art. 130, which reads: "Public officials are servants of the collective, not of a party". [...] Parties (factions) are not



recognized in the Constitution. Instead, they are recognized in the house rules of parliamentary democracies like the by-laws for the German Reichstag of 12 December 1922».

LXVII Kelsen 1984: 55-57. Due to space limits, we cannot engage into a detailed account of Kelsen's considerations on institutional reforms: cfr. Kelsen 1984: 80-93 (*The reform of Parliament and The professional representation*).

LXVIII Schmitt, 1988a: 51.

LXIX See Peters 2006.

LXX We derive such powerful expression from Kalyvas 2000.

LXXI Cfr. Schmitt 2008: 268-279 (ch. 18: *The People and the Democratic Constitution*). For a broad and acute analysis of this chapter, see Kalyvas 2000.

LXXII Noteworthy in *Die Verfassungslibere* (ch. 18), while recalling the main scientific contributions to the existing literature on public opinion, Schmitt refers to F. Tönnies (*Kritik der öffentlichen Meinung*, 1922), J. Bryce (*The American Commonwealth*, 1888), A. Venn Dicey (*Law and Public Opinion in England*, 1905), L. Lowell (*Public Opinion and Popular Government*, 1913). No reference, though, is made to Lippmann's writings, contrary to the attention reserved to the American journalist just one year before in *Volksbegehren und Volksentscheidung* and in 1926 in the second preface to *The Crisis of Parliamentary Democracy*.

LXXIII Muller 2000: 1781 acknowledges that, drawing on Schmitt's constitutional theory, «some observers have claimed that intellectual resources for “radical democracy” can be extracted from it»; however, he deconstructs the Schmittian understanding of both representation and peoplehood as innervated by «religious-cum-authoritarian, “substantial” modes of thought» (Muller 2000: 1788) and tries to develop a descriptive (and prescriptive) analysis of the Constitution of Europe with, beyond and against Schmitt himself.

LXXIV Summing up the theoretical questions that can be raised when reading the EU through, beyond and against Schmitt, see Muller 2000: 1779-1880: «[...] does European integration in fact prove [...] that “Schmittian sovereignty” remains caught in existentialist, concretist ways of thinking, which have long lost touch with the intricate “legimitimation through procedure” or the legitimation through prosperity which some see at the heart of the EU? [...] Has Schmittian unitary and decisionist sovereignty, which always asks for the identification of the final arbiter, been extinguished in favor of “pooled sovereignty” and a kind of subtle sovereignty by “mutual recognition, continuity and consent”? [...] Can one say, then, to put it crudely, that if Europe works, Schmitt is wrong? Or is the joke, after all, on the anti-Schmittians, who remain fixated on Schmitt's Weimar writings, and overlook his predictions about the end of the nation-state, and his advocacy of economic *Großräume* (great spaces), in which case the EU would be the first *Großraum* realized?».

LXXV Duncan 2004. Useful remarks on Schmitt's appropriation (and reinterpretation) of Sieyès' notion of the creative *pouvoir constituant* are also available in Muller 2000: 1781-1788.

LXXVI On the limits and clues respectively disclosed by these two images of the democratic people within Schmitt's political and constitutional theory, see Kalyvas 2000: 1532-1556. According to Dyzenhaus 2007 this re-conceptualization would lead towards a «liberal account of the rule of law», whereby Schmitt's 'negative prescriptive political theory' and his reading of the constituent power as *das formlos Formende* ('the amorphous but forming entity') is simply dismissed. I disagree with such a conclusion and rather retain the notion of a 'normalized' constituent power as a powerful mean for making representative democracy work and represented citizens think.

LXXVII This would be the case, for instance, of the mass demonstrations occurred on February 15<sup>th</sup>, 2003, in London, Rome, Paris, Barcelona, Berlin against the involvement of their national governments in the Iraq War as allies to the US: on this point see Levy et al. 2005 (especially the 'manifesto' co-authored by Habermas and Derrida, formerly published on the *Frankfurter Allgemeine Zeitung* and *Libération* and arguing for a Core Europe with a distinctive and self-critical European public sphere).

LXXVIII See Urbinati 1998; Urbinati 2005.

LXXIX The conditions and presuppositions of political judgment throughout intra-electoral periods become crucial questions for representative democracies as they test the quality of representation on a double track. They found the (positive) liberty of democratic citizens on a substantial basis (instead of making it a comet that appears only «at fixed and rare intervals», as feared by Constant in 1819) and compel elected governments to be accountable to the entirety of those they represent.



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**“Euro-Bonds”**  
**The Ruiz Zambrano judgment or the Real Invention of**  
**EU Citizenship**

by  
Loïc Azoulay

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## Abstract

This paper aims to provide a brief analysis of the Ruiz Zambrano judgment (Case C-34/09). Traditionally, the EU citizenship has been mainly construed as a status of integration into the Member States of the Union: a status of transnational integration. The basic claim developed in these pages is that, with Zambrano, the EUCJ moved away from a concept of transnational integration to one of genuine European integration, thus fostering a new vision, based on the existence of Euro-bonds.

## Key-words:

European Court of Justice, Zambrano, citizenship



## 1. EU Citizenship as a status of integration\*

### *A genuine European integration*

Ruiz Zambrano, a judgment of the European Court of Justice of 8 March 2011 (Case C-34/09), is an ordinary case leading to potential extraordinary consequences for the development of EU law. Let me say first where I see the main contribution of this judgment. In the case-law of the Court which gave substance to this notion, EU citizenship consisted essentially in offering the nationals of the member states the opportunity to act on a transnational plane within the Union. Nationals of member states were granted rights in order to circulate freely, to be admitted in other member states and to enjoy the same treatment as nationals of the host country. They were vested with the power to address the authorities of another member state and to claim admission, residence and welfare benefits on the same conditions as the nationals of that state. This empowerment was aimed to ensure the integration of EU citizens into the society of the host state. The status of EU citizen has been mainly construed as a status of integration into the member states of the Union: a status of transnational integration. According to this model, an individual is EU citizen by the very fact that he/she circulates within the Union and becomes a “quasi-national” of another member state. Now, what emerges from this case is the notion of integration within the territory of the Union taken as a whole. We move from a *transnational* (the fact of being assimilated in another society) and *plurinational* (the fact of multiplying affiliations within the Union) integration to a genuine *European* integration. The European territory as such is the natural place of life and integration for European citizens and their families.

### *‘Illegal residents’*

Some interesting factual elements of the Zambrano case are worth noting. They touch upon the general issue of migration in Europe today. Mr Ruiz Zambrano is a Colombian national who decided to leave his country of origin with his family and to seek asylum in Belgium. The Belgian authorities refused his application for asylum and subsequent applications to have his situation regularized. Despite this refusal and the



absence of any resident permit, he and his wife have been registered as ‘residents’ in a Belgian municipality and he started to work regularly with a full-time employment contract. Since the rejection of his application for residence in March 2006 Mr. and Mrs. Zambrano have held special residence permits valid during the duration of the judicial action he has brought against this rejection. During this stay, Mrs Zambrano gave birth to two children, Diego and Jessica. They acquired Belgian nationality by the fact of being born in Belgium and since the parents did not take specific steps to have them recognized as Colombian nationals. This is the result of the application of the Belgian Nationality Code at the time of the case.

Their condition is typical of the condition of many migrants in Europe, who are in a transitory position, but a position which is intended to persist; they are migrants who are *recognized* and partially included in the administrative and economic life of the country but who are not *authorized* to stay in the territory. Mr and Mrs Zambrano belong to this category of people who have been provocatively labelled as ‘*illegal citizens*’ (by the French philosopher Etienne Balibar; see also the work of Enrica Rigo). More importantly for the Court in its judgment, the case concerns the children whose identity from a EU law perspective is twofold. They are Union citizens as Belgian nationals. And they are *dependent* persons, a fragile population that cannot rely on its own resources. Arguably, the issue of the *care* is an important feature in this judgment.

#### *‘The territory of the Union’*

Confronted with this case, the Court considers that EU citizenship law precludes Belgium from refusing Mr. Ruiz Zambrano a right of residence and a work permit. His minor children, who are EU citizens, should not be deprived of the right to stay within the territory of the European Union. In other words, deportation of European citizens to countries outside the territory of Europe is not permitted. It would amount to an “expatriation”. The reference to the ‘territory of the Union’ is a central reference in the judgment. This reference is not only the metaphor which designates the sum of the physical territories of the member states. It is a normative reference which refers to a new common space, a space of distribution of rights and common values. What the Court is doing here is to recognize a status to specific categories of individuals – European citizens and the persons connected to them as dependents or care-takers. This status is attached to



them wherever they happen to be, it does not depend on their physical location. It grants them rights to circulate and to *occupy* the European space. There is a strong normative dimension implicit in the reasoning. To reside in Europe means not only to be physically located in its territory but also to be granted a number of rights and ultimately to be under the protection of certain values of personal welfare and moral security.

## 2. Shifts in the legal theory of European citizenship

### *EU citizenship and mobility*

The first and the most obvious shift lies in the disconnection of EU citizenship from free movement. In its first cases dealing with EU citizenship, the Court undertook to release the rights of citizenship from the economic considerations attached to freedom of movement in the realm of the internal market. The Court freed the mobility of individuals from the exercise of an economic activity. But the rights of citizenship were still dependent on mobility. This was reflected in Directive 2004/38 which codifies the jurisprudence of the Court and which states, in its preamble, that *'Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement'*.

Following the *Zambrano* judgment, one could say that part of the EU citizenship regime is now split in two parts. The ordinary enjoyment of EU Citizenship rights (residence and non-discrimination) is established on the basis of Article 21 of the treaty and Directive 2004/38 and still dependent on mobility. As the Court recalls in a recent judgment, *"the residence to which [the directive refers] is linked to the exercise of the freedom of movement for persons"* (Judgment of 12 May 2011, *McCarthy*, Case C-434/09). However, there are 'extraordinary situation' in which the safeguard of the statute is directly concerned. EU citizenship can then be based on Article 20 of the treaty and be released from the mobility condition. In the first part of the *Ruiz Zambrano* judgment, the Court sets aside the Directive and decides to ground its decision on the basis of Article 20 TFEU (concealing the fact that this provision explicitly refers to the conditions defined by the EU legislator in the Directive). On this basis, the Court is able to state that the sole presence of a Union citizen in a member state, even if this member state is his/her country of origin, is liable to trigger 'European' protection. The right of residence of the children is sufficient on its own



to grant residence to the parents who take care of them. There is not even the need to refer to the fundamental rights of the children, their right to family life. The dispute is entirely settled on the basis of the *statutory* right of residence of the children. In ‘extraordinary’ situations, there is no need to refer to ‘fundamental’ rights; EU Citizenship works well on its own.

#### *The status of EU citizen*

Another important change concerns the reference to the ‘status’ of citizen of the Union. The Court proclaimed that “*Union citizenship is destined to be the fundamental status of nationals of the member states*” for the first time in the *Grzelczyk* case in 2001. This formula enabled the Court to broaden the scope of application of the principle of non-discrimination on the ground of nationality. Since then, in each case where this reference was introduced by the Court (*Baumbast, Garcia Avello, Zhu and Chen, Commission v. Austria*), it has always had a residual and procedural function: it was used to legitimize a comparison between nationals and non-nationals, as an argument to say that, if they are ‘Europeans’, the latter should enjoy the same treatment irrespective of their nationality (*Commission v. Austria*, C-147/03).

In that case, as already in a previous one (*Rottmann*, C-135/08), the reference to the status of those involved in the case plays a prominent role that differs somewhat from earlier decisions. It is presented as the real source of the rights and duties conferred on EU citizens and their family members. The consequence is that the status in itself has to be protected in order to protect the rights attached to it. These rights refer to the rights of citizenship (movement, non-discrimination, social integration) but one can also see a reference to the fundamental rights protected under the Charter and the ECHR. If taken seriously, the combination of citizenship and fundamental rights would have far-reaching effect in the broadening of the scope of application of EU law.

#### *Is there a right to the European territory?*

An important part of this short judgment is devoted to examining the possible consequences of not granting the right of residence to the parents. The Court relies on an ‘argument from consequences’. The use of this argument is interesting and must be put into context. First of all, this is a response to the argument put forward by the Irish



government before the Court, the ‘floodgates’ argument that the granting of a right of residence is liable to lead to ‘unmanageable results’, to a loss of control over immigration flows. The Court has already responded to a similar argument in a previous case, the *Metock* case (C-127/08). It argued that “*the refusal to grant a right of entry to the family members of a Union citizen would be such as to encourage him to leave in order to lead a family life in another member state or in a non-member country*”. In *Zambrano*, the Court states similarly that “*a refusal to grant a right of residence and a work permit to the father would lead to a situation where the children would have to leave the territory of the Union*”. In *Metock*, the Union citizens involved had circulated within the Union. The Court recognized to the Union a competence to regulate the conditions of entry and residence of third-country nationals. This competence was based on the need to protect the freedom of movement of European citizens.

In *Zambrano*, the children haven’t circulated within the Union. The EU law influence is therefore considerably widened to cover non-mobile citizens. In such reasoning, the argument from consequences in terms of individual rights prevails over the argument from consequences in terms of state control of immigration. The issue is no longer the EU competence in the field of immigration. The real issue is to know whether the right of EU citizens to enjoy the European territory prevails over the state competence to regulate entry and access to its territory.

### 3. The invention of Euro-bonds ?

#### *Classifications and re-classifications*

The main consequence of the case is the transformation of the status of Mr. Ruiz Zambrano. From asylum seeker, he becomes a ‘quasi’ European citizen. From transitory residence and illegal status, he gets permanent and legal residence. Not only that: the Court enables him to be granted a work permit in Belgium, to be socially integrated in this country. This case illustrates the commutability of personal statuses in Europe. The Union has multiplied the statuses conferred to migrants. These statuses are more or less protective. This inevitably fosters a phenomenon of re-classifications based on EU law and a phenomenon of self-re-classifications by the migrants themselves. One may wonder about the exportability of this solution to other types of situations. Is it a case limited to



people socially integrated in a European society, having concluded employment contracts? Is it a case of ‘care’ limited to situations concerning dependent persons like children? In the recent *MCCarthy* judgment of 12 May 2011, the Court rejects the transposition of this solution to the situation of an adult having a family member outside the territory of the Union. Is this a retreat of the Court? One has perhaps to distinguish, depending on the facts of the case. But, whatever the case, the *Ruiz Zambrano* judgment remains the one in which a new status was given to EU citizens.

### *Union citizens as Europeans*

European citizenship has so far been presented as a means “to strengthen the protection of the rights and interests of the nationals of member states” (Art. 2 of the former Treaty on the European Union). The idea was to protect their rights against potential discrimination on the part of authorities of the member states. Now, this case highlights another dimension of European citizenship, namely the protection of the rights of Union citizens as genuine ‘Europeans’ committed to the European Union, its territory and its common values, and not only to the member states. The Court justifies its solution on the ground that Article 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union [the two children] of the genuine enjoyment of the substance of the rights [circulation, residence in another member state] conferred by virtue of their status of the Union”. A rather weak justification. The strong justification lies in the fact that a deportation from the European territory would amount to an “expatriation”.

It is not by chance that this case benefits mainly a non-European, Mr. Ruiz Zambrano, a Colombian national. This shows the willingness of the Union to develop its own boundaries between individuals, its own notion of membership. The case challenges the theory of defining the European citizenship by reference to the nationals of member states who circulate within the EU. The theory is required to include all those individuals who are integrated in Europe and are willing to develop ties in this territory, including nationals of non-member states who contest the borders of Europe set up by the member states.

### *From recognition to allegiance*





In another case, concerning the access to the profession of notary in the member states, the advocate general Cruz-Villalón stated that “European citizenship is evolving as a direct bond between the citizen and the Union” (Case C-47/08). For the sake of his demonstration, he insisted that *“the concept of loyalty as an expression of commitment to and solidarity with the political community cannot be regarded in itself as a distinctive, exclusive and preclusive characteristic of the Member States, such that it inevitably requires the bond of nationality. On the contrary, a European citizen is not as such unable to make a commitment of loyalty to the Union... The notary thus operates within a framework in which loyalty extends both to the State conferring authority and to the Union assuming it, as well as to the other Member States”*. Under this interpretation, EU citizenship is a mechanism which ensures a transfer of loyalty from one member state to another. This model is new. It is not one of recognition of a national by the society of another member state, but one of allegiance to another collectivity. Notice however that, in this case, the Union is not the final addressee of the commitment of loyalty. It is rather the guarantor that assumes the genuineness of the commitments established with different member states.

This mechanism comes into resonance with the new financial mechanism established by the Union to safeguard the stability of the euro area and to resolve the debt crisis. The Union authorizes the euro area member states to support a member state in budgetary trouble by granting financial assistance, but it does not commit itself by issuing Eurobonds. Now, the creation of financial Eurobonds may be economically and politically hard to achieve. Just in the same way, the creation of individual and symbolic Euro-bonds, which emerges at the margins in this singular case, will be legally vain if it is not supported by a political and popular mobilization akin to the consensus, was it permissive or not, that was at the birth of the setting up of the European Communities and which is more than ever imperilled.

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**Operation Atalanta and the Protection of EU Citizens:  
*Civis Europaeus Unheeded?***

by

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## Abstract

This paper critically assesses the EU's anti-piracy operation *Atalanta* in the light of the protection of Union citizens. The main question is to which extent a Union citizen threatened by pirates off the coast of Somalia could rely on the promise of *civis europaeus sum*. The paper discusses the various legal aspects pertaining to the forceful protection of EU citizens in international law, EU constitutional law and the operational parameters of *Atalanta*. It argues that within the particular framework of the international effort to combat piracy, the protection of citizens by military force could be legal. Moreover, the protection of citizens outside the EU forms now one of the legally-binding general objectives of the Union. Yet, this objective is not reiterated in the operational mandate, which creates tension and confusion between the general objective and the CSDP instrument. The paper concludes that the mandate of *Atalanta*, by focussing entirely on universal objectives, is constitutionally incomplete and shows that the external dimension of Union citizenship is still underdeveloped.

## Key-words:

Operation EUNAVFOR Atalanta, Common Defence and Security Policy (CSDP), Piracy, Union citizenship, use of force, protection of nationals abroad



## 1. Introduction: The *civis europaeus* and the *hostis humani generis*

The ancient Roman dictum ‘*civis romanus sum*’,<sup>1</sup> a pledge of respect for one’s rights as a Roman citizen, has remained a powerful concept throughout the centuries. Importantly, the status that it indicates was not just relevant within the Roman Empire, but also carried considerable weight beyond its borders, instilling fear in the ‘barbarians’ that mistreating a Roman would be answered with severe reprisals. It is this external dimension of citizen protection with which the present contribution is concerned in the context of the European Union, with particular regard to its Common Security and Defence Policy (CSDP) as exemplified through the anti-piracy operation *Atalanta*.

In the modern age, the phrase resurfaced in the context of protecting a nation-state’s citizens abroad. As one of the most (in)famous examples, Lord Palmerston evoked in a speech before the British House of Commons in 1850 ‘the sense of duty which has led us to think ourselves bound to afford protection to our fellow subjects abroad’ (reproduced in Francis 1852: 496). Consequently, according to Palmerston, ‘as the Roman, in days of old, held himself free from indignity, when he could say *Civis Romanus sum*; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.’ (reproduced in Francis 1852: 496).

Similarly, even though in more aggressive terms, in 1900 Kaiser Wilhelm II told his troops at Bremerhaven (in a speech that would later be known as the “*Hunnenrede*”), before sending them off to China to quell the Boxer Rebellion that ‘by its character the German Empire has the obligation to provide help to its citizens whenever they are oppressed abroad’ (my translation, original reproduced in Görtemaker 1996: 357). Consequently, in order to avenge the alleged breaches of international law committed by the Chinese, the *Kaiser* instructed his troops to handle their arms in such a way that ‘for a thousand years no Chinese will dare even to squint at a German anymore’ (my translation, original reproduced in Görtemaker 1996: 357; for other historical examples see Ianniello Saliceti, 2011: 91-92). Already here, it becomes obvious that there are two sides to the concept. Next to the as such laudable idea of the state extending its protection over its citizens wherever they may be to shield them from harm, there is also the negative connotation of disregard for other



countries' sovereignty, as 'a pretext for intervention' (Gray 2008: 159) and generally a sign of 'imperialism', especially when the use of force is involved.

Also in the context of the European Union the ancient adage has been drawn upon. Four Advocates General have used the expression 'civis europeus [sic] sum'.<sup>II</sup> According to Advocate General Jacobs, who originally introduced the phrase into the vocabulary of the European Court of Justice, a Union citizen is 'entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values [...]'.<sup>III</sup> However, *civis europaeus sum* in these cases concerned the invocation of fundamental rights by Union citizens *within* the EU. The protection of Union citizens abroad is a matter distinct from the legal momentum behind consolidation and incorporation of citizens' rights protection inside the Union's borders.<sup>IV</sup> Still, the introduction of Union citizenship into the primary law by the Maastricht Treaty already included an explicit external component, *viz.* the protection by the diplomatic or consular authorities of any Member State in third countries for Union citizens whose Member State is not represented (Art. 8c TEU (Maastricht Treaty version); for the post-Lisbon provision, Art. 23 TFEU; see also Art. 46 Charter of Fundamental Rights). Apart from consular and diplomatic protection proper, an innovation by the Lisbon Treaty is the inclusion among the objectives of the Union to 'uphold and promote its values and interests and contribute to the protection of its citizens' in its external relations (Art. 3(5) TEU). The failed Constitutional Treaty did not refer to the protection of citizens abroad as a general Union objective (Art. I-3(4) CT). This novelty was introduced by the French government at the Intergovernmental Conference of 2007 (de Poncins 2008: 75-76). The motivation behind this was, it has been argued, to underline that the Union is not a 'Trojan horse' of globalisation, but instead acts as a shield for its citizens from globalisation's challenges and downsides (Sauron 2007: 30). Moreover, it could be seen as the constitutional concretization of the EU's objective, introduced in Art. 2 of the Maastricht Treaty, 'to assert its identity on the international scene'. One important aspect of this would be the external dimension of Union citizenship, *i.e.* also 'to reinforce the identity of European citizens throughout the rest of the world', as Ianniello Saliceti puts it, who states furthermore that this had been pursued already as early as 1985 by the 'Adonnino Committee' (2011: 92).



With the introduction and rapid development of the Common Security and Defence Policy (formerly ESDP), the European Union has equipped itself also with military capabilities that can be used to pursue its foreign policy (or ‘external action’, to use the post-Lisbon term).<sup>V</sup> The extent to which these capabilities can also be used to pursue the objective of protecting Union citizens abroad will be addressed here in the context of Operation *Atalanta*, the EU’s first naval military operation. Launched on 8 December 2008 (Council Decision 2008/918/CFSP), it will continue at least till December 2012 (Council Decision 2010/766/CFSP, Art. 1(5)). The academic debate surrounding *Atalanta* has thus far focussed on issues pertaining to legal aspects of the detention and prosecution of pirates and/or Law of the Sea issues (Fischer-Lescano and Kreck 2009; Fink and Galvin 2009: 384-385; Naert 2010: 179-191), or the geopolitical implications of the operation (Germond and Smith 2009; Kamerling and van der Putten 2010; Holmes 2010; Larik and Weiler 2011). However, it is argued here that the issue of protection of Union citizens should not be neglected, especially in view of both the unique (one might even say *sui generis*) nature of the concept of Union citizenship as well as of the EU as an actor in matters of international security. International organisations such as NATO do not contain any notion of common ‘citizenship’, whereas for individual countries it is a rather traditional and uncontroversial issue to protect their own nationals, who are bound by a ‘genuine link’ to their state,<sup>VI</sup> abroad. For some it is even a constitutional objective (Ianniello Saliceti 2011: 97). Consequently, these peculiar features set the EU and Operation *Atalanta* apart from the other actors and their respective deployments in this theatre. Moreover, and in contrast to other CSDP/ESDP operations, *Atalanta* serves as a well-suited case study for the external protection of Union citizens. Whereas former missions were strictly concerned with external objectives that could only indirectly or incidentally affect the security of Union citizens, e.g. peace-keeping operations, police/rule of law missions or security sector reform programmes, *Atalanta* addresses pirate attacks in one of the most heavily-used maritime trade routes in the world, through which also large numbers of ships flying flags of EU Member States and EU citizens pass (Germond and Smith 2009: 587-589).

It is against this backdrop that the novel *civis europaeus* encounters the re-surfacing *hostis humani generis* (as pirates were classically termed). Consequently, the question emerges whether Union citizens abroad can also trust here in the weight of the legal concept of *civis*



*europaeus sum*. Can they rely on the assets of Operation *Atalanta*, i.e. – to use Palmerston’s imagery – the ‘watchful eye’ and the ‘strong arm’ of the Union to protect them against the threat of pirate attacks? In order to approach this question, the paper will proceed as follows: Section 2 addresses the international law aspects of the of the external protection of citizens by forceful means; section 3 turns to the EU’s constitutional framework and the issue of using the CSDP to pursue the objective of protecting EU citizens aboard; section 4 subsequently scrutinizes to which extent the mandate of Operation *Atalanta* takes this goal into account, observing that in spite of a constitutional objective the operation is not explicitly pursuing the protection of Union citizens. Section 5 points out the implications of this tension between the two. The paper concludes that the mandate of *Atalanta*, by focussing entirely on ‘universal’ objectives and neglecting the *civis europaeus*, is – if not unconstitutional – constitutionally incomplete.

## 2. International law aspects

The deployment of military forces and the use of force in order to protect a country’s citizens abroad raise first and foremost the question of legality under international law. For the EU the issue to use force for that purpose arises in the context of *Atalanta* with regard to crew members and passengers with Union citizenship who are threatened by pirates in the operation theatre.

In view of the general prohibition imposed on states to use force ‘in their international relations’ under Article 2(4) of the Charter of the United Nations, we have to address first the general parameters of international law in terms of the use of force to protect one’s citizens abroad. Even though International Law Commission (ICL) Special Rapporteur Dugard considered ‘[t]he use of force as the ultimate means of diplomatic protection’ in his 2000 report (International Law Commission 2000: para. 47; see also Gray, 2009: 136-137), this opinion cannot be regarded as the predominant one, and was not even shared by the majority of the ICL members (Gray 2009: 137). The current ILC commentary clearly states that ‘[t]he use of force [...] is not a permissible method for the enforcement of the right of diplomatic protection’ (International Law Commission 2006: 27). Beyond the realm of diplomatic protection, international legal scholarship either discards any notion of forceful citizen protection as an exception to the prohibition to use



force (Bothe 2004: 604-605), or see merely little support in state practice and legal opinion for it (Gray 2008: 156-160).<sup>VII</sup>

However, in the present case, we are not dealing with intervention on the territory of another state and/or against foreign state agents, but with pirate attacks – that is non-state actors – on ships within the territorial waters of Somalia or on the high seas. This is, in the first place, regulated by the international Law of the Sea as codified in the United Nations Convention on the Law of the Sea (UNCLOS). The convention provides a definition of piracy (Art. 101 UNCLOS), and allows any state to seize pirate ships on the high seas, arrest the pirates and exercise jurisdiction over them (Art. 105 UNCLOS). Therefore, on the high seas, a state is allowed to use force against pirates without having to invoke any exceptional (and controversial) ‘right’ to protect its own citizens or to exercise a humanitarian intervention (Ronzitti 1985: 137).

Importantly, in this particular case, the United Nations Security Council (UNSC) has passed a number of resolutions addressing the piracy surge off the Coast of Somalia, which supplement, and in view of the supremacy of the UN Charter to other international agreements partly supplant (Art. 103 UN Charter), the UNCLOS framework. This concerns in particular United Nations Security Council Resolution 1816 (2008) of 2 June 2008 (para. 7),<sup>VIII</sup> which authorizes states operating under this legal framework to use ‘all necessary means to repress acts of piracy and armed robbery’ (para. 7(b)), i.e. also to use force. Overall, in essence it makes ‘the rules of international law concerning piracy on the high seas applicable also to territorial waters’ of Somalia (Treves 2009: 404).<sup>IX</sup>

The addition of the term ‘armed robbery’ to the UNCLOS-defined term ‘piracy’ is of some significance, as the latter notion might not always be applicable to modern forms of piracy (e.g. the requirement that always two ships must be involved). Treves points out that the former term is used in the context of the International Maritime Organization (IMO) and supplements the notion of piracy, ‘inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship’ (Treves 2009: 403). According to the IMO, ‘armed robbery’ is defined as ‘any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy” directed against a ship or against persons or property on board such a ship within a State’s jurisdiction over such offences.’ (International Maritime Organization 2011: Annex, para. 2.2.)



However, even though the Security Council is acting here under Chapter VII of the UN Charter, the Transitional Federal Government (TFG) of Somalia has to be notified of operations in its territorial waters (United Nations Security Council Resolution 1816 (2008), para. 11),<sup>x</sup> which Naert calls ‘a simplified form of consent’ (Naert 2010: 185). While superfluous in view of the powers conferred upon the Security Council under Chapter VII, this could be seen as a supplementary invitation by Somalia for states to intervene in the fight against piracy in its territorial waters, which could serve to preclude illegality of the use of force as covered by such an invitation (Ronzitti 2007: 417). The EU has notified the TFG of Somalia accordingly (See Council Decision 2008/918/CFSP of 8 December 2008, point 4 of the grounds).

One should distinguish here the use of force against pirates from that in a situation of armed conflict between states. As Treves puts it, in contrast to acts of self-defence, counter-piracy should ‘be assimilated to the exercise of the power to engage in police action on the high seas on foreign vessels which is permitted by exceptions to the rule affirming the exclusive jurisdiction of the flag state’ (2009: 413). Similarly, but more accurately, Lubell calls for a ‘law enforcement approach of the scaled use of force’, which recognizes that even though we face here a force level below that of armed conflict, ‘[t]he level of force and types of weapons employed may well rise beyond the usual domestic crime scenarios’ (2010: 225).

In view of the general authorization to combat piracy by the Law of the Sea and its extension *ratione materiae* (‘armed robbery’) and *loci* (Somali territorial waters) through UN Security Council resolutions (and affirmed by TFG notifications), a state cannot be seen as violating another state’s rights or territorial integrity if it uses force against pirates off the coast of Somalia.<sup>xI</sup> There is no reason why this conclusion should change when the act of repressing piracy was carried out in a situation where the state’s own citizens were under threat. As was pointed out earlier, states do not have to invoke an exceptional right to protect their citizens to employ forceful measures against pirates. Hence, they can use these measures also to that particular end. As states are under no obligation, but are instead generally authorized to combat piracy, the protection by the (proportionate) use of force of a state’s nationals within these legal parameters is to be considered unobjectionable under international law.<sup>xII</sup>



As regards the special nature of the EU as an international actor, it follows from the foregoing that in any case its Member States would be allowed to use force against pirates within the particular legal framework concerning Somali piracy. Only in case of overstepping this framework and breaching international law would the question of responsibility between the Member States providing military assets to *Atalanta* and the EU itself arise. After all, the relevant Joint Action states that '[t]he *European Union (EU)* shall conduct a military operation [...] called "Atalanta", not the several Member States (Council Joint Action 2008/851/CFSP, Art. 1(1), emphasis added).

Such questions of international responsibility of the EU notwithstanding (see Naert 2010: 641-644), it seems clear that force by a Member State operating within *Atalanta* could be used to protect a Member State's own citizens. There have been already a number of instances where EU Member States contemplated the use of force or actually resorted to forceful means to protect their citizens against pirates. According to French diplomatic sources, '[o]n three occasions French forces have had to intervene to protect French citizens taken hostage by pirates'. This concerned the vessels *Le Ponant*, *Carré d'As* and *Tanit* (Permanent Mission of France to the United Nations in New York 2009). In early May 2009, a rescue operation by German commandos of the kidnapped freighter *Hansa Stavanger* anchored in a Somali harbour was narrowly aborted for security concerns (Spiegel 2009).

Furthermore, and crucially, this authorization under the international legal framework also covers the protection of non-nationals, which obviously makes sense seeing the often multinational setup of merchant ship crews and the general interest of the international community involved. These non-nationals could therefore also come from other EU Member States. A fitting example here is the rescue mission conducted by Dutch forces from the frigate *Tromp* operating in the framework of *Atalanta*, which also saved German nationals from pirates that had hijacked the *MS Taipan* in April 2010 (EU NAVOR Somalia 2010). This – at least in effect – amounts to an act of an EU Member State's military forces protecting EU citizens from pirates. In view of the foregoing this is to be deemed legal under international law. The extent to which such protection of Union citizens is framed by EU law will be dealt with in the next two sections.



### 3. EU constitutional law aspects

From the perspective of EU primary law, as was stated in the introduction, the Lisbon Treaty introduced among the objectives of the Union to ‘uphold and promote its values and interests and contribute to the protection of its citizens’ (Art. 3(5) TEU). From the emerging literature on the Union’s objectives as a category of constitutional law,<sup>xiii</sup> it can be concluded that these are binding obligations that commit the Union and its institutions to actively pursue these objectives within their areas of competence and that frame the use of their discretion accordingly (Calliess 2003: 90-93; Ruffert 2011: 41-44; Reimer 2003: 1000-1007; Kotzur 2005: 314-315; Plecher-Hochstraßer 2006: 105-136; Sommermann 1997: 280-296; Ipsen 1972: 556-563). In this literature, there is general agreement that also the Member States are bound, albeit indirectly, by these objectives by virtue of the duty of cooperation (Art. 4(3) TEU). Of course external relations, and in particular the Union’s Common Foreign and Security Policy (CFSP), of which the CSDP is a component, have certain special characteristics (intergovernmentalism and very limited of jurisdiction of the ECJ, see Art. 24 TEU; and Thym 2010: 330-338; van Elsuwege 2010). However, there are no cogent reasons to suggest that external action-related objectives should be treated in a fundamentally different way from internal policy-related objectives (Larik 2011).

How, then, do the objectives of upholding and promoting the Union’s values and interests and contributing to the protection of its citizens abroad apply to the piracy surge off the Coast of Somalia? As far as the (economic) interests are concerned, the stakes for the EU are obvious. The strategic economic importance for the EU lies in the fact that the Gulf of Aden is a maritime chokepoint through which 90 percent of merchandise and 30 percent of the energy resources consumed in Europe pass (French Ministry of Defence 2010; also Larik and Weiler: 85-86). Therefore, as French vice-admiral Bruno Nielly puts it, ‘il n’est pas question pour l’Europe de laisser ne serait-ce qu’un tronçon de cette route menacé par un phénomène tel que la piraterie’ and that ‘[l]’Europe, d’abord, y défend ses intérêts’ (French Ministry of Defence 2010). Also Germond calls Operation *Atalanta* ‘the first ever ESDP operation that primarily aims at defending Member States’ interests (that is, providing security to their merchant shipping)’ (2010: 53).<sup>xiv</sup> In addition, Europe’s fishing industry should not remain unaddressed, which has been very active in the area and



has been criticized frequently for taking advantage of the lack of effective state power in Somalia (Phillips 2009; and generally on illegal fishing Lehr and Lehmann 2007: 12-13). Apart from the economic, there are also wider security concerns such as the pirates collaborating with terrorist groups, and of course the protection of EU citizens (Germond and Smith 2009: 580-581), a matter to which we will return in detail. Therefore, *Atalanta* can definitely be seen as a measure in the pursuit of the Union's interests.

One could also argue that the EU's approach in *Atalanta* is framed to safeguard and promote its values. Examples for this would be the integrated approach that also aims at improving the situation in Somalia itself (above all through the EU Training Mission in Somalia, Council Decision 2010/197/CFSP), even though the effectiveness of this 'comprehensive approach' can be questioned (Sanchez Barrueco 2009). With particular regard to the treatment of captured pirates, safeguard mechanisms to protect their human rights stand out. A prominent illustration of this is that the EU ensures that they will not be subject to the death penalty when tried in third countries (Council Joint Action 2008/851/CFSP, Art. 12(2)). Also multilateral cooperation among the different actors in the region is to be fostered, which, too, can be seen as expressions of European values.<sup>xv</sup>

But what about the potential contribution of *Atalanta* to the protection of Union citizens, as an objective that is stipulated explicitly next to values and interests, i.e. an objective in its own right? Here, first of all the question needs to be answered whether, and to which extent, the CFSP/CSDP can be used to this specific end. As is also generally agreed concerning constitutionally-codified objectives, they do not as such establish competence (Reimer 2003: 995-996; Calliess 2003: 89-90; Kotzur 2005: 314). Given that the EU remains an entity based on conferred powers (Art. 5(1) TEU), the competence to pursue a Union objective and the procedures to be followed ought to be specified elsewhere in the primary law (Art. 3(6) TEU).

As a preliminary observation, the objective of citizen protection abroad is not explicitly reiterated or linked to competences and procedures in Title V of the TEU or Part Five of the TFEU on external action. With particular regard to the objectives of the CFSP, Art. 23 TEU states that the Union's international action 'shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1'. However, Arts. 21 and 22 TEU, which make up this chapter, do not include a specific reference to the protection of citizens. What is made explicit



elsewhere is the right of Union citizens ‘to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State’ in third countries in which their Member State of nationality is not represented (Art. 23 TFEU; also Art. 46 Charter of Fundamental Rights). This provision is situated under the heading ‘Non-discrimination and Citizenship’ in the TFEU. This raises the question whether the objective of citizen protection abroad is only to be pursued through diplomatic or consular protection as an external aspect of citizenship and, *a contrario*, not through the CFSP/CSDP.

This would seem too narrow an interpretation. The scope of the CFSP is very broad, as Art. 24(1) states that ‘[t]he Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security’.<sup>xvi</sup> Also, despite the lack of explicit reference to citizen protection there, the general Union objectives found in Art. 3(5) TEU are to guide our interpretation of, and need to be ‘read together’ with, the more specific objectives and provisions that follow in the Treaties (Lenaerts and Van Nuffel 2011: 111; Callies 2003: 91-92; Ipsen 1972: 558). Therefore, the protection of citizens can be regarded as implied under the Union’s ‘fundamental interests’ and ‘security’, which are to be safeguarded under Art. 21(2)(a) through EU external action. Thus, the Union can be deemed generally competent to protect its citizens abroad, including through the CFSP. Of course, this competence, as part of the CFSP, would be of a strictly non-exclusive kind incapable of inhibiting Member States’ own respective competence to protect their nationals abroad (Art. 2(4) TFEU; Eeckhout 2011: 171).

Turning now to the CSDP proper, Art. 42(1) TEU provides that ‘[t]he common security and defence policy shall be an integral part of the common foreign and security policy’. However, citizen protection is not explicitly mentioned here either, as civilian and military capabilities may be used by the Union ‘on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’ (Art. 41(1) TEU). That would not as such seem to include the protection of citizens.

However, the more precise enumeration of the so-called ‘Petersberg tasks’ in Art. 43(1) TEU ‘include[s]’, *inter alia*, ‘humanitarian and rescue tasks’. Even though Union citizens are not mentioned, the notion of ‘rescue tasks’ can only reasonably be understood



as referring also to rescue efforts of one's own citizens. This view finds confirmation when looking at the background of this provision. In the original 1992 Petersberg declaration of the Western European Union (WEU), the French version referred to 'des missions humanitaires ou d'évacuation *de ressortissants*' (Western European Union 1992: 7, emphasis added). This reference reappeared in a more recent factsheet of the now defunct WEU, which stated that 'Battlegroups can be used for the full range of missions and tasks listed in Article 43 of the Treaty on European Union (Petersberg missions)' including, importantly, 'the evacuation of *EU citizens*' (European Security and Defence Assembly/Assembly of WEU 2009, emphasis added). The later omission of this reference to citizens in the Amsterdam Treaty has been interpreted as intending to not a priori exclude third-country nationals from being rescued through EU missions (von Kielmansegg 2007: 632; d'Argent 1998: 391). Any other interpretation would seem to be at odds with the rather wide scope of the CSDP. According to Coelmont (2008: 6), 'apart from collective defence, all kinds of military operations one can at present realistically invent in our global world can all be undertaken in a European context as an ESDP (or CSDP) operation.' Moreover, given the prominent place of the protection of citizens among the general objectives of the Union, a systematic-teleological interpretation of the Treaties would favour the pursuit of this objective by the entire spectrum of external EU policies and capabilities, including those of the CSDP.

Of course, competence to pursue this objective through the CSDP does not dispense of the legal limitations of EU law and international law that will have to be respected in doing so. For instance, a rescue operation of EU citizens from pirates, just like any general anti-piracy action, must respect basic legal principles such as necessity and proportionality, and respect the rights of third parties (e.g. the sovereign rights of third states into whose territorial waters/territory EU citizens may be abducted by pirates and the parameters set by the UN Security Council).

Consequently, the preliminary conclusion is that the EU legal order allows the Union to use the CSDP and the assets of the Member States to pursue the objective of protecting its citizens. Furthermore, as was concluded earlier, the international legal regime in place also authorizes the use of force to that end (n.b. for counter-piracy in general, which includes but is not limited to citizen protection).



The additional question arises, then, whether the EU and its Member States are also under a stricter obligation in this regard. In particular, is there a right of EU citizens to be protected against pirates by the Union? What exists thus far – at most – is the right of EU citizens to protection by the diplomatic or consular authorities of EU Member States in case their Member State of nationality is not represented in a third country.<sup>xvii</sup> Legislatively, this has been elaborated upon by Decision 95/553/EC on the protection for citizens of the European Union by diplomatic and consular representations. But given the succinctness of the law in this regard it is certainly correct to say that ‘the *acquis* relating to the protection of EU citizens is not well developed’ (Ianniello Saliceti 2011: 97; referring also to European Commission 2006). In any event, the reference to ‘third countries’ would imply that situations on the high seas are not included, nor would be the protection by naval forces as opposed to ‘diplomatic or consular authorities’. Curiously enough though, Ianniello Saliceti discusses in this context the example of an evacuation operation from an area of crisis involving ‘rescue aircraft’ (Ianniello Saliceti 2011: 97). It is doubtful whether the notion of consular and diplomatic protection could be stretched thus far. At least the International Law Commission’s Draft Articles on Diplomatic Protection or the Vienna Convention on Consular Relations do not include this particular type of action,<sup>xviii</sup> and, *a fortiori* it would appear, acts by military forces on the high seas. At best, chartered civilian aircraft might be considered. Therefore, it can be concluded that any rights under EU law in terms of the *forceful* protection of citizens abroad by *military* means do not exist. In addition, procedurally there is no forum to invoke such rights directly *vis-à-vis* the EU in view of the exclusion of jurisdiction of the ECJ from most of the CFSP (Art. 24(1) TEU and Art. 275 TFEU).<sup>xix</sup>

#### 4. The operational mandate

Having considered the EU’s constitutional framework, let us now turn to the mandate proper of Operation *Atalanta*, and see to which extent it lives up to the objective of protecting Union citizens. The mandate and operational parameters of are set out in Joint Action 2008/851. Art. 1(1) of the Joint Action characterizes the mission as ‘a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted



with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea signed in Montego Bay on 10 December 1982 [...] and by means, in particular, of commitments made with third States [...].’ (Council Joint Action 2008/851/CFSP, Art. 1(1))

Art. 1 then proceeds to set out the operation’s basic objectives, of which there were initially two: First, protection of vessels of the World Food Programme (WFP) delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UN Security Council Resolution 1814 (2008); secondly, the protection of vulnerable vessels and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UN Security Council Resolution 1816 (2008) (Council Joint Action 2008/851/CFSP, Art. 1(1)). A third objective was introduced on 8 December 2009 by amending Art. 1 of the Joint Action, stating that ‘[i]n addition, *Atalanta* shall contribute to the monitoring of fishing activities off the coast of Somalia.’<sup>XX</sup> This can be seen as showing awareness of the controversial fishing activities by European vessels and the intention to make clear that *Atalanta* is not there to act as a military shield for the illegal exploitation of Somalia’s maritime resources.

Art. 2 of the Joint Action subsequently provides the specific objectives in the actual operational mandate. Essentially, *Atalanta* shall ‘as far as available capabilities allow’, provide protection to WFP vessels (including by placing armed units on board); provide protection of merchant vessels ‘based on a case-by-case evaluation of needs’; take the ‘necessary measures’, i.e. also the use of force, to combat acts of piracy and armed robbery; detain and transfer piracy suspects for prosecution; ‘liaise and cooperate’ with other relevant actors in the theatre; and, at a later stage, lend assistance to Somali authorities ‘by making available data relating to fishing activities compiled in the course of the operation’.<sup>XXI</sup>

A specific reference to the protection of Union citizens in the mandate is missing. It is clearly tied to the international legal framework, above all the relevant United Nations Security Council resolutions and the Law of the Sea. Especially the formulation of the mission as one ‘in support of’ UN Security Council resolutions suggests that Operation *Atalanta* functions as an executing arm of the Security Council. The EU is thereby – as the TEU puts it – contributing to ‘multilateral solutions to common problems’ (Art. 21(1), second subpara. TEU) by addressing a threat to international peace and security.



Consequently, it is to this universal end that it protects WFP ships, secures maritime traffic and pursues pirates.

Among the ships that are to be protected, WFP vessels enjoy priority. They are not only mentioned first, but are also given the express possibility to have armed units put on board. Most important, however, is the absence of a reference to ‘a case-by-case evaluation of needs’, which applies to merchant vessels. Among the merchant vessels, no distinction is made between ships sailing under EU Member State flags or those with Union citizens on board and the rest. The presentation of the operation by the Council to the public further highlights this prioritization. Features like the ‘food count’ tables used on the factsheets about the operation, informing us that between the launch of the operation and the end of 2010 about 490000 tons of food have been delivered and ‘on average, more than 1600000’ Somalis have been fed each day (Council of the European Union 2011: 2), foster the impression that this mission is of a primarily, if not exclusively, humanitarian character. A similar ‘EU citizens rescued’ count is nowhere to be found.

## 5. A mismatch of objectives?

The question now arises as to the relationship between the operational mandate and its specific objectives on the one, and the constitutional objectives of the EU Treaties on the other hand, and how they each frame the discretion of the EU forces assigned to Operation *Atalanta*. Even though, as was concluded earlier, there exist neither court jurisdiction nor individual rights here, objectives are still legally binding and serve as a normative framework for the actors called upon to pursue them.

At this point, it is worth drawing an analogy from Ianniello Saliceti’s example for the application of the principle of non-discrimination in the context of an evacuation operation of EU citizens (see *supra* section 3). He suggests that non-discrimination in such a case requires to ‘take onboard an equal number of distressed EU citizens of each nationality’ in a rescue operation by aircraft (Ianniello Saliceti 2011: 97).<sup>xxii</sup> In this example, it seems to be implied that first EU citizens would have to be rescued, leaving only any potential spare seats for third country nationals. Even though it is difficult to agree with such a strict application of equality *among* EU citizens, it reveals nonetheless the assumption



that the objective of citizen protection frames the discretion of the actors in a particular situation.

Let us assume then a situation in which an *Atalanta* warship receives distress calls from several vessels being attacked by pirates. On one ship, there are a number of EU citizens present, on the others not. There are no other military capabilities available. For the warship, the distance to the distressed ships is about the same, and given time constraints, only one ship can be helped, leaving the others at the mercy of the pirates. It is a hypothetical example, but given the vastness of the area covered and the relatively little number of warships available,<sup>xxiii</sup> it is not entirely far-fetched. In such a situation, depending on the features of the other ships, the mandate of *Atalanta* and the objectives of Art. 3(5) TEU, in particular with regard to the protection of citizens, might be at odds.

As was pointed out, the mandate of Joint Action 2008/851 prioritizes WFP ships, and provides as criterion to choose among merchant vessels a case-by-case evaluation of need. Thus, assuming there was a WFP ship among the distressed vessels, the operational mandate would unequivocally point to the WFP ship to be rescued, abandoning the EU citizens on the other ship to their fate. The general objectives of the Union, however, explicitly emphasize the protection of citizens in the EU's external action. This shifts the balance, if not towards favouring the ship with EU citizens onboard, at least to a less clear-cut priority structure. The result is a (also morally difficult) choice between either promoting the universal/altruistic value of ensuring the flow of humanitarian aid to the suffering population of Somalia or pursuing the self-interested objective of protecting one's own citizens.

What if, alternatively, the choice was between a cargo ship (with no crew members who are EU citizens) and a yacht with EU citizens? The mandate's case-by-case criterion is of little use here, as the need is equal in this example. Consequently, the mandate gives no further guidance, leaving it up to the commander of the warship to decide.<sup>xxiv</sup> Art. 3(5) TEU, in turn, frames it as a choice between safeguarding the EU's interest in safe maritime trade by helping the cargo vessel and contributing to citizen protection by helping the yacht. Though it is as such also an open choice, the explicit reference to citizens as opposed to the wide notion of 'interest' might tilt the balance towards EU citizens.

Arguably, for a nation-state, the choice to give priority to its own citizens in both cases would not be objectionable. Universal and economic objectives are not to be



discounted, but in this particular case they could not be served in view of the imperative of protecting one's own nationals first. Charity, so to say, begins at home. As Bowett points out (1986: 45), states 'will be placed under extreme political pressure to act to protect the safety of their nationals abroad' and cannot 'lightly refuse such protection when it lies within [their] powers to afford it'. Hence, one could imagine the domestic political outrage for a case in which the national military failed to prevent the kidnapping of nationals by pirates when it had the chance to do so. In the EU context, however, this is a more delicate matter. From a Member State perspective, helping another Member State's nationals is at the outset an act of altruism (e.g. the Dutch navy rescuing the German crew from the *MS Taipan*). But the fact that both of them are EU Member States with loyalty obligations towards the Union, and by virtue of the over-arching concept of Union citizenship, it becomes a self-serving act from the perspective of the outside, non-EU world.<sup>xxv</sup>

How can this tension between the Joint Action and Art. 3(5) TEU be resolved? Even though CFSP/CSDP acts are not qualified as 'legislative acts' (Art. 24(1), second subpara. TEU), they are binding and the primacy of the primary law as *lex superior* applies (on the legal nature of CFSP acts and the hierarchy of norms see Wessel 1999: 198-204; Gosalbo Bono 2006: 341-47). The introduction of Union objectives of general application (Art. 3 TEU) by the Lisbon reform bolsters this conclusion. This means that in the absence of a clear conflict, the secondary instrument, i.e. the Joint Action here, must be interpreted in conformity with the primary law. Hence, the objectives of the operation as set out in the mandate cannot be interpreted in such a way that the pursuit of any of the constitutional objectives as set out in Art. 3(5) TEU is undercut. Thus, Operation *Atalanta's* mandate is not to be construed as neglecting the protection of Union citizens altogether. Given its total absence from the mandate, there is in any event potential for disorientation or misunderstanding in critical situations where clear guidance from the legal framework would be highly desirable.

One may think about plausible reasons for the conspicuous absence of citizen protection in the mandate. One possible explanation may be the participation of third countries in the operation. To date, Norway, Croatia, Ukraine and Montenegro have contributed to *Atalanta* (Council of the European Union 2011: 2; see also e.g. Council Decision 2010/199/CFSP). Therefore, one might consider it inappropriate to mandate these countries to help protect EU citizens. Here, the same logic applies: It would



challenge the priority of protecting their own nationals (or interests) by committing themselves to *Atalanta*. Then again, it would not be inconceivable to simply add the protection of citizens of participating countries to the mandate as well. As we have seen, the ‘Petersberg task’ of rescue operations in Art. 43(1) TEU is deliberately left open to rescuing third-country nationals as well.

Another reason might be the political sensitivity of European countries regarding the issue of using military force to save their own nationals (and, *a fortiori*, other EU citizens). Therefore, the emphasis is put on the multilateral framework and universal objectives. Germany would be at the forefront of such considerations. It should be recalled that Federal President Köhler resigned from office in mid-2010 following protracted criticism for a statement that for a country like Germany, it might be necessary to also defend its interests such as free trade routes by force (for a reproduction of the original quote see Mandalka 2010). Subsequently, Foreign Minister Westerwelle tried to clarify Germany’s stance in a speech before the *Bundestag* on Operation *Atalanta* in November 2010. Regarding the protection of national interests (*Interessenwahrnehmung*) he underlined that the entire operation had as its rationale the guarantee of delivery of humanitarian aid, and only as a secondary goal there was also the protection of international maritime traffic (German Foreign Office 2010). As he put it, ‘foreign policy that is committed to humanitarian values can, may, even must also take into account one’s own interests.’<sup>xxvi</sup> However, he then softened this reference to the ‘own interests’ by stating that freedom of movement on the high seas is a common interest of the international community and that Germany was acting under a mandate of the UNSC (German Foreign Office 2010). While we see here that the pursuit of the national interest is still a contentious issue, the protection of citizens did not figure as controversial in the discussion. It was rather the tension between economic and universal humanitarian considerations. As was mentioned earlier, the German government had planned and only narrowly avoided carrying out an operation of German special forces to rescue the partly German crew of the kidnapped container ship *Hansa Stavanger*.<sup>xxvii</sup>

In other Member States, such controversies do not seem to arise at all either. The Swedish foreign ministry, for instance, also puts the protection of WFP ships first, whereas the presence of naval forces ‘is also seen to make it easier for merchant shipping in the area, including vessels that fly the Swedish flag and that sail in the area’ (Ministry of



Foreign Affairs of Sweden 2010). Here, the protection of Swedish ships serves as an indirect motivation. More explicit is the Spanish government's stance. The ministry of defence points out that 'the problem of piracy represented not just a threat to international maritime security, but also to national interests in the area, represented by the fishing activities of the Spanish tuna fleet in the Indian Ocean.'<sup>xxviii</sup> For the Spanish government, the protection of Spanish vessels and fishermen and WFP ships appear side by side as motivation for sending warships to that area (Spanish Ministry of Defence 2010). As was mentioned earlier, the French already have a history of using force to rescue their nationals from pirates captured by Somali pirates.

Thus, neither third country participation nor political sensitivity seem to explain the absence of citizen protection from the mandate of *Atalanta* in a plausible way. To the contrary, a look at the national stances of EU Member States rather indicates that the forceful protection of nationals is not controversial. But this equally shows that citizen protection, especially in the realm of security policy, is still seen from a strictly national viewpoint, which remains thus far unaffected by the concept of 'Union citizenship'. The elevation of the protection of EU citizens abroad to a constitutional objective of the Union does not seem to have altered this. Illustrative is here again the example mentioned at the outset, i.e. the rescue of German crew members of the hijacked *MS Taipan* by Dutch troops from the frigate *HNLMS Tromp* operating in the framework of *Atalanta*. Not even the Operation itself regarded this as an act of protecting EU citizens by CSDP assets. Instead, the press release by *Atalanta* on the successful rescue operation limited itself to stating that 'EU NAVFOR HNLMS Tromp retakes pirated MV Taipan', thus identifying the warship as part of the EU operation (EU NAVFOR Somalia 2010). Also in the national media of both countries it was not portrayed in a European perspective (NRC Handelsblad 2010; Spiegel 2010). Especially telling was the angle taken by an Associated Press reporter who subtitled his article on the incident: 'Dutch marines sidestep EU bureaucracy to rescue German container ship from Somali pirates' (Corder 2010). From this viewpoint, the EU does not appear as the actor or even facilitator for the Member States to act, but as an obstacle to achieving the goal of mutual protection of nationals.



## 6. Conclusion: *Civis europaeus in foro interno, externo barbarus*

The discussion of this encounter between the *civis europaeus* and the *hostis humani generis* off the coast of Somali yields the following observations. First, in this particular setting, international law allows the protection by the use of force of victims of piracy by virtue of the Law of the Sea and the special regime imposed by the UN Security Council. Within this particular framework, states are allowed to use force *also* for the purpose of protecting their own citizens from pirates. Secondly, the concept of ‘Union citizenship’ gives us a new perspective to look at the challenge for the Member States to protect jointly their citizens abroad. The altruistic objective of protecting a foreigner is transformed into the Union’s constitutionally entrenched self-interest to protect *its omni* citizens. Union citizenship has now an explicit external dimension, which goes beyond diplomatic and consular assistance, and indeed also extends to the CFSP/CSDP. Thirdly, the mandate of Operation *Atalanta* clearly prioritizes the pursuit of universal objectives, above all the protection of WFP ships, and otherwise lumps together all merchant ships, making no reference to Union citizens at all. Therefore, fourthly, while the notion of EU citizenship looms large in the primary law and in the Union’s internal sphere, it is conspicuously absent in the implementing acts of the operation. This creates tension which in extreme situations can lead to putting the protection of Union citizens in the back seat. Whereas this would be politically highly controversial in a national setting, the salience of this issue appears not to have surfaced at the Union level.

In view of these observations, it can be concluded that there is a widening gap between the powerful notion of Union citizenship within the Union and its present weakness outside of it. Internally, the development of Union law makes it increasingly difficult to construe nationals from different Member States as proper ‘foreigners’. The phrase *civis europaeus sum* carries weight *in foro interno*. Externally, we see that the *cives europaei* might receive consular assistance in case, for instance, they get jailed, are hospitalized or lose their passport. However, in the face of pirate attacks in the troubled waters off the Somali coast, *civis europaeus sum* remains thus far a call that falls on deaf ears.



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<sup>I</sup> For an early example from the New Testament, see Acts of the Apostles 22:29.

<sup>II</sup> Those opinions are: ECJ, Case C-168/91 *Konstantinidis v Stadt Altensteig*, Opinion of AG Jacobs, 1993 ECR I-01191, para. 46; which was later taken up in ECJ, Case C-380/05, *Centro Europa*, Opinion of AG Poiares Maduro, 2008 ECR I-00349, para. 16; ECJ, Case C-228/07 *Jörn Petersen*, Opinion of AG Ruiz-Jarabo Colomer, 2008 ECR I-06989, para. 16; and ECJ, Case C-34/09 *Zambrano*, Opinion AG Sharpston of 30 September 2010, nyr, para. 83.

<sup>III</sup> Case C-168/91 *Konstantinidis*, Opinion of AG Jacobs 1993 ECR I-01191, para. 46. It also appears as the heading for the chapter on Union citizenship in a textbook on EU constitutional law (Rosas and Young 2011: 128).

<sup>IV</sup> For a pertinent example of this momentum notice the ECJ's judgement in ECJ, Case C-34/09 *Zambrano*, Judgement of 8 March 2011, nyr, which concerned a situation lacking any kind of transnational element, but was based solely on the status as a Union citizen. Note also Arts. 20-22 TFEU and Arts. 39-45 Charter of Fundamental Rights on the rights of EU citizens within the Union.

<sup>V</sup> For a recent overview see Webber, 2011. Following the entry into force of the Lisbon Treaty, the Union's CSDP institutional structure has been moved to the European External Action Service (EEAS), see Council Decision 2010/427/EU, Annex.

<sup>VI</sup> For a discussion of the difficult transferability of the 'genuine link' of nationality to the EU context under international law, see Vigni, 2011.

<sup>VII</sup> But see Ronzitti (2007: 416-417), who concludes that it might constitute a distinct exception to the prohibition to use force based on customary international law and points to changing opinion and practice of states that were traditionally opposed to such an exception.

<sup>VIII</sup> See United Nations Security Council Resolution 1816 (2008) of 2 June 2008, S/RES/1816 (2008), para. 7.

<sup>IX</sup> For incursions even onto Somali soil, note United Nations Security Council Resolution 1851 (2008) of 16 December 2008, S/RES/1851 (2008), para. 6.

<sup>X</sup> See also the more recent United Nations Security Council Resolution 1897 (2009) of 30 November 2009, para. 8, which affirms the necessity of the consent of the TFG.

<sup>XI</sup> Of course, general principles and basic human rights are to be observed, i.e. ensuring that the use of force is 'unavoidable, reasonable and necessary' (Treves 2009: 414; also Lubell 2010: 225-226). In other words, the principle of proportionality can be applied here by analogy.

<sup>XII</sup> See also already Ronzitti, 1985: 137. Given this express authorization, the arguably more far-fetched line of argumentation according to which pirate attacks could be deemed an armed attack by non-state actors triggering the right to self-defence will be omitted here. See in detail on this 9/11-related discussion Gray, 2008: 193-253; Lubell, 2010: 29-36; and on protection of nationals as a form of self-defence Bowett, 1986. In the EU context, note that the mutual assistance clause (Art. 42(7) TEU) only applies '[i]f a Member State is the victim of armed aggression on its territory', which therefore does not cover attacks on citizens abroad.

<sup>XIII</sup> Of course, the constitutional approach to EU law remains a matter of on-going debate (Martinico 2009; Martinico 2011) and one should certainly refrain from unreflecting 'constitutional labeling' (Avbelj 2008: 26). However, it seems beyond doubt, and sufficient for the present purposes of this paper, to point out that the EU primary law today fulfils most of the functions a national constitution would fulfil in a national legal order (in detail Calliess 2011).

<sup>XIV</sup> The reference to Member State interests, however, detracts from the notion of (autonomous) EU interests that are to be defended. As the world's leading trade power, it may well be assumed here that the EU is also defending *its* interest in secure maritime trade, not just that of the individual Member States. Germond and Smith (2009: 587-589) therefore refer more accurately to the interests of both the Union and its Member States, which are more directly at stake in *Atalanta* than in previous CSDP/ESDP missions.

<sup>XV</sup> Liaising with other organisations is part of the mandate, Council Joint Action 2008/851/CFSP, Art. 2(f); for the practice of the EU as promoter of coordination between the most important actors see Larik and



Weiler, 2011: 93-97. Compare this in particular with Art. 21(2), second subpara. TEU.

<sup>XVI</sup> This includes also ‘the progressive framing of a common defence policy that might lead to a common defence’. However, as was pointed out above, protection of EU citizens against pirates is not to be construed as collective/common defence. On the broadness as well as ill-defined nature of CFSP competence (Art. 2(4) TFEU), see Sari, 2011.

<sup>XVII</sup> See further the contribution by Madalina Moraru to this special issue.

<sup>XVIII</sup> Art. 1 of the ILC Draft Articles on Diplomatic Protection (see also *supra* section 2 on the debate within the ILC); and Art. 5 Vienna Convention on Consular Relations.

<sup>XIX</sup> Art. 24(1) TEU and Art. 275 TFEU. The two exceptions provided, i.e. patrolling the border between CFSP and other Union competences (Art. 40 TEU) and the legality of restrictive measures (Art. 275 TFEU), would not apply in the present case.

<sup>XX</sup> Art. 1(3) of the Joint action as amended by Council Decision 2009/907/CFSP, Art. 1.

<sup>XXI</sup> Council Joint Action 2008/851/CFSP, Art. 2. Council Decision 2009/907/CFSP added the words ‘and cooperate’ to point (f) and added point (g) on data transfers.

<sup>XXII</sup> Arguably, this is somewhat reminiscent of Noah’s Arc and the divine instruction to save ‘two of every kind’ (Genesis 6:19). Also, whether the EU law principle of equal treatment can overrule humanitarian considerations (‘women and children first’) or practical effectiveness (‘first come, first served’) can be questioned.

<sup>XXIII</sup> The area of operation of *Atalanta* is about 2 million square nautical miles, i.e. an area comparable to twice that of the Mediterranean, and is being patrolled by about a dozen *Atalanta* warships and two to four reconnaissance aircraft. Even by adding the deployments of the other navies, the dispersion remains very thin.

<sup>XXIV</sup> Among the merchant vessels, according to Sanchez Barrueco (2009: 221), the wording ‘on a case-by-case’ basis ‘might suggest that ships carrying a European flag would prevail but to date this assumption has not proven to be correct.’

<sup>XXV</sup> For an interesting discussion of the transformation of *bonum commune* to *bonum particulare* depending on the point of view, see Isensee, 2010: 8-9 and 19-22.

<sup>XXVI</sup> ‘Eine Außenpolitik, die humanitären Werten verpflichtet ist, kann und darf, ja muss auch die eigenen Interessen im Blick behalten.’ (my translation, German Foreign Office 2010).

<sup>XXVII</sup> It should be noted that whereas the rescue team formed part of the German Federal Police, it was stationed on a US navy vessel, which was escorted by German warships. Historically, one could also recall here the rescue by German special forces of the kidnapped aircraft *Landsbut* in 1977, which, coincidentally, took place on Somali soil as the plane had landed on the airport of Mogadishu (Ronzitti 1985: 79).

<sup>XXVIII</sup> ‘[...] el problema de la piratería en Somalia representaba, no sólo una amenaza para la seguridad marítima internacional, sino también para los intereses nacionales en la zona, representados por la actividad pesquera de la flota atunera española en el Índico.’ (my translation, Spanish Ministry of Defence 2009).

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**Protection of EU citizens abroad:  
A legal assessment of the EU citizen's right to consular  
and diplomatic protection**

by

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## Abstract

The wide range of disasters that has recently hit third countries has shown that not even the Member States with the widest network of consular and diplomatic representation can ensure on their own the protection of their nationals located in the affected areas. The present paper addresses the question of whether the EU citizenship confers to the citizens of the Member States real benefits when they find themselves in distress outside of the Union's borders. It critically assesses the legal nature, content and effects in the domestic legal orders of the least developed right recognised to the EU citizen: the right to protection abroad (Art. 20(2)(c) TFEU). The paper will demonstrate that the EU citizen has a clear, individual and directly effective right to receive non-discriminatory protection in third countries abroad from any of the Member States that is represented in loco. Nevertheless, since for the moment, the right to protection abroad is limited to an application of the principle of non-discrimination based on nationality, the paper will show that in practice, the effectiveness of the EU citizen's right to protection abroad is hindered by the divergent regulatory frameworks of the Member States on consular and diplomatic protection of nationals, frameworks which have not, so far, been harmonised by a EU measure. The paper concludes by describing the new roles acquired by the Union after the Lisbon Treaty in the field of consular and diplomatic protection of citizens abroad and how this change influences the role of the Member States in a traditional State-like activity.

## Key-words:

EU law – public international law – Lisbon Treaty – consular and diplomatic protection – EU citizenship – EEAS



*'There are fifty-four cities on the island, all spacious and magnificent, identical in language, customs, institutions, and laws.'*

Sir Thomas More, *Utopia* (1516)

## 1. Introduction

The recent and devastating natural and man-made disasters which so far have affected all the regions of the world, from countries of North Africa to the Persian Gulf (Tunisia, Egypt, Libya and Barhein) and Japan<sup>I</sup>, have brought back to public attention the issue of aid that a EU citizen who is in difficulties in a country outside the EU can expect to receive when his home Member State is not represented in that non-EU country.

In these situations of emergency and extreme difficulty, any Union citizen who finds himself unrepresented<sup>II</sup> by his home Member State in a third country would obviously like to know whether his 'additional'<sup>III</sup> and 'fundamental'<sup>IV</sup> status of EU citizen may give him any additional benefits to those flowing from national citizenship while outside of the Union's borders. Or do the rights and freedoms resulting from the EU citizenship stop at the borders of the Union's internal market?

For instance, when Haiti was hit by a tsunami in 2010, less than half of the Member States had a consular or diplomatic mission *in loco* to which their nationals could resort to for help. When the democratic revolution shook Libya in the spring of 2011, only 8 Member States were represented, while a total of 6000 EU citizens were in need of protection.<sup>V</sup> The aforementioned crises are not isolated events, but they are part of a phenomenon which has developed in the last decade. More and more EU citizens travel outside of the Union,<sup>VI</sup> while increasingly, certain of them establish themselves in third countries and thus need protection abroad on a regular basis.<sup>VII</sup> While the number of EU citizens in need of protection abroad increases, the number of consular and diplomatic representations of the Member States decreases, mainly due to the financial crises that have recently affected each of them.<sup>VIII</sup> The result is that a number, higher than even before, of EU citizens cannot obtain protection in third countries from their home Member States.



In light of the fact that more and more EU citizens find themselves without protection from their home Member State, the questions that this paper seeks to answer are: firstly, whether the nationals of the unrepresented Member States have a right to protection while in third countries under the EU law, and secondly, from whom should they ask for this kind of help. Should the EU's delegations be responsible for the EU citizens abroad<sup>IX</sup>, or should the latter turn to the consular or diplomatic representations of the other Member States that are represented in third countries, because the European Union as an international organisation is not entitled under public international law to exercise a State reserved competence such as consular and diplomatic protection of nationals?<sup>X</sup>

The paradox is that even if the Union's citizens travel now more frequent outside of the Union, they are not more aware of the rights the foundational Treaties of the EU confer them while located in third countries. From the very beginning of the concept of EU citizenship, the citizens have been endowed with a Treaty based right which reads as follows

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State'.<sup>XI</sup>

Notwithstanding, 2006 and 2008 Eurobarometer surveys<sup>XII</sup> revealed that the majority of EU citizens do not know they have this right, and, even if they know of its existence, they do not know what exactly are they entitled to receive under this right.<sup>XIII</sup> When the EU citizens were asked what kind of assistance would they expect to receive from the Member State they turn to for help, the majority of them responded that they expect to receive the same kind of help, regardless of which of the Member States they approach (Flash Eurobarometer no. 294 'EU citizenship' of March 2010).

This paper will show (section two) that, for the moment, despite the wish of the majority of EU citizens, EU law does not confer them a right to uniform protection abroad, because the Treaty provides for a mere prohibition of discrimination based on nationality, and does not require the Member States to harmonise their national laws on consular and diplomatic protection of nationals. Section two will discuss the exact rights a EU citizen can claim under the Treaty based right of protection by the consular and



diplomatic authorities of the Member States while outside of the Union's borders and assesses the legal effects of these rights within the Member States' domestic legal orders.

After looking at the material scope of the EU citizen's right to protection in third countries, the paper continues by addressing the question of the actors competent to ensure the EU's model of consular and diplomatic protection of the EU citizens. Under public international law, the question has long received a clear answer (Vattel, 1758; Amerasingh, 2008), which has remained mostly un-changed<sup>XIV</sup> for the last decades - it is only the State of nationality that has competence to exercise consular and diplomatic protection of its own nationals.<sup>XV</sup> However, under EU law, the State of nationality is no longer the sole actor entitled to exercise consular and diplomatic protection of its own citizens. First, the Maastricht Treaty entitled other Member States than the Member State of nationality to exercise consular and diplomatic protection for the EU citizens, and, now, the Lisbon Treaty has expressly conferred a role for the European Union, an international organisation, in the exercise of protection abroad of the EU citizens.<sup>XVI</sup> Section three of this paper assesses the way in which the Lisbon Treaty has changed the exercise of consular and diplomatic protection of the Union's citizens in third countries and the division of roles between the EU and the Member States in this field.

## 2. The rights of the EU citizen in distress in third countries under the EU law framework

18 years have passed since the Maastricht Treaty conferred on the EU citizen a right to protection in third countries when he is not represented *in loco* by his home Member State. Despite the long existence of this right and the fact that its material scope has remained unchanged by the several Treaty amendments,<sup>XVII</sup> EU citizens have still barely exercised this right.<sup>XVIII</sup> A recent analysis of Art. 23(1) TFEU identified as the main cause for the low level of claims by the EU citizens the different standards of protection abroad of nationals existing between the Member States (Faro & Moraru, 2011). It will be shown in the following paragraphs that the EU Treaties have provided for a mere prohibition of discrimination based on nationality, which does not necessarily require harmonisation of the national practice and legislation.<sup>XIX</sup> Thus, the EU legal framework is



made up of 27 different forms of protection abroad of the EU citizens by their home Member States.

In light of the discrepant national regulatory frameworks on consular and diplomatic protection of citizens,<sup>xx</sup> it is no surprise that the EU citizen is not aware or is confused about the rights he enjoys while he is in distress in third countries. Ironically, even if the Union's citizen is aware of what the EU law confers on him, this paper argues that the effectiveness of the right is hindered because of the following elements: 1) the fact that the principle of non-discrimination based on nationality provided in Art. 23(1) TFEU has a very limited standardization force, thus leaving the content of the EU citizen's right to protection abroad at the level of only the minimum denominator of what the Member States confer on their own nationals; since there is a large discrepancy between the domestic standards of protection abroad of nationals, the content of the EU right to protection abroad is close to nothing; 2) absence of domestic legal remedies available to the EU citizens in certain of the national judiciatures against acts or refusal to provide consular and diplomatic protection; and 3) currently, limited legal remedies existing at the Union level.<sup>xxi</sup>

In light of the problems raised above, this paper plans to shed light on the material scope of the EU Treaties' Articles, as amended by the Lisbon Treaty, on consular and diplomatic protection of the EU citizens abroad. The paper will argue that the still persistent confusion surrounding the area is the inevitable result of accommodating divergent domestic frameworks on consular and diplomatic protection of nationals under the EU law umbrella: ranging from matter reserved to the executive's control to a fundamental right to protection abroad of the national enshrined in the Constitution. In light of the numerous and wide discrepancies existent between the national frameworks on conferral of protection abroad on nationals<sup>xxii</sup>, the confusion surrounding the material and personal scope of the EU citizen's right to protection abroad will decrease only if the national practices are harmonised.<sup>xxiii</sup>

The paper will seek to identify the material scope of the EU citizen's right to protection while outside the Union's borders by analysing: 1) the legal status of the EU citizen's protection in the world; 2) whether Art. 20(2)(c) TFEU confers a right or only a prohibition of discrimination based on nationality; 3) whether the equal treatment principle is applicable only to consular protection requests or also to diplomatic protection requests



of EU citizens; and finally whether the EU citizen's right to consular and diplomatic protection is directly effective within the domestic legal orders.

## **2.1. The legal status of the EU citizen's protection abroad by the consular and diplomatic officials of the Member States - right or entitlement to legitimate expectations?**

The legal status of the EU citizen's protection in third countries – whether a right or entitlement – is not entirely clear<sup>xxiv</sup> for either academics<sup>xxv</sup> or practitioners, be they from the Member States,<sup>xxvi</sup> or from the EU's Institutions.<sup>xxvii</sup>

The difference between 'right' and 'entitlement to legitimate expectation' as legal status of the protection the EU citizen can enjoy in third countries is of utmost importance for what the citizens can claim in practice. The doctrine of 'legitimate expectations' applies to areas perceived as matters reserved to the executive power, where the latter enjoys discretionary powers to define the content of the policy. If the protection of the EU citizen in the world is considered an entitlement to legitimate expectations, then the EU citizen will be entitled only to having his claim properly taken into account by the administrative power while the latter considers his individual case.<sup>xxviii</sup> The EU citizen will not have a right to receive, in practice, consular assistance. On the other hand, if the protection of the EU citizen in third countries is interpreted as a 'right', then the margin of discretion left to the State is significantly limited, as the citizen has the right, and the State a corresponding obligation to provide consular protection. In short, the difference between 'right' and 'legitimate expectations' is to be found in the starting premise of the citizen's claim. While in the case of legitimate expectations, the premise is that the citizen is not entitled to receive consular protection, and it is the citizen who bears the burden of proving otherwise, in the case of a 'right', the premise is that the citizen is entitled to receive consular protection, and the burden of proving otherwise is with the administrative authorities.

Let us now turn to the wording of Art. 20(2)(c) TFEU in order to establish whether EU law provides or not for an individual right of the EU citizen to protection abroad by



the represented Member States, or only an entitlement to legitimate expectations to receive this kind of protection, as argued by certain of the Member States.<sup>XXIX</sup>

Under the EC Treaty framework, the unclear wording of the provision on protection of the EU citizens in third countries has left room for interpretation. For instance, the following could be seen as arguments in favour of the entitlement argument: 1) the use of the expression ‘shall be *entitled to*’ in Art. 20 EC Treaty, instead of ‘shall have *the right to*’ which was the expression used for all other rights of the EU citizens provided in Part two on citizenship; 2) the fact that Art. 17(2) EC Treaty, even if providing in mandatory terms that the EU citizens ‘shall enjoy the rights conferred by this Treaty’, did not include a list of these rights; 3) the fact that Art. 46 of the EU Charter, which has the same wording as Art. 20 EC Treaty, even if clearly entitled ‘*right to consular and diplomatic protection*’ thus indicating that Art. 20 EC Treaty established *a right* for the EU citizens, *and not an entitlement*, was not legally binding<sup>XXX</sup>, thus did not have the legal force necessary to clarify the contention ‘*right*’ v ‘*entitlement*’ of the protection abroad of EU citizens.

Pre-Lisbon, the EU law framework on consular and diplomatic protection of EU citizens was drafted in ambiguous terms subject to opposing interpretation, with an obligation for the Member States more clearly identifiable in soft law documents (Guidelines on Protection of EU citizens of 2006) and international agreements (Preamble, Art.2 of Decision 95/553/EC) than in the founding Treaties.

One of the innovations brought by the Lisbon Treaty clarifying what are the exact rights of the EU citizens under EU law is the re-structuring of former Art. 17 of the EC Treaty in the form of a non-exhaustive list of rights clearly stated as being the rights of the EU citizens. Instead of having the rights spread out in different Articles, as it was under the EC Treaty, Art. 20 TFEU starts by putting forward the list of rights that the citizens enjoy:

‘Citizens of the Union shall enjoy *the rights* and be subject to the duties provided for in the Treaties. They *shall have* [...] *the right* to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.’ (emphases added)



It should be noted that current Art. 20 TFEU does not use the word ‘entitlement’ in relation to the protection abroad of EU citizens, nor does it make a distinction between the protection by the consular and diplomatic authorities of the Member States in third countries and the other EU citizen’s rights. Consequently the FEU Treaty clarifies the previous debate on whether the EU citizen has or has not a right to protection while in third countries. This conclusion is supported also by the now legally binding EU Charter on Fundamental Rights and Freedoms. Art. 46 of the EU Charter is entitled ‘*the right to consular and diplomatic protection*’ and is part of the EU primary law (Art. 6 TEU) that binds the Member States in their conduct towards the Union's citizens. Since there is no legal hierarchy between the EU Charter and the EU Treaties, and the wording of Art. 46 of the EU Charter is identical with the wording of Art. 23 (1) TFEU, then, by way of consequence, the headline of Art. 46 – *right to consular and diplomatic protection* – indicates that Art. 20(2)(c) TFEU enshrines an *individual* right to consular and diplomatic protection conferred upon the unrepresented EU citizen.<sup>XXXI</sup>

## **2.2. Legal content of the right to consular and diplomatic protection – is it something more than the principle of equal treatment based on nationality?**

It was mentioned in the introduction that according to a recent survey, the majority of the EU citizens expect to receive the same kind of help they will be given by their Member State of origin from the consular and diplomatic representations of any of the other Member States under Art. 20(2)(c) TFEU (Eurobarometer no.294, 2010). For the moment it is rather a utopian desire than the reality. Such a common framework for the exercise of consular protection for the benefit of the EU citizens presupposes either the existence of a Union law that establishes this binding common framework which, with the help of the EU Courts, will be applied and interpreted uniformly across the Union's territory, or that the 27 national legal frameworks on the exercise of consular and diplomatic protection of nationals are almost identical. Unfortunately, neither of these scenarios applies.



At the moment of writing, the EU law framework governing the topic of protection abroad of EU citizens does not establish a common set of rights and procedures for the consular and diplomatic protection of the unrepresented Union citizens. The relevant EU law is made of first, general provisions found in Union primary law (the founding Treaties<sup>xxxii</sup> and the EU Charter), secondly, of two international agreements implementing former Art. 20 EC Treaty, which substantially restrict the EU primary law scope (two Decisions of the Representatives of the Member States meeting within the Council<sup>xxxiii</sup>), though without harmonising the relevant national legislation and practice, and lastly, of an impressive range of soft law: Council Conclusions and Guidelines<sup>xxxiv</sup>, and numerous papers issued by the Commission.<sup>xxxv</sup> There is no space here to engage in a detailed discussion of these provisions and reasons of the existent EU legal framework<sup>xxxvi</sup>, suffice it to say, at this point, that these measures do not establish, either separately or in combination, a uniform framework for the exercise of consular and diplomatic protection of EU citizens in the world, but they rather preserve the existing different national standards of protection of EU citizens.

As to the scenario that the 27 Member States might have a similar regulatory framework on consular and diplomatic protection of nationals, it has been pointed out at the beginning of this section that there are extensive discrepancies between the Member States' national law and practice on protection abroad of nationals. The divergence between the domestic frameworks is, in fact, a natural result of the different national foreign policy interests, historical ties developed by each of the Member States with different regions of the world, different ambitions and seize of population. Thus it would have been almost impossible to develop a shared model of consular protection of nationals. The resistance of the Member States to the adoption of a common harmonised EU model of consular and diplomatic protection of EU citizens results from their understanding of consular and diplomatic protection of their nationals as one of the ultimate attributes of a sovereign State. The loss of the State's discretionary power to contour the model of protection abroad of nationals is thus equated with loss of an important part of the State's sovereignty. In light of the Member States' approach to consular and diplomatic protection of nationals as a traditionally reserved State activity, the EU design of protection abroad of the EU citizens as a right uniformly exercised irrespective of the requested Member States is for the near future a merely utopian aim.



Having established what Art. 20(2)(c) TFEU does not confer to the EU citizens, we now turn to the question of what the provision does confer on the Union's citizens in distress abroad.

The wording of the EU citizen's right to consular and diplomatic protection abroad has remained almost the same from its very first inception as Art. 8c of the Maastricht Treaty until now:

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.'<sup>xxxvii</sup>

From the use of the 'on the same conditions' expression, we can legitimately conclude that the Article provides for the application of the principle of non-discrimination based on nationality in the specific field of consular and diplomatic protection of EU citizens in the world. Certain academics (Condinanzi et al., 2009) argued that the right to consular and diplomatic protection as framed by the founding Treaty is not innovative as to its content, since it is a mere reiteration of the explicit general EU law principle of non-discrimination based on nationality laid down in Art. 18 TFEU (former Art. 12 EC Treaty) applying it to the specific situation of protection of the EU citizens abroad. Interestingly, it has to be noted that at the moment of introducing the concept of EU citizenship, the scope of other citizenship rights of EU citizens was also interpreted as mainly an application of the principle of non-discrimination based on nationality, even though this was still seen as a major step in the European integration process (Duff, 2009).

In the meantime, the scope of the EU citizen's rights, especially of the freedom to reside and move, has been developed by the Court so as to include also mere prohibition of serious inconvenience without actual discrimination based on nationality.<sup>xxxviii</sup>

A similar evolution can be identified, though to a lesser degree, in regard to another EU citizenship right which shares similarities with the right to consular and diplomatic protection, since it is framed in the language of equal treatment, and applies also in the sensitive area of high politics of the Member States: the right to vote for the European Parliament elections enshrined in Art. 22 TFEU.<sup>xxxix</sup> Despite the explicit equal treatment



wording and the high sensitiveness of the ‘political rights’ field, the Court of Justice in the *Aruba* case<sup>XLI</sup> held that EU citizens have a right to vote for the European Parliament’s elections as ‘a normal incident of Union citizenship’ (Shaw, 2008).

We can thus notice a trend in the jurisprudence of the Court of Justice of the EU (CJEU) whereby certain rights of the EU citizens as recognised by Art. 20 TFEU have developed a scope going beyond the application of the principle of non-discrimination based on nationality.<sup>XLI</sup> The question is: can we identify a similar jurisprudential thread also in regard to the EU citizen’s right to consular and diplomatic protection? In other words, has the Union citizen’s right to consular and diplomatic protection developed into something more than the principle of non-discrimination, so that the EU citizen enjoys wider protection abroad than equal treatment solely based on the fundamental status of Union citizenship, as happened for example in regard to the right to reside and move?

For the moment, a similar jurisprudential evolution cannot be traced in regard to the right to consular and diplomatic protection, simply because the EU Courts have not so far specifically dealt with the EU citizens’ right to protection abroad.<sup>XLII</sup> The majority of the national case law that has reached the EU Courts does not concern the right to consular protection, but other consular affairs matters, such as: issuing of visas,<sup>XLIII</sup> financial obligations arisen for the Member States as a result of signing a memorandum of understanding between the Commission and the Member States on setting up a common diplomatic mission in Abuja (Nigeria),<sup>XLIV</sup> establishing a hierarchy between the methods of sending judicial documents by post or by consular or diplomatic agents under Union law,<sup>XLV</sup> and the duty of diplomatic protection of the Union in regard to vessels (not individuals) of the Member States.<sup>XLVI</sup>

The fact that for the moment the legal content of the EU citizen’s right to consular and diplomatic protection is an expression of the principle of non-discrimination based on nationality does not mean that Art. 20(2)(c) TFEU in its initial form as Art. 8c of the Maastricht Treaty was not innovative, that the right will remain indefinitely at the level of the principle of non-discrimination based on nationality; or that the Member States can deny the right to consular protection to un-represented EU citizens simply because they do not confer a right to consular protection to their own citizens either. It what follows I will explain each of these foregoing conclusions.



If the founding Treaties had not provided for the right to consular and diplomatic protection, the mere existence of the general principle of non-discrimination based on nationality laid down at the start of the citizenship part of the Treaty<sup>XLVII</sup> would not have been of much help to the EU citizens located outside of the Union's borders. The general principle of non-discrimination based on nationality applies, as Art. 18 TFEU (former Art. 12 EC Treaty) clearly says, *within the scope of EU law*. It is already settled norm that the general principle of non-discrimination based on nationality, and more generally the entire category of general principles of EU law do not operate in a self-standing fashion or in the abstract.<sup>XLVIII</sup> The Member States are bound to respect the general principles only when they act within the scope of EU law<sup>XLIX</sup>. The concept of 'scope of EU law' is an autonomous concept whose substance has been increasingly expanded based on the EU's Institutions exercise of powers and expansive interpretation of EU law by the CJEU. Currently, 'the scope of EU law' in relation to the Member States actions includes in general three main situations: 1) when Member States implement EU law;<sup>L</sup> 2) Member States derogating, when permitted, from EU law;<sup>LI</sup> 3) when Member States adopt measures touching upon a matter which has already been the subject of a specific substantive rule of EU law.<sup>LII</sup>

Pre-Lisbon, the protection abroad of EU citizens was stipulated by only two Treaty articles: the substantive norm - Art. 20 EC Treaty enshrined the right to protection abroad ensured by the consular and diplomatic authorities of the Member States; and the procedural norm – Art. 20 EU Treaty which was a specific application of the principle of sincere cooperation between the Member States and EU Institutions in this field. In the absence of these Treaty provisions, or express Treaty objective of protection abroad of the EU citizens by the Member States which could justify the use of the flexibility clause in this area, the scope of EU law as described in the foregoing general situations could not have included the area of protection abroad of EU citizens. Consequently, the Member States' actions on consular and diplomatic protection of EU citizens would not be covered by the scope of EU law and thus the general principle of non-discrimination based on nationality will not be applicable to the Member States' actions in the field of protection abroad of EU citizens.

The innovative element brought by inserting Art. 8c in the EC Treaty sits thus in 'creating' *the scope of EU law*, in the absence of which the individuals would not have



benefited of the application of the general principle of non-discrimination based on nationality.<sup>LIII</sup>

The right to consular and diplomatic protection of the Union's citizens has so far remained underdeveloped in comparison with the other EU citizenship rights and has not been the subject of the EU Courts' jurisprudence. However, the legal content of the Union citizen's right to consular and diplomatic protection does not necessarily have to remain at its current status of a simple expression of the equal treatment principle. The Council, depending of the content of the future directives it may adopt,<sup>LIV</sup> and the EU Courts, which may apply their purposive interpretation<sup>LV</sup> to Arts. 20(2)(c) and 23(1) TFEU and to the future Council Directives, may lead the way to an evolution of the EU citizen's right to protection abroad similar to that recently experienced by other EU citizenship rights (e.g. freedom to move and reside and the right to vote for the European Parliament).

The current understanding of the right to consular and diplomatic protection as a manifestation of the equal treatment principle does not though justify a rejection of consular protection by a Member State simply on the basis that it does not confer such assistance to its nationals under its national law.<sup>LVI</sup> Consular and diplomatic protection in third countries is a fundamental right of the EU's citizens (Art. 46 part of Title V - Citizen's rights of the EU Charter.), rejection of this right by the Member States is justified only if the conditions provided by Art. 52 of the EU Charter are observed.<sup>LVII</sup> An outright denial of protection by one of the Member States will empty the fundamental right of the EU citizen of any meaningful effect, thus raising serious concerns about the respect of the essence and proportionality requirement under Art. 52 EU Charter. Consequently, even if the founding Treaties frame the right to protection abroad as a principle of equal treatment, Art. 46 in conjunction with Art. 52 EU Charter do not legitimise the conduct of Member States that question whether to respond or not to EU citizens' requests for protection while in third countries, such a questioning which is tantamount to an outright denial of the fundamental right to consular and diplomatic protection.

Let us now look at how the principle of non-discrimination based on nationality might work in the specific situation of evacuating the EU citizens from crisis situations, which recently have greatly challenged both the Union and the Member States.<sup>LVIII</sup> Art. 23(1) TFEU does not require a different conduct from the Member States in cases of crises than in day-to-day situations. In both circumstances, only the EU citizens that do not have



an accessible consular or diplomatic representation of their Member State are entitled to receive protection from another Member State. In crises, however, the Member States have not followed such a strict approach, but they aimed to ensure the evacuation of all EU citizens, being guided by the motto of ‘no citizen will be left behind’, irrespective of whether they were or not represented in the third country hit by crises.<sup>LIX</sup> Despite their good intentions, the Member States operated on the basis of an *ad-hoc* type of cooperation, and not on a pre-established contingency plan.<sup>LX</sup> This practice has to be reconsidered in light of the EU general principles and Treaty rights, so as to eliminate arbitrariness from the application of the fundamental right to protection abroad of the EU citizens. In addition to the respect of the EU citizen’s right to consular and diplomatic protection, the Member States will have to think how to ensure the respect of the EU citizen’s right to family life when planning the evacuation of the third country nationals who are family members of the EU citizen. Even if the right to consular and diplomatic protection is only a right of the Union’s citizen not extended to non-EU family members, the inclusion of the right to family life in Art. 7 of the EU Charter, and the future accession of the EU to the European Convention on Human Rights (Art. 8 ECHR being of specific concern in these circumstances) require the Member States to take all steps possible to ensure that in emergency evacuation, the non-EU family members will not be separated from EU citizens.<sup>LXI</sup>

### **2.3. Does diplomatic protection fall under the scope of the EU citizen’s right to protection abroad?**

In the previous section it was shown that the content of the EU citizen’s right enshrined in Art. 20 (2)(c) TFEU is the principle of non-discrimination based on nationality. In this section it will be shown that the issue whether the Article confers independent rights beyond the equal treatment right is not the only unclear aspect of the legal content of this right. The harshest critique visited by both academics (Stein, 2002; Vermeer-Künzli, 2006; Vigni, 2011; Closa, 1995) and Member States<sup>LXII</sup> on the FEU Treaty provisions on protection abroad of the EU citizen concerns the lack of clarity of the material scope of this right. In other words, it is argued that the founding Treaties do not



clarify what type of protection the individuals are entitled to request in third countries - consular *or/and* diplomatic protection-, and what is the exact scope of each of these mechanisms. It has been pointed out that Art. 20(2)(c) TFEU does not use the settled public international law concepts of ‘consular protection’ and ‘diplomatic protection’, but a new concept which is not an established legal concept under the public international law norms – ‘protection by the consular and diplomatic authorities of the Member States’ and consequently should not be understood as encompassing the consular and diplomatic protection mechanisms existing under public international law (Vigni, 2011). Once again it seems that the EU legal order establishes its own autonomous legal concept, similar to concepts already existing under public international law, but unclear in their precise meaning.<sup>LXIII</sup> The present section will tackle the question whether, under the EU model of protection of the EU citizens abroad, the latter are entitled to receive both consular and diplomatic protection or only one of them, and whether these types of protection should be understood as having the same meaning as those already existing under public international law.

A brief retrospective of the Maastricht inter-governmental debate on the citizenship provisions might help to understand the wish of the Member States. At the time of drafting the Maastricht Treaty, Spain made a proposal for an Article on the protection of the unrepresented EU citizens while outside of the Union. The article was drafted in clear terms, expressly providing for ‘consular and diplomatic assistance and protection’<sup>LXIV</sup> of the citizens of the European Union from any of the Member States.<sup>LXV</sup> However, not all of the Member States agreed with Spain’s proposal to refer precisely to consular and diplomatic protection of unrepresented EU citizens. The compromise they managed to reach was a broader concept which permits both interpretations – with/without diplomatic protection. This kind of ‘enigmatic’ legislative drafting is followed by the Member States when they do not agree on the exact scope of a future Treaty provision. The result is that they leave it framed in broad terms that can be subject to different interpretation, which, depending on the evolution of the Member States’ view of the topic, can be interpreted in different ways leading to different legal consequences.<sup>LXVI</sup> The Member States maintained this ambiguous attitude during the elaboration of the Decision 95/553/EC on the implementation of the EU citizen’s right to protection abroad. Several delegations of the Member States opposed Arts. 11-18 of the original draft of the *ad-hoc* group which expressly referred to diplomatic



protection (Stein, 2002). Since the aforementioned Decision is an international agreement which could have been adopted only by unanimous consent, those Articles and consequently diplomatic protection did not made their way into the final Decision. The Member States decided instead to focus on the mechanism that was the most requested by the EU citizens and at the same raised less problematic legal questions – consular protection.<sup>LXVII</sup>

In the previous paragraphs we attempted to find out what rights precisely the Member States intended to confer on EU citizens in the relevant texts and concluded that their conduct during the Treaty negotiations and during the elaboration of the EC Decision strongly suggested indecision and divided opinions. However, so far we have looked only at the English official version of the Treaties. In Polish, Finish or Czech, the texts read differently for Art. 20(2)(c) and 23(1) TFEU, since the official versions of these Articles in the aforementioned languages use the clear concept of consular *and* diplomatic protection. In case of different language versions of a text of EU law, the ECJ has decided that uniform interpretation must be given to the text and hence, ‘in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.’<sup>LXVIII</sup> In our case, the purpose of Art. 20(2)(c) TFEU has to be seen in light of the newly introduced Union objective of ‘protection of the Union citizens in the world’ (Art. 3(5) TEU). The objective seems to refer to a general protection of the Union’s citizens in third countries, without distinction or limitations. In the same way, neither Art. 20(2)(c), nor Art. 23(2) TFEU make a distinction or exclude diplomatic protection from their scope, even if the Member States had multiple occasions during several Treaty amendments to introduce such a limitation. This interpretation whereby diplomatic protection is included in the content of the EU citizen’s right to protection abroad seems to be supported also by Art. 46 EU Charter, which is now part of the EU primary law. As previously mentioned, the wording of Art. 46 EU Charter is identical with Arts. 20(2)(c) and 23(1) TFEU, while Art. 46 EU Charter is conclusively entitled ‘right to consular and diplomatic protection’. It can be argued that the EU Courts may sustain a similar interpretation of the scope of Art. 20(2)(c) TFEU, since in cases concerning EU citizenship rights, or fundamental human rights, the Court has usually had in mind the effectiveness of these rights, sometimes even to the detriment of the Member States’ interests.<sup>LXIX</sup>



In *Ayadi*<sup>LXX</sup> and *Hassan*<sup>LXXI</sup>, the General Court of the EU has recognised an obligation on the part of the Member States to exercise diplomatic protection for foreign citizens who reside within the Union's territory. If the Court was willing to go as far as recognising an obligation for the Member States in regard to third country nationals, it can be argued that, it will also do so for the benefit of the EU citizens.

Despite the temptation to make an analogy between the obligation to provide diplomatic protection established in the foregoing cases for the benefit of non-EU citizens and the right of the EU citizen to diplomatic protection, we have to recall that the foregoing judgments were decided in a specific context<sup>LXXII</sup> which weighed heavily in the Courts' decision-making process. These specific and limited circumstances do not suffice to make a general statement that the Court will regard diplomatic protection as part of the Union citizen's right to protection abroad. Nevertheless, they may play an influencing role on the Court in its decision whether to stick to a limited interpretation of the material scope of protection abroad of the EU citizen or decide to make history in the public international law field by recognising a right to diplomatic protection to the individual from a non-nationality Member State.

So far we looked at the EU law framework to find out whether the right to protection abroad of the Union's citizens can be interpreted as encompassing also diplomatic protection. It has been pointed out that EU law favours such an interpretation. However, public international law academics (Dugard, 2006; Vermeer-Künzli, 2006) have argued that the EU model of protection abroad cannot be interpreted as encompassing diplomatic protection since such an interpretation is unlawful under public international law norms for the following reasons: firstly, the nationality condition required under public international law is not fulfilled, and secondly, the previous consent of third countries to the EU model has not been obtained.<sup>LXXIII</sup>

This paper argues that even if the general norm under public international law is still one that permits only the State of nationality to exercise diplomatic protection for its own nationals, there are recent developments which indicate a shift from this traditional approach. Draft Art. 8 of the ILC Draft Articles on Diplomatic Protection, whereby refugees and stateless persons lawfully resident in a country can receive also diplomatic protection, signals that the traditional understanding of the nationality as a *ius sanguinis* or *ius soli* is no longer the sole type of link which can legitimize the exercise of diplomatic



protection for an individual. It seems that the ILC suggests that there can be a genuine link between an individual and the State on a basis other than that of nationality, as long as the relation between the individual and the State is solid. The issue of whether currently there is such a solid link between the Union's citizens and all other Member States as to justify the EU model of protection abroad of the Union's citizens is a complex one. Due to limited space, it cannot be discussed here.<sup>LXXIV</sup>

The main argument of this paper in favor of the legitimacy of the EU model of consular and diplomatic protection of the EU citizens is not based on the 'solid link' argument, but on the fact that the ILC Draft Articles on diplomatic protection establish minimum standards under public international law which permit the States to go beyond these rules as long as they respect the condition of obtaining the express and unanimous consent of all the States involved in the new model (i.e. the State of nationality, the State exercising the protection and the receiving third country).<sup>LXXV</sup> Consequently, from a public international law perspective, the problem of the EU model consists not in the fact that public international law generally excludes diplomatic protection of the kind envisaged by the EU law, as exceptions are possible, but rather whether there is, on the one hand, an express unanimous consent of the Member States for the EU model to include diplomatic protection, and on the other hand, whether there is the consent of the third countries for the exercise of consular and diplomatic protection by non-nationality Member States.

In regard to the unanimous consent of the Member States, it was pointed out above that the Member States have divided opinions on the issue of the legal content of the right, and for the moment it cannot be said that they have a unanimous view on whether to include or not the diplomatic protection within the scope of the EU citizen's right to protection abroad.<sup>LXXVI</sup> As to the consent of the third countries in regard to the exercise of diplomatic protection by a non-nationality Member States, according to Art. 6 of the VCDR there is no need of express consent for the exercise of diplomatic protection, it can be inferred also from the absence of opposition by third countries, although, in case of absence of a signed agreement, third countries can, at any moment and without any explanation, change their previous position and object to this exercise of diplomatic protection. In spite of the express Treaty obligation of the Member States to start international negotiations with third countries<sup>LXXVII</sup> so as to ensure the consent of the latter to the EU model of exercise of protection abroad of citizens, the majority of the EU



countries have never started such formal negotiations, with only two exceptions.<sup>IXXVIII</sup> It can be argued that so far the lack of opposition from third countries to the exercise of diplomatic and consular protection of EU citizens by non-nationality Member States signals recognition of the EU citizen's right as encompassing both consular and diplomatic protection. However, the absence of a written binding agreement substantiating the consent of non-EU countries to the EU model of protection abroad of EU citizens which is atypical from the model of protection abroad of nationals traditionally accepted under public international law is prone to question the acceptance by non-EU countries of the EU citizen's right to diplomatic protection and thus also endanger the effectiveness of the right.

One might question why the public international law perspective is relevant, since the EU is an autonomous legal order with an established practice of autonomous legal concepts whose questionable legitimacy under the public international law norms has not impeded their application under the EU legal order.<sup>IXXIX</sup> The present topic, diplomatic protection of unrepresented EU citizens in third countries, is a mechanism that does not operate within the EU territory, as the previous EU autonomous concepts, but entirely outside the Union's borders. Consequently, the pact between the EU countries is a *res inter alios acta* for the third countries, which enjoy sovereign powers on whether to prohibit or not a procedure carried out entirely within their sovereign territory. In future, if diplomatic protection will be recognized under the EU law framework for the benefit of the Union's citizens, the formal consent of third countries has to be ensured so as to prevent the prospect of discretionary rejection.

#### 2.4. Questioning the direct effect of the EU citizen's right to protection abroad

In light of the different positions currently taken by the Member States on whether the EU citizen has or not a right to protection abroad and on the material scope of this right, it is highly possible that situations where the EU citizens will be refused assistance will arise in the future. The question that this section plans to assess is whether the EU



citizen can invoke his Treaty based right before the national courts in order to find redress against such refusals.

It is settled case law of the EU courts that rights derived from the EU law may be invoked directly before the national courts if they satisfy the conditions of clear, precise and unconditional wording.<sup>LXXX</sup> As Bruno de Witte notes, the Court has, over time, changed its strict *Van Gend en Loos* understanding of these conditions so that currently the direct effect test boils down to one single condition: ‘is the norm sufficiently operational in itself to be applied by a court?’<sup>LXXXI</sup>

The main arguments raised by academics (Closa, 1995; Kadelbach, 2003; Puissechet, 2003) against the direct effect of the right to consular and diplomatic protection are first that the right is not clear in what it confers on the EU citizens (see the above mentioned debate on whether diplomatic protection is or not included),<sup>LXXXII</sup> second that the right needs further implementing measures to be adopted by the Member States in order to be effective according to the requirement laid down in Art. 23(1) TFEU, and third, that the exercise of the right by the Member States depends upon the consent of the receiving third country which, for the moment, none of the Member States, with few exceptions, has formally acquired.<sup>LXXXIII</sup> We will continue by addressing in turn each of these three critiques.

Concerning the questioned clarity of the EU citizen’s right to protection abroad, it was previously shown that, for the moment, the right is at a status of a specific application of prohibition of discrimination based on nationality in the field of consular and diplomatic protection of the unrepresented EU citizens. It should be noted that in *Reyners*,<sup>LXXXIV</sup> the CJEU recognised direct effect to former Art. 52 EEC Treaty on freedom of establishment based on the interpretation of this Article as a prohibition of discrimination (Craig, 1992). Nowadays it can be argued with certainty that the principle of non-discrimination based on nationality enjoys direct effect.<sup>LXXXV</sup>

As to the contention that the right is not unconditional since it requires the Member States to adopt implementing measures, it has to be noticed that the Lisbon Treaty brought a change in the wording of Art. 23(1) TFEU. Former Art. 20 EC Treaty stipulated that ‘the Member States *shall establish the necessary rules among themselves* [...] required to secure this protection.’ while current Art. 23(1) TFEU reads as follows: ‘The Member States *shall adopt the necessary provisions* [...] required to secure this protection.’ (emphases



added) Art. 23 TFEU continues in paragraph two with an express conferral of legislative competence to the Council which can act in the field of consular and diplomatic protection of the EU citizens by way of adopting directives. There are two important changes in the wording of the right: first is the replacement of ‘establish rules’ with ‘adopt provisions’ and second, the word which might have indicated the purely inter-governmental character of the field, ‘among themselves’, was eliminated. As noted by another author (Saliceti, 2011), the change of wording may indicate that the measures under reference are those that the Member States have to adopt so as to implement the Council directives, since the expression ‘adopt provisions’ is commonly used in the field of implementation of directives by the Member States.<sup>LXXXVI</sup> On the other hand, the previous expression ‘establish rules’ conveyed the idea of new norms to be adopted for the purpose of detailing the content of the Union citizen’s right. Whether this is or not the intention of the Member States, the CJEU has constantly ruled that the need for further implementing measures to be adopted by the Member States is not *per se* capable of denying direct effect to a Treaty based provision. There are numerous examples pointing in this direction, most of them to be found in the field of fundamental freedoms,<sup>LXXXVII</sup> however the most relevant example for the present topic is the EU citizen’s right to reside and move which the Court has recognised as directly effective<sup>LXXXVIII</sup>, despite the conditional language of the Treaty provision.

Former Art. 18(1) EC Treaty was firstly conditioned by limits which the Member States could impose and secondly by measures which the Member States themselves could adopt ‘to give effect to the right’. The latter condition is similar to the one enshrined in Art. 23(1) TFEU. Contrary to the Member States, the Court of Justice of the EU, in the *Baumbast* judgment, held that the need of further implementing measures by the Member States does not prejudice the direct effect character of the right to reside and move, as the margin of discretion left to the Member States is subject to strict judicial review by the national and EU courts. Consequently, even if rejecting the interpretation of the new wording of Art. 23(1) TFEU as a reiteration of the Member States’ duty to adopt national measures implementing the relevant EU law, in light of the Court’s reasoning in *Baumbast*, the direct effect of the right to consular and diplomatic protection in national judicatures still cannot be rejected because the limitations that the Member States can adopt under the Treaty are subject to the full jurisdiction of the EU and the national courts.<sup>LXXXIX</sup>



In the foregoing paragraphs, the *Reyners* and *Defrenne* cases were invoked as examples of cases where the direct effect was recognised by the CJEU to unclear and legally incomplete Treaty Articles.<sup>XC</sup> The reason why the CJEU, despite expressly recognising the conditionality of these Articles, held in favour of direct effect was to ensure the objective of these Articles when the Member States failed to fulfil their obligations to adopt implementing legislation within the provided transitional period. In light of this reasoning, the Member States' persistent failure to start international obligations with non-EU countries for the last 18 years, despite the initial time limit provided in Art. 8c of the Maastricht Treaty,<sup>XCI</sup> and the clear obligation mentioned in Art. 23(1) TFEU, might influence the Court's decision in favour of recognising direct effect to the EU citizen's right to consular and diplomatic protection.

### **3. What role for the Union in the protection of the EU citizens abroad – a unique model of protection of individuals abroad**

'The EU remains the only organisation that can call on a full panoply of instruments and resources [to] complement the traditional foreign policy tools of its member states.'<sup>XCII</sup>

The above statement made by Solana one month before the entry into force of the Lisbon Treaty in regard to the role of the EU as an international actor perfectly reflects the *status quo* of the relation between the Union and the Member States in the area of consular and diplomatic protection of the EU citizens. Currently, the EU's role in the field of protection abroad of EU citizens is to complement the Member States, when the latter so request<sup>XCIII</sup>, in their efforts to ensure protection abroad of the EU citizens.<sup>XCIV</sup> For the moment the EU plays only a supporting role for the Member States but, as it will be shown in this section, it has the potential to develop into something more revolutionary. For the moment this merely 'supporting' role played by the EU already represents a unique role in the arena of international organisations<sup>XCIV</sup> as there is no other international organisation enjoying a similar state like function. The supporting role conferred by the Lisbon Treaty to the EU has definitely not been an overnight conquest, but the culmination of a long evolution and fervent debate between the Member States and between the Commission



and the Council.<sup>xcvi</sup> It remains to be seen whether this sort of master - apprentice relation between the Member States and the EU will evolve in the future into an equal sharing of tasks relation. The creation of the EEAS, the increased number of training courses for the EEAS personnel including also the specific task of the protection of EU citizens<sup>xcvii</sup>, the newly attributed legislative competence to the Council in the field of consular and diplomatic protection of EU citizens and the EU's expansionist approach to its external competences indicate that maybe the EU's role in protection abroad of the EU citizens will not stagnate at a mere supporting role but has the potential to evolve into something more grandiose.

When the Maastricht Treaty introduced for the first time a Union citizen's right to protection outside the Union's borders, the only role envisaged for the Union in this regard was limited to one sentence in the EU Treaty, whereby the consular and diplomatic representations of the Member States and the Community delegations were obliged to cooperate so as 'to contribute to the implementation' of the EU citizen's right to protection in third countries (Former Art. 20(2) TEU). In contrast with other EU citizen's rights, the drafters of the Treaty did not endow the Council with legislative powers to ensure that the Union citizen's right would be effectively applied and developed. As in other sensitive foreign policy areas, the EU model of consular and diplomatic protection of the EU citizens was kept out of the reach of the Union's legislative procedures and left to the control of the Member States' executives. The only instruments that the Union could have adopted to implement the EU citizen's right were political acts, such : CFSP measures adopted by unanimous consent,<sup>xcviii</sup> though, in practice, they have never been adopted, or non-binding Council Guidelines<sup>xcix</sup> adopted in Council's specific Working Group (COCON)<sup>c</sup> which have been popular with the Member States due to their non-constraining effects. The latter remained the masters of the field due to their exclusive competence to adopt acts implementing the EU citizen's right to consular and diplomatic protection (see former Art. 20 EC Treaty). And they did so, by way of using a hybrid type of acts - Decisions of the Representatives of the Governments of the Member States adopted within the Council, which so far have been the only legally binding acts adopted in this field. This type of Decisions was not designed to affect the rights of the individuals, but they were usually adopted for making political statements, or, even if producing binding legal effects, they were limited to the Member States with no direct impact on the



rights and obligation of individuals.<sup>CI</sup> Therefore, in light of their limited legal effects, the limited judicial guarantees which they offered to individuals due to the Decision's hybrid nature<sup>CI</sup> did not create problems for the protection of the fundamental human rights of EU citizens. The two Decisions adopted in the field of protection abroad of EU citizens are, though, exceptions from this rule as they directly affect the EU citizens' right to consular and diplomatic protection by restricting the material scope of the fundamental right without conferring on EU citizens legal remedies to complain at the EU level.<sup>CIII</sup> The main effective judicial remedy which the EU legal order conferred on the individuals is the direct action of annulment, which in the case of the Decisions on consular and diplomatic protection of the EU citizens is not available to the injured EU citizens.<sup>CIIV</sup>

So far when the Community did not have the competence to act, but action was necessary in order to obtain a Community or, in exceptional circumstances even a Union objective closely linked with a Community objective,<sup>CV</sup> the Member States decided to use the flexibility clause so as to justify the adoption of Community measures. Former Art. 308 EC Treaty has been used by the Member States as a legal basis for the adoption of a Community Decision aiming to extend a Community Mechanism also to consular assistance provided to EU citizens in urgent need of help in third countries (see Council Decision 2007/779/EC). Arguably, the same Article could have been used<sup>CVI</sup>, if unanimously agreed by the Member States, for the purpose of adopting Community measures on the protection abroad of EU citizens, instead of *sui-generis* measures which do not confer the same judicial guarantees on the individuals as do Community measures. The regulation of the protection abroad of EU citizens by way of Community measures was seen by some of the Member States as a too dangerous step for their sovereignty, since a traditional prerogative of the State (Vattel, 1758) would have been given to the EU. The Member States which had a long-standing tradition of wide consular and diplomatic representation felt most the danger of delegating competence to the Union in this field.<sup>CVII</sup> Since Art. 308 EC Treaty required unanimous consent, the persistent opposition of certain Member States did not allow the use of the flexibility clause for the purpose of establishing a uniform standard of protection abroad of EU citizens which could have been achieved only by way of Community measures.

The Lisbon Treaty has brought a salient change to the legal framework of consular and diplomatic protection by abandoning the previous logic of inter-governmental *sui-*



*generis* decision making, and instead involving the EU with its legislative procedure and the newly created EEAS in a field historically dominated by States. In view of achieving its newly inserted objective of protecting EU citizens in the world (Art. 3(5) TEU), the Council has been endowed with express legislative power to adopt Directives ‘establishing the coordination and cooperation measures necessary to facilitate’ the aforementioned protection (Art. 23(2) TFEU). After consulting the European Parliament, the Council acts by qualified majority (Art. 16(3) TEU). The involvement of the European Parliament and the replacement of unanimous decision-making with qualified majority voting limit the long defended sovereignty of the Member States. On the other hand, it has to be noticed that Art. 23(2) TFEU maintained part of the inter-governmental language, as the directives the Council is entitled to adopt are limited to ‘cooperation and coordination’ measures, recalling the pre-Lisbon framework of cooperation and coordination among the Member States that had previously governed the field. The ‘coordination and cooperation’ language of Art. 23(2) TFEU gives us an indication that the directive to be adopted might not be used for harmonising the national law and practice on the legal nature, force, material and personal scope of consular and diplomatic protection of citizens: the Council might be entitled only to establish a common model for operational actions in cases of assisting the EU citizens in distress. The ambit of the directive under Art. 23(2) TFEU is similar to the ambit of the *sui generis* measures that the Member States could have adopted under the previous pillar structure. The difference that comes with the Lisbon Treaty is however significant in terms of judicial guarantees, since the change of legal nature of the measures that regulate the field of protection abroad of the EU citizens brings with it increased judicial guarantees for the individuals both at the Union and national level.

Additional consequences for the sovereignty of the Member States in this field may result from the fact that they are now sharing their external competence with the Union (Arts. 2(2), 4(2) TFEU). In light of the fact that the Member States have not started negotiations with third countries for the purpose of obtaining the latter’s consent to the EU model of exercise of consular and diplomatic protection of EU citizens, the Commission has proposed to include such a consent clause in mixed agreements that will be concluded/amended with third countries. According to a Commission Communication of March 2011, ‘the negotiations are on-going’, but the Commission omitted to mention in the Communication which kind of negotiating framework will be chosen: the Open Skies



method (Cremona, 2011) whereby the Member States continue to negotiate and conclude international agreements but under the strict supervision of the Commission, or delegate power to the Union to conduct the negotiations.

The newly created European External Service (EEAS) has also been endowed with competence to act for the protection of the Union citizens, *via* the Union delegations in third countries (Art. 5(10) Council Decision on EEAS and Art. 221 TFEU). The EEAS role is for the moment only that of supporting the Member States' representations in third countries, but has the potential to evolve according to Art. 13(2) of the EEAS Council Decision:

‘The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.’

The Report which will be drafted on the EEAS activity may reveal that, in the field of consular and diplomatic protection of the EU citizens abroad, there will be a need to adopt further actions to respond to problems that have occurred in practice. If the EEAS role in this area was insignificant and not open to further development then there would have been no need to include this subject matter in the Report on the EEAS' activities.<sup>CVIII</sup> Consequently, it may be that in the future, depending on the facts of the Report, the EEAS might acquire a more prominent role in the protection abroad of EU citizens with further consequent loss of the long defended sovereignty for the Member States.

#### 4. Conclusion

This paper has discussed one of the modalities to ensure protection of the EU citizens in the world, namely consular and diplomatic protection of unrepresented Union citizens. The mechanism was presented and evaluated as a right of the EU citizen.<sup>CIX</sup> The right to consular and diplomatic protection of the Union's citizens, which was introduced with the Maastricht Treaty in 1992, has so far remained under-developed in comparison with the other rights of the EU citizens.



The argument of this paper is that, after the Lisbon Treaty, the EU citizen has a fundamental right to consular and diplomatic protection in non-EU countries which he can request from any of the Member States that is represented *in loco*, when his home Member States does not have an accessible consular or diplomatic representation. The holder of the obligation to protection is not the Member State of nationality, but any of the Member States that has a consular or diplomatic representation in the place from the third country where the citizen is located. The term ‘in the place’ has to be differentiated from ‘in the third country’ since it confers the right on the EU citizen to ask for protection from any of the Member States that has a consular or diplomatic representation in a place nearer to where he is located instead of having to travel hundreds of kilometres to reach the consular or diplomatic representation of his own Member State within the same third country. The right can be invoked directly by the individual before the domestic courts of the Member States when he considers himself to have been injured by acts of the consular or diplomatic agents. If certain Member States do not provide national legal remedies for their own citizens to complain against such acts, Art. 19(1) TEU now requires the Member States to make available such legal remedies, at least, for non-national EU citizens.

It has been mentioned that, despite the recently concluded work of the ILC, public international law norms do not recognise the individual a right to consular and diplomatic protection, but stipulates rather that the State is still the one to enjoy a right to exercise protection abroad for the citizen. With the express provision of a fundamental right to consular and diplomatic protection abroad in the EU Charter (Art. 46), the EU develops an autonomous legal concept in public international law by departing from the long established status of consular and diplomatic protection as a right of the State, and updating it to the status of a fundamental right of the individual. However, in the case of the EU law the right is not recognised to the individual in his relation to his State of nationality. It must be kept in mind that, under the EU legal order, the holder of the right is the EU citizen who does not have an accessible consular representation of its own Member State or another State representing it on a permanent basis.

The recent revolutions in the Mediterranean region and Middle East have shown the importance of the EU citizen’s right to consular and diplomatic protection and that consular assistance poses a growing challenge to the Member States and the Union. Not even the Member States benefiting of the widest external representation network can cope



alone with these catastrophes. These events have proved that only if both the EU and the Member States cooperate on a constant basis, will it be possible to effectively evacuate EU citizens from areas in distress. If, in the situations of collective evacuation, the civil protection mechanism<sup>CX</sup> plays an important role and ensures what seems to be an effective *modus vivendi* between the Union's institutional setting and the Member States, in cases of individual consular protection, there still is much work to be done in order to ensure that the existing discrepancies between the 27 national regulatory frameworks on consular and diplomatic protection of citizens do not deprive the EU citizen of his now fundamental right to protection abroad.

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<sup>I</sup> Many regions of the world were hit by major natural or man-made disasters in the last five or six years which caused a great number of deaths and injuries to the population. For instance, the democratic uprising in spring 2011 in the Southern Neighbourhood, the earthquake and the tsunami that hit Haiti in January 2010, the Icelandic volcanic ash cloud of 2010, acts of local or international terrorism (Sharm el-Sheik 2005, 11 September 2001 Attacks on World Trade Centre in New York), military conflicts (Lebanon conflict of summer 2006, the Georgian conflict of August 2008).

<sup>II</sup> According to a 2007 survey there is a high percentage of Union citizens that may find themselves in this situation, since only in Beijing, Moscow and Washington all 27 Member States have at least one embassy (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009, COM (2007) 767 of 5 December 2007). In regard to the recent international crisis: in Libya only 8 Member States were represented, while in Bahrain only 4, see Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, doc. COM (2011) 149/2 of 23 March 2011).

<sup>III</sup> After the Lisbon amendment, there is a noteworthy turn of phrase in the key provisions on Union citizenship. Art. 9 TEU (placed in the very first Title of the TEU on Common fundamental provisions on the EU) and Art. 20 TFEU (the specific Treaty Article on citizenship) stipulates that the citizenship of the Union shall be 'additional to' instead of 'complementary to' the national citizenship. According to Shaw and de Waele, the difference in terminology is not a mere cosmetic change, but signals that the Union citizenship should now be seen as a self-standing, independent status from national citizenship, see more in J Shaw, 'The Treaty of Lisbon and Citizenship', *The Federal Trust European Policy Brief*, June 2008; and H de Waele, 'European Union Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12 *European Journal of Migration and Law* 319-336.

<sup>IV</sup> This pronouncement of Union citizenship which 'is destined to be the fundamental status' of the nationals of the EU countries has been repeated in a long line of case-law. See, for instance, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-224/98 *D'Hoop v. Office national de l'emploi* [2002] ECR I-6191, para. 28; Case C-103/08 *Gottwald*, Judgment of 1 October 2009, nyr, para. 23; Case C-544/07 *Rüffler*, Judgment of 23 April 2009, nyr, para. 62; Case C-135/08 *Rottmann* [2010] ECR I-0000, para. 43; Case C-34/09 *Zambrano*,



Judgment of 8 March 2011, para. 41. In the last two cases there has been a change of terminology, the European Court of Justice has no longer described the Union citizenship in terms of a future achievement ('is destined to be'), but already as a present result ('is intended to') which the citizens of the Member States can thus currently benefit of.

<sup>V</sup> Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, COM (2011) 149/2 of 23 March 2011).

<sup>VI</sup> According to a 2007 survey, there are around 7 million of Union citizens travelling in a third country where their home Member State is not represented. See Action Plan 2007-2009 and related Impact Assessment, European Commission, Communication to the European Parliament, the EU Council, the Economic and Social Committee and the Committee of Regions, Document COM (2007) 767 final of 5 December 2007 and Document SEC (2007) 1600 of 5 December 2007.

<sup>VII</sup> According to the European Commission 2010 Report on Union citizenship 'more than 30 million EU citizens live permanently in a third country, but only in three countries (United States, China and Russia) are all 27 Member States represented'. See European Commission, EU citizenship Report 2010 - *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010, p. 9.

<sup>VIII</sup> According to a comparative research, all of the Member States have had to close to a bigger or lesser extent certain of their consular or diplomatic representations abroad. See [www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf](http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf)

<sup>IX</sup> According to the declaration of F Frattini, Director of the DG Justice in 2007, 17% of the interviewed Union citizens believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels of 29 May 2007.

<sup>X</sup> Public international law recognises a right to exercise diplomatic protection to an international organisation only in regard to its agents, generally described as 'functional protection'. A mechanism which the International Law Commission (ILC) has described as a different mechanism than the diplomatic and consular protection of nationals which only States can exercise. See Draft Articles on Diplomatic Protection with commentaries, text adopted by the ILC at its fifty-eighth session, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, 2006 (A/61/10).

<sup>XI</sup> Former Art. 8c TEC became after the Amsterdam amendment Art. 20 TEC and after the Lisbon amendment, Art. 23(1) TFEU. In addition, the EU Charter of Fundamental Rights stipulates the same right in Art. 46.

<sup>XII</sup> Eurobarometer No. 188 of July 2006 and Flash Eurobarometer No. 213 of February 2008. On the same line, see also the more recent Flash Eurobarometer no. 294 'EU citizenship' of March 2010.

<sup>XIII</sup> This is confirmed by the Commission's Report to the European Parliament, the Council and the European Economic and Social Committee on progress towards effective EU Citizenship 2007-2010 (doc. COM (2010) 602 of 27 October 2010), Section 2.7.

<sup>XIV</sup> Despite the work of the International Law Commission (ILC) on codification of the law on diplomatic protection finished in 2006, the *Vatellian* legal fiction whereby diplomatic protection is a right of the State of nationality and not of the individual, has been maintained by the ILC Draft Articles on diplomatic protection. See Arts. 1 and 2 of the Draft Articles on the Diplomatic Protection. Text adopted by the International Law Commission at its fifty-eighth session, (A/61/10). Available online at: [untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf)

<sup>XV</sup> More details on the international law perspective on consular and diplomatic protection of individuals and whether the European construction of consular and diplomatic protection is in conformity with public international law norms, see P Vigni 'The Protection of EU Citizens: The Perspective of International law' in J Larik and M Moraru (eds.) *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Paper 2011/10 91-107; as well as P Vigni, 'Diplomatic and consular protection: Misleading Combination or Creative Solution?', *EUI Law Working Paper 2010/11*.

<sup>XVI</sup> See Art. 3(5) TEU, Arts. 23(2), 221 TFEU and Art. 5(10) of Council Decision establishing the organisation and functioning of the European External Action Service 11665/1/10 REV 1 Brussels, 20 July 2010.

<sup>XVII</sup> Including the latest amendment by the Lisbon Treaty, which has kept unchanged the material scope of the right of the EU citizen to protection abroad.

<sup>XVIII</sup> Between 2007- 2009 approximately 600 unrepresented Union citizens were provided consular protection under Art. 20 (2)(c) TFEU. See Section 3 of Chapter three of the CARE Final Report.

<sup>XIX</sup> Art. 23 (1) TFEU reads as follows: 'Every citizen of the Union shall, in the territory of a third country in



which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.’ Paragraph two of the same article confers legislative competence to the Council, however, the directives the Council is entitled to adopt aim only at facilitating the protection under this provision, ‘[...] establishing the coordination and cooperation measures necessary to facilitate such protection.’ Thus harmonisation seems to be excluded from the ambit of the Council competence. Based on this interpretation of the Union’s legislative competence, the Union will not have the power to provide in the future directive, without the unanimous consent of the Member States, the right of the EU citizen to repatriation, since certain of the Member States do not provide internally this right. Measures that can be included in the directive are based on cooperation and coordination among the Member States domestic procedures rather than on the harmonization of their national legislation and practices.

<sup>XX</sup> For instance: different legal status and effects of the consular and diplomatic protection of citizens (certain Member States recognise a fundamental right to their nationals, others only a right, while others have an approach whereby consular and diplomatic protection is a matter of policy under the executive’s control); consular and diplomatic protection has different material and personal scope depending on the specific approach adopted by the Member States; certain of the Member States still have in force international agreements concluded with other Member States before their accession to the EU, whose compatibility with the relevant EU law is questionable. For more details, see the CARE Report, section 7 of Chapter 3.

<sup>XXI</sup> The limited legal remedies available under the current EU law are the cause of the hybrid legal nature of the Decisions on consular protection (Decision 95/553/EC and Decision 96/409/CFSP), which, on the one hand, are international agreements and not EU acts, because they are not concluded by the EU institutions but only within the institutional framework of the EU Council, while, on the other hand, despite their public international law nature, they also form an integral part of EU law due to their legal basis – Art. 23(1) TFEU. Despite being part of the EU law, the legal nature of international agreements of these Decisions restricts the available EU legal remedies to infringements procedures. The possibility of actions of annulment brought by individuals and preliminary references addressed by national courts is debatable. On the legal status, effects and judicial remedies against Decisions of the Representatives of the Governments of the Member States concluded within the Council, in general, see RH Lauwaars, ‘Institutional Structure’ (Chapter IV) in PJG Kapteyn, AM McDonnell, KJM Moterlmans, CWA Timmermans (eds), *The Law of the European Union and the European Communities*, fourth edition (Alphen aan den Rijn: Kluwer Law International 2008) 221; and B de Witte, ‘Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements’ in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU law* (Antwerpen: Intersentia 2001) 261-62.

<sup>XXII</sup> For a full description of the discrepancies existing between the Member States on consular and diplomatic protection of nationals, see Chapter seven of CARE Report, available online at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>

<sup>XXIII</sup> After the entry into force of the Lisbon Treaty, the Council has legislative power to adopt by qualified majority voting directives for the purpose of facilitating the protection abroad of the EU citizens (Art. 23(2) TFEU). The Council has thus the power to adopt EU measures harmonising to a certain extent the domestic frameworks as long as there is no other appropriate measure that could ensure facilitating protection abroad of the EU citizens.

<sup>XXIV</sup> The situation was more convoluted in the pre-Lisbon era, due to a more vague language used in the relevant Treaty provisions.

<sup>XXV</sup> There are certain academic opinions which portrayed former Art. 20 TEC as an illustration of the Common Foreign and Security Policy (CFSP), a requirement for joint action between the Member States rather than as an individual right like the EU citizen’s right to move and reside within the EU. See S Kadelbach, ‘Union Citizenship’, *Jean Monnet Working Paper*, 2003, 30 and Siofra O’Leary, *EU Citizenship – The Options for Reform*, IPPR, 1996, 63.

<sup>XXVI</sup> For e.g., Ireland and UK Ministries of Foreign Affairs. However, UK has argued different opinions. In mid-2005, during hearings before the ECJ, the UK acting as a defendant in a case brought before the Court by Spain, argued that consular and diplomatic protection is a right of the individual and not a policy (Case C-145/04 *Spain v UK* [2006] ECR I-17917, para. 54). During the same year, as a response to the Commission Green Paper, the UK argued that the same Treaty based provision did not provide for a ‘right’ to the Union citizens (!).



<sup>XXVII</sup> See for the different opinions of the MEPs. European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Resolution of 11 December 2007 P6\_TA(2007)0592, available at <http://www.careproject.eu/database/schedaEU.php?eulex=EUEPreport&lang=6>.

<sup>XXVIII</sup> See, for example, de Smith, *Judicial Review*, fifth edition, 1995, at 574-5, citing *Re Findlay* [1985] AC 318, 388, per Lord Scarman. For an application of the doctrine of legitimate expectations to the specific case of diplomatic protection of citizens, see *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs* and another [2002] EWCA Civ 1598; and *R (on the application of Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, both cases are available in the CARE Database ([http://www.careproject.eu/database/browse\\_euc.php#](http://www.careproject.eu/database/browse_euc.php#)).

<sup>XXIX</sup> For instance, UK and Ireland. See the UK position: ‘the United Kingdom will not engage in publicity campaigns to inform EU citizens of Art. 23 TFEU until its definition and meaning has been legally clarified. The language of ‘consular and diplomatic protection’ and ‘entitlement’ hold a stronger guarantee than is actually available to EU citizens and could create a potentially confusing state of affairs for EU citizens.’ Statement made by Jim Murphy, Minister of Europe at the Foreign and Commonwealth Office, European Standing Committee, ‘Diplomatic and Consular Protection’, session 2007-08, 23 June 2008, at col. 5, available in the CARE Database. So far, this position has not changed, according to the Report on the UK regulatory framework on consular protection to be found in the CARE Report.

<sup>XXX</sup> Until 1<sup>st</sup> December 2009, the EU Charter had only an interpretative role in the application of EU law. See more on this in B de Witte, ‘The Use of the ECHR and Convention Case Law by the European Court of Justice’ in P Popelier, Catherine van de Heyning and P van Nuffel (eds) *Human Rights Protection in the European Legal Order: the Interaction between the European and the National Courts*, Cambridge: Intersentia, 2011, 17-35.

<sup>XXXI</sup> It is important to distinguish between the EU citizen and the unrepresented EU citizen as holder of the right. The Treaties and the EU Charter do not confer a right to consular and diplomatic protection on all EU citizens, but only to a restricted category, namely, as expressly mentioned by the Treaties, to the ‘unrepresented EU citizens’. The notion of ‘unrepresented’ as a condition that a Union citizen has to fulfil in order to enjoy the right to consular protection is exhaustively defined in Art. 1 of Decision 95/553/EC: ‘Every citizen of the European Union is entitled to the consular protection of any Member State’s diplomatic or consular representation if, in the place in which he is located, his own Member State or another State representing it on a permanent basis has no: - accessible permanent representation, or - accessible Honorary Consul competent for such matters.’

<sup>XXXII</sup> Art. 20(2)(c) and 23 TFEU and 35 TEU.

<sup>XXXIII</sup> More details on the content and legal nature and effects of Decision 95/553/EC and Decision 96/409/CFSP can be found in the CARE Report.

<sup>XXXIV</sup> The COCON committee has adopted in 15 years of its existence an impressive number of conclusions and guidelines in the field of consular protection, which however maintain a very broad language, sometimes simply limiting to reiterate the relevant Treaty provisions: see Guidelines approved by the Interim PSC on 6 October 2000, Cooperation between Missions of Member States and Commission Delegations in Third Countries and to International Organisations, 12094/00; Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5.11 2010; Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON on 26 June 2006 – 10109/2/06 REV 2; Lead State Concept in Consular Crises, Conclusions adopted by COCON, 10715/07, 12.07.2006; ‘Common Practices in Consular Assistance’ and ‘Crisis Coordination’ adopted by the COCON, 10698/10, 9.06.2010; Guidelines for further implementing a number of provisions under Decision 95/553/EC adopted by COCON, 11113/08, 24.06.2008. The initial work of the COCON was not disclosed to the public.

<sup>XXXV</sup> Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Communication from the Commission, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Summary of the Impact Assessment (SEC/2007/1601) - Commission staff working document, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular



protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Impact Assessment (SEC/2007/1600) - Commission staff working document, 05/12/2007; European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens' rights – 27/10/2010; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU On progress towards effective EU Citizenship 2007-2010 – 27/10/2010.

<sup>xxxvi</sup> These issues are addressed in a PhD thesis currently undertaken at the EU by the author.

<sup>xxxvii</sup> Art. 8c Maastricht Treaty made express the obligation for the EU countries to start, within a short deadline (*before 31 December 1993*), negotiations with third countries in order to ensure effective application of the right. This deadline was deleted from the subsequent Treaty provisions. The present EU Treaties dedicate two separate provisions to this right: Arts. 20(2)(c) TFEU and 23 TFEU. There is only one difference between the wordings of Art. 20(2)(c) and 23(1) TFEU: if Art 20(2)(c) TFEU provides that consular **and** diplomatic authorities of the Member States will confer protection, Art. 23(1) TFEU provides that national consular **or** diplomatic authorities will confer protection. This paper argues that the use of 'or' is rather intended to clarify the situation when a Member State has both diplomatic and consular representations in a third country. In this case, the Union citizen should seek protection only from one of these authorities representing the Member State, and not take advantage of help from both of representations. However, in light of the perfect match of the rest of the wording of Art. 20(2)(c) TFEU with Art. 23(1) TFEU, the change of 'and' with 'or' is regrettable and should have been avoided by the Treaty drafters.

<sup>xxxviii</sup> Case C-391/09 *Runevič-Vardyn and Wardyn*, Judgment of 12 May 2011, nyr.

<sup>xxxix</sup> On the basis of Art. 22 TFEU, citizens of the Member States resident in other Member States have the right to vote in European Parliament's elections *under the same conditions* as nationals.

<sup>xl</sup> Case C-300/04 *Eman and Sevinger v. College vanburgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

<sup>xli</sup> Case C-135/08 *Rottmann*, judgment of 2 March 2010, nyp; Case C-34/09 *Zambrano*, Judgment of 8 March 2011, nyp.

<sup>xlii</sup> The landmark cases of the ECJ in the field of the EU citizenship have so far created either economic or social rights for the Union citizens within the borders of the internal market. For economic rights see the pronouncements of the ECJ in: Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-258/04 *Ioannidis* [2005] ECR I-8275; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; Case C-362/88 *GB-INNO* [1990] ECR I-667. For social rights, see the pronouncements of the Court of Justice in Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613; Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case [ECJ] C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-158/07 *Förster* [2008] ECR I-8507; Case 186/87 *Cowan* [1989] ECR 195; Case C-57/96 *Meints* [1997] ECR I-6689.

<sup>xliiii</sup> Case T-372/02 *Internationaler Hilfsfonds v Commission* [2003] ECR II-438; Case C-327/02 *Panayotova* [2004] ECR I-11055; Case C-139/08 *Kqiku* [2009] ECR I--2887; C-219/08 *Commission v Belgium* [2009] ECR I-9213; Case C-228/06 *Soysal* [2009] ECR I-1031; Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgium* [2002] ECR I-6591; Case C-257/99 *Barkoci and Marcel Malik* [2001] ECR I- 6557.

<sup>xliiv</sup> Case C-203/07 P *Greece v Commission* [2008] ECR I-0000.

<sup>xli v</sup> See Case C-473/04 *Plumex v Young Sports NV* [2006] ECR I-1579 – the Union law that was interpreted in this case was the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

<sup>xli vi</sup> This duty arose however only as a result of an express contractual obligation on the part of the Union, Case T-572/93 *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1995] ECR 11-2025.

<sup>xli vii</sup> To be noticed that the provision of the general principle of non-discrimination based on nationality is located within the chapter on Citizenship only since the Lisbon amendment. In the EC Treaty, it was located in a different part (Part One on Principles) separated from Part two on Citizenship.

<sup>xli viii</sup> Op AG Sharpston in Case 427/06 Bartsch, para. 69. See further T. Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> ed., 2006), 36 to 42; and J. Temple Lang, 'The Sphere in which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles', *Legal Issues of European Integration* 1991, 23 to 35; S Prechal, S de vries & H van Eijken, 'The Principle of Attributed power and the Scope fo EU Law' in L Besselink, F Pennings, S Prechal (eds.) *The eclipse of the Legality Principle in the European Union*, Kluwer Law International, 2011, 216.



<sup>XLIX</sup> It is settled case law of the CJEU that the general principles of EU law apply to the Member States actions only when they act within the scope of EU law: Case 149/77 *Defrenne III* [1978] ECR 1365, paras. 27 and 30, and Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 15, Case C-442/00 *Caballero* [2002] ECR I-11915, paras 30 and 32, Case C-13/05 [2006] ECR I-6467, Case C-144/04 [2005] ECR I-9981 para. 75; Op AG Sharpston in Case 427/06 Bartsch [2008] ECR I-7245 para. 66.

<sup>L</sup> Such as Directives, Decisions, operationalization of Regulations, C - 345/06 *Heinrich*, [2009] *ECR* I-1659 interpretation of national legislation in light of what used to be Framework Decisions (see Angelidaki, Pupino). Additionally, see, for example, Case 230/78 *Eridania* [1979] ECR 2749, para. 31; Case 77/81 *Zuckerfabrik Franken* [1982] ECR 681, paras 22 to 28; Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paras 10 and 11; Case 5/88 *Wachauf* [1989] ECR 2609, paras 17 to 22; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paras 88 to 93.

<sup>LI</sup> Case C-260/89 *ERT* [1991] ECR I-2925, paras. 41 to 45; and Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 24.

<sup>LII</sup> See, for example, Case C-71/02 *Karner* [2004] ECR I-3025, paras 48 to 53 (potential impediment to intra-Community trade); instances of Member States acting as trustees of the Union's interests, see *inter alia* Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paras 23 to 30 (Member States acting as trustees of the Community in an area of exclusive Community competence) and Case C 246/07 *Commission v Sweden* (PFOS) judgment of 20 April 2010, nyr; Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenbeide and Others* [1997] ECR I-7281, paras. 45 to 48 (measures adopted by a Member State in the exercise of its competences relating to VAT).; Case C-402/09 *Tatu*, judgment of 7 April 2011 not yet reported, (Member States adopting pollution tax for second-hand imported cars).

<sup>LIII</sup> As happened with the other Treaty based rights of the EU citizen which developed from a mere application of the principle of non-discrimination based on nationality into self-standing rights which the EU citizens can invoke solely based on their nationality (Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41).

<sup>LIV</sup> Based on Art. 23(2) TFEU. To be noticed that this Article does not require the Council to adopt implementing legislation, but it only gives it this possibility.

<sup>LV</sup> The purpose of the Treaty Articles, especially those on Union citizen's rights and fundamental freedoms has played a significant role in the European Court of Justice's interpretation of these Articles, whether in cases assessing direct effect, or breach of these rights and freedoms. See more in B de Witte, 'Chapter 12 – Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press 2011).

<sup>LVI</sup> As certain Member States have argued, see, for example, the position of the Member States having an approach of the consular and diplomatic protection of nationals as a matter of the executive's policy in the CARE Final Report, available at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>

<sup>LVII</sup> According to Art. 52(1) of the EU Charter, limitations and restrictions of the Charter's fundamental rights are possible as long as the following conditions are fulfilled: the limitation must be provided by law; respect the essence of the fundamental rights; respects the principle of proportionality; it is necessary for the purpose of genuinely meeting objectives of general interest as recognised by the Union or there is a need to protect rights and freedoms of others.

<sup>LVIII</sup> See, *inter alia*, the recent democratic revolutions in Egypt, Libya, the tsunami that affected Japan.

<sup>LIX</sup> According to the information gather by the author during interviews with Commission and Member States representatives in the period of March – July 2011.

<sup>LX</sup> One author argues that the Member States will respect the principle of non-discrimination based on nationality only if an equal number of places is given to each of the Member States in the transport means made available by another Member State (A Ianniello-Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 *European Public Law* 91, 97). This paper, on the other hand, argues that Art. 23 TFEU would not require the aforementioned method of division of places, as the Article entitles only the unrepresented EU citizens to equal treatment. According to Art. 1 of the Decision 95/553/EC, unrepresented Union citizens are those that do not have an accessible consular or diplomatic mission of their State in the third country where they are located. Thus, in practice, a strict application of the Treaty Article would require a division of places by the number of the unrepresented Member States plus one (the Member State providing the transport means). However, in practice, the Member States are not that formalistic, as proved by the recent evacuation procedure of the EU citizens from



Egypt and Libya.

<sup>LXI</sup> For the moment, the Member States have not yet recognised a right to protection abroad of the non-EU family member joining the EU citizen, not even in the limited circumstances of emergency evacuation. The situation is handled on a case by case basis. See more on this in M Moraru and S Faro, 'La Questione dell'Effettività del Diritto dei Cittadini Europei alla Protezione Diplomatica e Consolare nei Paesi Terzi. I Risultati del Progetto CARE', *Riv. Ital. Dir. Pubbl. Comunitario*, forthcoming issue (3/4), 2011 and Section 4.1.1 of Chapter three of the CARE Report.

<sup>LXII</sup> See the national Reports on France, Ireland, Poland, UK in the CARE Report, available at [www.careproject.eu/database/browse\\_eu.php](http://www.careproject.eu/database/browse_eu.php).

<sup>LXIII</sup> For instance, see the EU specific legal definition of 'goods', 'worker', 'primacy', 'subsidiarity', 'proportionality', 'alien', 'national security', 'court and tribunal', 'genuine link' – in EU citizenship case law the meaning of 'genuine link' is different in comparison to the public international law concept of 'genuine link'. The following examples show that the EU Courts have not limited their interpretation to mere transposition of the international law concepts, but adapted them to the EU legal order specificity.

<sup>LXIV</sup> It can be noticed that the Spanish proposal referred to both 'protection' and 'assistance' since under Spanish national law the two concepts are legally different. The Spanish legal literature distinguishes between protection, which involves formal complaints before public authorities, while assistance refers rather to provision of food, clothes, and medicines. See E Vilarino Pintos, *Curso de Derecho Diplomático y Consular. Parte general y textos codificadores* (Tecnos: Madrid 1987) 102-103; A Maresca, *Las relaciones consulares* (Piernas:Madrid 1974) 215-219.

<sup>LXV</sup> See Documentation de la RIE, col 18 1991, 333-338 and 405-409.

<sup>LXVI</sup> A similar example of divided opinions between the Member States leading to a broad definition of a legal concept is the well known broad, encompassing all, definition of the CFSP, see R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 34 *Common Market Law Review* 358–9.

<sup>LXVII</sup> The Commission seems to have the same interpretation, diplomatic protection is not *per se* excluded from the legal content of the Union citizen's right, but for the moment, attention is given to the most problematic aspect of the right – consular protection for Union citizens found in distress in third countries. See Accompanying document to the Commission Action Plan 2007-2009 - Impact Assessment, doc. SEC (2007) 1600 of 5 December 2007 and the European Commission's EU citizenship Report 2010 - *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010.

<sup>LXVIII</sup> Case C-341/01 *PlatoPlastik Robert Frank* [2004] ECR I-4883, para. 64; Case C 340-08 *M and others*, (Fourth Chamber) judgement of 29 April 2010, nyr, para. 44. In the latter case there was discrepancy between on one hand, the different official language version of the EU law at issue (Council Regulation no 881/2002) and, on the other hand, between the official translation of the relevant EU law and the United Nations Security Council Resolution 1390 implemented by the foregoing Council Regulation. Since it could not take a decision solely based on literary interpretation, the ECJ interpreted the provision on the basis of the aim of both the Regulation and Resolution.

<sup>LXIX</sup> See for example, C-200/02 *Chen* [2004] ECR I-9925; Case C-135/08 *Rottmann* [2010] ECR I-0000; Case C-34/09 *Zambrano*, judgment of 8 March 2011; and the already famous Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

<sup>LXX</sup> Case T-253/02 *Ayadi v Council and Commission* [2006] ECR II-2139, para. 149

<sup>LXXI</sup> Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-52, para. 119.

<sup>LXXII</sup> There was no effective judicial remedy available for the injured individuals at either the national or international level. In regard to consular and diplomatic protection of the EU citizens in non-EU countries, certain of the Member States have domestic legal remedies available, as for those that do not, they are now required under Art. 19(1) TEU. It remains to be seen how the ECJ will interpret Arts. 20(2)(c) and 23 TFEU as well as Art. 46 EU Charter: in the Member States' or the EU citizen's benefit?

<sup>LXXIII</sup> According to Art. 8 of the Vienna Convention on Consular Relations (VCCR) and Art. 6 of the Vienna Convention on Diplomatic Protection (VCDR), the receiving third country has discretionary power to oppose to the exercise of consular and diplomatic protection by another State than the State of nationality, as long as it has not formally consented to this type of protection of individuals.

<sup>LXXIV</sup> To be noticed though that the Lisbon Treaty has brought a proliferation of references to 'peoples of Europe', 'Union peoples' which signals a strong desire to continue the creation of a sense of belonging between the citizens of the Member States and the Union, and not necessarily between the citizens of the Member States and the other Member States: preamble 13, TEU - Arts. 1(2), 3(1), 3(5), 9(1), 3(2), 10(4),



13(1), 14(2), 35(3); TFEU – Arts.15(3), 20(1), 21(1), 22, 23, 24, 170(1), 227(1), 228(1).

LXXXV Case *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy)[1989] ICJ Reports 1989, para. 50 of the judgment; Advisory Opinion - Reparation for Injuries Suffered in the Service of the UN, ICJ Reports 1949, p. 11: 'In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.'

LXXXVI The EU is bound to respect public international law (Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019 para. 9). By way of consequence, it may be argued that it is bound to respect also the requirement of the three consents needed for a legitimate exercise of protection abroad of the EU citizens by other Member States than the State of nationality. However, the requirement of respecting public international law norms did not impede the CJEU from favouring EU instead of public international law norms in the *Kadi* case. It remains to be seen how the CJEU will interpret the requirement of unanimous consent under public international law in relation to the exercise of consular and diplomatic protection of EU citizens in non-EU countries.

LXXXVII The obligation was first included in Art. 8c Maastricht Treaty and remained in all subsequent versions of the Article including in the present Art. 23(1) TFEU.

LXXXVIII There are two exceptions: Italy signed several bilateral agreements after the entry into force of the Maastricht Treaty which include provisions protecting Union citizens working and/or living in third countries - namely the Conventions with Ukraine in 2003 (Art. 62), Republic of Moldova in 2000 (Art. 61), Georgia in 2002 (Art. 60), Great People's Libyan Arab Jamahiriya Socialist in 1998 (Art. 2) and Russian Federation in 2001 (Art. 37); the second exception is Portugal, namely the Consular Convention between Portugal and the Russian Federation (concluded in 2001). These agreements can be found online in the CARE database.

LXXXIX See the practice of disconnection clauses. For an extensive discussion on the regime of disconnection clauses in EU law see M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited - The EU and its Member States in the World* (Oxford: Hart Publishing 2010).

LXXX C-26/62 *Van Gend en Loos* [1963] ECR 1. TC Hartley, *The Foundations of European Union Law*, seventh edition (Oxford: Oxford University Press 2010) 110.

LXXXI The justiciability test as the author calls it. See de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' 331.

LXXXII In addition to this argument, certain Member States argue that the Treaty based Article needs further clarification whether it confers consular assistance and/or protection as in certain national legal orders the two legal concepts are distinct: Germany, Ireland, Romania, Spain, UK. See more on this topic in CARE Report, Chapter three, Section. 4.1.1.

LXXXIII Art. 23(1) TFEU second indent provides: 'Member States shall [...] start the international negotiations required to secure this protection.', recognising the public international law requirements: Art. 8 of the VCCR and Art. 6 of the VCDR.

LXXXIV Case C-2/74 *Reyners v Belgium* [1974] ECR 652, para. 30: 'After the expiry of the transitional period the directives provided for by the chapter on the right of establishment have become superfluous *with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.*' (emphasis added) See also Case 43/75 *Defrenne v SABENA* [1976] ECR 445.

LXXXV For a recent case on direct effect of the principle of non-discrimination based on nationality, see Case C-164/07 *Wood* [2008] ECR I-4143.

LXXXVI See for instance Art. 291(1) TFEU: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.'

LXXXVII For instance, Case C-13/68 *Salgoil* [1968] ECR 463. Hilson notes that the recognition of direct effect to the fundamental freedoms by the European Court of Justice surprised, as 'none of them sit particularly happily with the requirements as to clarity, precision and unconditionality.' See C Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 *European Law Review* 636, 640.

LXXXVIII Case C-431/99 *Baumbast* [2002] ECR I-7091.

LXXXIX After the Lisbon amendment, the general rule is that the EU courts have general jurisdiction to review the application of the EU Treaties, thus including Arts. 20 and 23 TFEU, unless expressly excluded as is the case of the CFSP provisions (Art. 24 TEU).

<sup>XC</sup> *Reyners* – former Art. 52 EC Treaty and *Defrenne* – former Art. 119 EC Treaty.



<sup>XCI</sup> Art. 8C of the EC Treaty reads as follows: ‘*Before the 31 December 1993* the Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.’ (emphasis added)

<sup>XCII</sup> Statement made by Javier Solana, ‘EU Makes Its Mark on the World Stage’, *The Guardian*, 11 October 2009.

<sup>XCIH</sup> The area is not categorised among the TFEU list of competences, however, Art. 5(10) of the Council Decision establishing the EEAS is suggestive of the Union role in the area of consular and diplomatic protection, as well as Art. 35(3) TEU.

<sup>XCIV</sup> So far EU Institutions that have plaid a role in consular and diplomatic protection of the Union citizens are: the Union Presidency, SITCEN, the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, and now also the EEAS (Art. 5(10) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30.

<sup>XCV</sup> The only situation recognised under public international law when an international organisation can exercise diplomatic protection is when it exercises functional protection, namely when the injury is suffered by an agent of an international organisation. In the Reparation case, the ICJ limited the functional protection only to injuries arising from a breach of an obligation designed to help an agent in performing his duties (ICJ, Advisory Opinion of 11 July 1949, ‘Reparations for injuries suffered in the service of the United Nations’, 1949, ICJ Reports, 182).

<sup>XCVI</sup> See the comments made during the public debate following the Commission Green Paper on the different views of the Commission, Council (especially of certain Member States) available at [www.careproject.eu/database/browse\\_cu.php](http://www.careproject.eu/database/browse_cu.php).

<sup>XCVII</sup> See Josep M. Lloveras Soler, The New EU Diplomacy: Learning to Add Value, *EUI Working Paper RSCAS 2011/05*.

<sup>XCVIII</sup> From all possible types of CFSP measures, a Joint Action would have probably been the most suited measure due to its specific operational character. In addition, CFSP Decisions could have also served the purpose of facilitating the protection abroad of EU citizens.

<sup>XCIX</sup> See *inter alia*, Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5 November 2010.

<sup>C</sup> The COCON is made up of representatives of the Member States’ Ministries of Foreign Affairs, usually working in the consular and diplomatic affairs unit.

<sup>CI</sup> Decisions of Representatives of the Governments of the Member States were and are usually adopted pursuant to Art. 253 TFEU (ex-Art. 223 TEC), Art. 341 TFEU (ex-Art. 289 TEC).

<sup>CIH</sup> Decisions of Representatives of the Member States meeting within the Council are *international agreements* concluded by the executives of the Member States and not by the Council, thus they are not EU acts. However they form an integral part of the EU legal order. See H R Lauwaars, Chapter four - Institutional Structure, in Kapteyn, Mortelmans, Timmermans (eds.) *The Law of the European Union and the European Communities*, fourth edition revisited 2008, 219-221.

<sup>CIH</sup> For instance, the possibility of the Union citizens to bring a direct action of annulment against the Decision 95/553/EC before the General Court of Justice is questionable, since the Decision is not a Union act.

<sup>CIV</sup> Actions of annulment are available only against EU acts, Decisions of the Representatives of the Government of the Member States do not fall under this category. See Case 22/70 *Commission v Council* [1971] ECR para. 42; Joined Cases C 181/91 and C 248/91 *Parliament v Council and Commission* (‘Bangladesh’) [1993] ECR I 3685, paras. 12-14; Opinion Kokott of 26 March 2009 in Case C 13/07 *Commission v Council*, para. 40; Case C- 370/07 *Commission v Council*, judgment of 01/10/2009, para. 42.

<sup>CV</sup> See the smart sanctions cases, where the inextricable link between the Union objective and the functioning of the internal market allowed the use of former Art. 308 EC Treaty for adopting a Community measures pursuing a Union objective. See, *inter alia*, Case T-306/01 *Yusuf* [2005] ECR II-3533, para. 164; Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649.

<sup>CVI</sup> The strict positive and negative conditions for the exercise of the Community general competence were cumulatively fulfilled: absence of a Treaty provision conferring competence to the Community, necessity, subsidiary and the existence of a Community objective. The Council had the possibility to act by way of adopting Community measures under former Art. 308 EC Treaty. However, the Member States unanimously



agreed only to actions by way of Decisions of the Representatives of the Member States adopted within the Council.

<sup>CVII</sup> See in this regard, the National Report of the UK in the CARE Report.

<sup>CVIII</sup> More on this in the CARE Report, Section 7 of Chapter 3.

<sup>CIX</sup> Consular and diplomatic protection as an external dimension of the Union citizenship is only one aspect of the protection abroad of the EU citizens. Consular protection can be conferred to the EU citizens in third countries hit by disasters also by ESDP missions. Interestingly, the first Decision adopted on the basis of former Art. 17 TEU concerned the evacuation of EU nationals whenever they are in danger in third countries. It was adopted as a *sui-generis* Decision that was not published in the Official Journal. Doc. 8386/96, Decision de Conseil du 27 juin 1996, relative aux opérations d'évacuations de ressortissants des Etats membres lorsque leur sécurité est en danger dans un pays tiers – see more in RA Wessel, *The European Union's foreign and security policy: a legal institutional perspective* (Dordrecht: Martinus Nijhoff Publishers 1999) 133.

<sup>CX</sup> Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community Mechanism to facilitate reinforced cooperation in civil protection assistance OJ L 297, p.7. See also, Art. 2(10) and recital 18 of the preamble of Council Decision 2007/779/EC of 8 November 2007 which extended the Civil Protection Mechanism also to situation of consular assistance of the Union citizens in third countries.

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# EU Citizenship, Naturalisations, and Mythical Cultural Exceptionalism in Europe Today'

by

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## Abstract

This essay discusses the dubious premises of ‘repressive liberalism’ underlying the policies of cultural ‘integration’ that have been adopted by a number of otherwise liberal democracies around the world. The author uses his own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of ‘cultural integration’, in order to expose the counterproductive nature of the ‘integration’ approach to the absorption of non-citizens. The essay claims that there is no such thing as a ‘nation-specific’ culture to be tested and that the creation and consolidation of EU citizenship changed the whole framework of reference within which any Member State nationality operates and should be discussed. The argument is that, particularly in the EU context, culture and language testing before naturalisation is built on false assumptions and does not serve any identifiable goal that would go beyond the perpetuation of prejudice. Since testing stigmatises a large number of Europeans and potentially undermines social cohesion in the Member States, it should be abolished.

## Key-words:

EU Law, Citizenship, European Citizenship, nationality, naturalisation, culture, integration, social cohesion, prejudice, testing.



*It has always been easier, it will always be easier, to think of someone as a non-citizen than to decide that he is a non-person.*

Alexander Bickel<sup>I</sup>

*Le propre n'est pas nécessairement le bien. Il est déjà choquant de dire my country right or wrong. La même formule, appliquée à ce que chacun appelle «sa culture», produit des effets tout aussi pervers.*

Rémi Brague<sup>II</sup>

## Introduction and the structure of the argument

This essay discusses the dubious premises of ‘repressive liberalism’<sup>III</sup> underlying the policy of cultural ‘integration’ adopted by a number of otherwise liberal democracies around the world.<sup>IV</sup> The focus is on the situation in the European Union (EU). I am using my own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of ‘cultural integration’, marked by ‘politics divided from society’.<sup>V</sup> This will hopefully provide a useful perspective for those readers who have never changed nationalities themselves.

This essay exposes the counterproductive nature of the mistaken ‘integration’ approach to the absorption of non-citizens embraced by a growing number of Member States of the Union.<sup>VI</sup> It claims that there is no such thing as a ‘nation specific’ culture to be tested and that the creation and consolidation of EU citizenship changed the whole framework of reference within which any Member State nationality operates and should be discussed. The argument is very simple: culture and language testing before naturalisation is built on false assumptions and does not serve any identifiable goal that would go beyond the perpetuation of prejudice, particularly in the EU context. As such, since testing stigmatises a large number of Europeans and potentially undermines social cohesion in the Member States, it should be abolished.

The essay is structured as follows. After a brief outline of the main problematic aspects of the shift towards the policy of ‘cultural testing’ in Europe and of its apparent clash with the rationale of EU integration, including the continuing articulation of the concept of EU citizenship (**I.**), the essay turns to a concise account of the author’s naturalisation experience (**II.**). Building on the first two sections, the myth of the necessary ‘integration’ of the ‘new-comers’<sup>VII</sup> into the majority society propagated by a number of (still) liberal democracies is exposed and analysed. This myth is commonly employed by states to justify the exclusion of citizenship applicants perceived in the popular culture as the ‘other’. A special emphasis is put on the problematic nature of the recent developments, when seen in the context of the continuing proceduralisation of the notion of nationality in the liberal democratic states during the last half a century. Having lost its substantive cultural essence, the contemporary legal vision of nationality disallows states from developing profoundly illiberal monocultures by punishing difference. The universality of modern culture reinforced by the ideal of liberal tolerance ensures that states introducing cultural tests, even with the best intentions, simply have nothing to test – my first thesis (**III.**). The essay continues by focusing on the clash between the essence of EU



citizenship, on the one hand, and that of Member States' nationalities on the other, firmly placing the debate within the legal-political context of European integration and demonstrating that within that context, any culture and language test by the Member States is *per se* far more dubious than in any other country in the world – my second thesis (IV.).

The mentioned developments damage the harmonious development of the societies of the EU Member States in a number of important ways, including the propagation of mythical national exceptionalism through the state-mandated exclusive idea of culture and, probably more importantly, by making it clear to the applicants for naturalisation that no matter where they might come from, their own '*non-culture*' is not good enough for the states where they reside.<sup>viii</sup> Once the layer of EU citizenship is added, the urgency to deal with the problems outlined becomes even more acute.<sup>ix</sup>

These problems not only make the lives of a huge number of people more miserable than they would otherwise be. They also threaten to affect the social cohesion of our societies, where a general shift to the purely doctrinal vision of what a society is seems to have taken a toll on common sense, simplifying reality to a dangerous degree.

## I. Outline of the problem

The articulation of the status of EU citizenship,<sup>x</sup> amplifying more general global trends,<sup>xi</sup> deeply affected the very essence of the Member States' nationalities in a number of important ways.<sup>xii</sup> While EU citizenship provides all Member State nationals with a number of Union-wide rights which no Member State alone could grant, the status of EU citizenship, although of *ius tractum* nature<sup>xiii</sup> (being derived from the nationalities nationality of the Member States),<sup>xiv</sup> often finds itself in a contrarian relationship with such nationalities. The main logic behind the nationalities of the Member States – as numerous naturalisation practices aimed at incorporating 'newcomers' clearly demonstrate – is that of *settling* the nationals within the confines of the states.<sup>xv</sup> The main logic of EU citizenship, on the contrary, consists in liberating citizens from the negative effects of the 'container theory of society'<sup>xvi</sup> that states (and sometimes regions) impose,<sup>xvii</sup> since the main EU citizenship right is *to leave* one's Member State of nationality<sup>xviii</sup> and to settle elsewhere in the Union. EU citizenship thus reinforces the democratic nature of the Union reflected in the EU Treaty by providing for voting with one's feet:<sup>xix</sup> EU citizens can always move away and choose a Member State which would suit best their ideals of liberty and the good life.<sup>xx</sup>

This obvious clash between the logical vectors of 'to stay' and 'to go' might be downplayed, but it will have to be addressed seriously in the immediate future. Given the positive potential of the legal status of EU citizenship to broaden citizens' horizon of opportunities<sup>xxi</sup> and the recent citizenship case law reaffirming the importance of this status,<sup>xxii</sup> the reconciliation of the two vectors can only occur through a rethinking and reframing of the Member States' nationalities, unless the whole construct of the internal market and EU citizenship is to be scrapped, with all the disastrous consequences that makes this highly unlikely.

The situation of newly naturalised Member State nationals is a perfect illustration of the logical disharmony between the two legal orders in the EU, affecting the same individuals simultaneously. This duality of statuses which governs the life of every single EU citizen exemplifies the archaic logic behind naturalisation, which is never questioned by



politicians and is only rarely seriously criticised by scholars.<sup>xxiii</sup> The illuminating critical accounts provided by Kostakopoulou<sup>xxiv</sup> and Carens<sup>xxv</sup> are particularly useful in employing simple facts to challenge the counterproductive views entrenched within the political mainstream, which in essence focus on the quasi-totalitarian embrace of a mythical monoculture, corresponding to each bounded community, to each nation.

Such an idea of the world shapes a duality, which consists in the tension between a presumed order ‘inside’ and anarchy ‘outside’,<sup>xxvi</sup> automatically dismissing any ‘outside’ culture as inferior to that of the majority culture ‘inside’ the state, mistakenly embracing the presumption of monocultural citizenship,<sup>xxvii</sup> which never existed in reality,<sup>xxviii</sup> however hard the states tried to impose it from within the confines of their ‘imagined communities’.<sup>xxix</sup> Viewed from this perspective, the European ‘*Costituzione senza popolo*’<sup>xxx</sup> is not an exception in representing a polity without a nation, but a reflection of the state of affairs where the state-imposed homogenisation is absent.<sup>xxxi</sup> Indeed, ‘nowhere is a common identity sufficient to give rise to new forms of governance. Identities overlap and compete with one another’.<sup>xxxii</sup> Moreover, to take the state-related official identity as the most important one *per se* would be verging on the absurd.

While Member States present language and ‘integration’ tests preceding naturalisation as necessary and useful, this article takes exception with such a view, demonstrating that the contrary is true. First of all, the liberal ideology of tolerance coupled with common sense permits argument against such practices. Indeed, those who are willing to naturalise are in the absolute majority of cases long-term residents of a polity. It would appear to be exceptionally arrogant of any ‘container society’ – of any state – to assume that the culture and language(s) of these people are inherently inferior to those the state happens to sponsor. So much inferior, in fact, as to lead to a ‘legitimate’ denial of their very membership of society.

Asking those who functioned in a society for years to pass any form of naturalisation test simply underlines their ‘otherness’ and exposes a presumption against the acceptance of such people as equals, unless they pass through the state-sponsored ‘purification’ process. In short, it comes down to the denial of social facts:<sup>xxxiii</sup> those who never bother to naturalise may stay, but will always be looked down upon by a state that presumes their cultural inferiority. The latter will mandate their exclusion from the majority society composed of ‘correct’ citizens,<sup>xxxiv</sup> whose representatives in the legislature would preach faithfulness to the ‘real’ (*i.e.* state-sponsored) culture, usually viewed as a frozen set of conventions, rather than a set of dynamic interactions of different, mutually enriching influences.<sup>xxxv</sup>

In fact, when speaking of culture in such a context, it is impossible but to focus on the idea of control, since, as pointed out by Adorno, ‘whoever speaks of culture speaks of administration as well, whether this is his intention or not’.<sup>xxxvi</sup> Once the state intervenes, the very essence of what one commonly understands as culture is instantly transformed: ‘the law can play an instrumental role in “organizing culture”’,<sup>xxxvii</sup> leading to the formation and promotion of *Leitkultur* – the version of ‘culture’ which is officially endorsed and promoted by the state.

The path of the liberal democratic state during the last half a century is, broadly-speaking, also a path *away* from such interventions and *towards* tolerance and pluralism, as exemplified by the degree to which states have embraced human rights and non-discrimination commitments. However, as the recent rise in the adoption of naturalisation ‘culture tests’ reveals, this does not prevent majorities from halting the exceptionalism of



local ‘cultures’, thereby employing narratives (as well as laws, of course) against those who ‘do not belong’.

An acceptance by the majority should not deter scholars from criticising this state of affairs. However, the understanding that majorities are more often wrong than right predates Publius<sup>XXXVIII</sup> and democracy is only a success in that it ‘does not demand much of people and [...] can function with a minimal human being’.<sup>XXXIX</sup> Moreover, democracy is just the means, as Weiler reminded us, not a value in itself.<sup>XI</sup> Consequently, ‘a democracy of vile persons will be vile’.<sup>XII</sup> One can sigh with relief: at least there is nothing wrong with democracy in Europe.

In the context of the EU all the aforementioned considerations are amplified by the functioning of the concept of EU citizenship. This status is conferred on any individual who acquires the nationality of a Member State and is essentially antithetical to the narrow-minded nationalist concerns which drive naturalisation politics. EU citizenship, by its mere existence, thus renders dubious all the illiberal ‘integration’ efforts put in place by national legislatures. These national policies cannot escape from being assessed in the context of the Union as a whole. Once the level of magnitude has changed – especially once viewed from the wider perspective of the EU – all state-mandated cultures become ‘minority cultures’<sup>XIII</sup> in some sense, which results in the instant taming of their mythical claims.<sup>XIII</sup> According to Kymlicka, ‘the world-historical task of the EU is to tame and diffuse liberal nationhood’,<sup>XIV</sup> which corresponds to the consolidation of democracy.<sup>XV</sup> Non-recognition of this important contribution of the EU would clearly amount to ‘moral blindness’.<sup>XVI</sup>

## II. On a personal note: becoming Dutch

When going through the process of naturalisation in the Netherlands, like any other citizenship applicant, I was asked to prove that I had legally resided in the Kingdom for a number of years,<sup>XVII</sup> that my income was sufficient and also that I was well enough versed in the local language and culture.<sup>XVIII</sup> The elaborate testing system in place in the Netherlands<sup>XIX</sup> is tuned to ensure the ‘integration’ of newly naturalised citizens into the society. The law demands that an ‘official’ test of (official) culture be passed.<sup>I</sup> Thus numerous years spent in the country teaching law at an (Imperial) University – in my case – were not viewed as a proof of successful ‘integration’.

The consequences of such an approach are truly paradoxical. ‘Integration’ becomes a bureaucratic exercise entirely ignoring the reality of life, as my actual functioning in society did not count. Having spent five or more years in the country, anyone necessarily has a network of friends and daily routines, be it a law professor, a prostitute, or a pro-bono fitness instructor. Passing an integration test in such a context merely means getting a seal of state approval for your *life*, which the state randomly distributes among taxpayers: today a professor of Dutch law is more successful than a catholic priest preaching to Latin Americans – tomorrow a porn-actor starring with Dutch divas is preferred by the Kingdom to a poet writing in Tagalog with the majority of friends coming from Luzon. The assumption that a state, when dealing with law-abiding, financially self-sufficient taxpayers, can officially brand some lives as deficient is certainly worrisome. Once such an assumption is questioned, no possible justification for any such tests can be found, no



matter how such tests are managed, what kind of questions they ask and what their stated goals are.

The Dutch *inburgeringstoets* sends a message which is clear: possessing humanity is not sufficient to be embraced by the Dutch state even after years spent in the Kingdom. Like a great number of other European countries, the Dutch state views the society it is in charge of as highly specific and different from any other on the planet. This starting assumption justifies the need to test the ‘knowledge’ of this specificity amongst those willing to naturalise or acquire permanent residence, *i.e.* those who have been part of this very society for many years. Listening to the municipal employee, I began to wonder how I had been able to survive so many years in a society so unique. Do they really see Godard’s films differently? Do they read Dostoyevsky differently? Clearly, they do not. Consequently – and coupled with the analysis contained in the following two parts of this essay – any culture test is inherently a hypocritical bureaucratic exercise based on an unjust presumption that in being ‘foreign’ some residents are not quite good enough to be recognised as full members of *their* community. This presumption not only stigmatises those deemed not good enough, it also ignores a simple and overwhelmingly important fact: those willing to naturalise *are* already part of the community, whether the state is willing to recognise this or not. Simply put, culture and language testing is used by states to ignore a reality they are for some reason uncomfortable with.

The Dutch state is not better nor worse than any other in this respect. To prove my worthiness to vote against the likes of Wilders and, most importantly, not to be looked down upon as someone who is ‘not good enough’ in a country where I have been paying taxes for my entire working life, I registered for the test. The content of it was (quite expectedly) *truly* strange, to say the least. It included questions such as ‘your neighbour died. What should you do?’ with the following suggested answers: ‘1. Nothing; 2. I send a condolences card; 3. I go help the widow’.<sup>LI</sup> As any specialist in Dutch culture knows, only *one* of these answers is correct. Consider another example: ‘Mrs. de Jong says “I will go and eat now”’ (*Ik ga nu eten*). Suggested reactions: ‘1. You are invited to join Mrs. de Jong; 2. Mrs. de Jong does not feel like speaking with you any more and wishes to go home; 3. Mrs. de Jong will probably invite you to eat with her later’.<sup>LII</sup> And lastly: ‘Fines above a certain amount disqualify you from the possibility of becoming Dutch’ with the following suggested reactions: ‘1. Thank God I only have a parking fine; 2. I did not know about this rule; 3. I never drink when I am driving’.<sup>LIII</sup>

Upon completing the test – for which, incidentally, example copies are not available anywhere on the basis that preparation is considered impossible since ‘the proper attitude ... cannot be learnt by heart’.<sup>LIV</sup> – the feeling of optimism which should normally accompany the decision to become a fully-fledged member of the society where one has been living for a very long time, was entirely gone.<sup>LIV</sup> I clearly remember how puzzled I was. *Is this Dutch culture?* For me Dutch culture included references to the Union of Utrecht, to the ‘Golden Age’<sup>LVI</sup> with its tulipmania,<sup>LVII</sup> to the art of Rembrandt van Rijn and Vincent van Gogh, to Piet Mondriaan, to groundbreaking architecture and design, the *Amsterdamse School*,<sup>LVIII</sup> *De Stijl*<sup>LIX</sup> etc. Above all though, it included references to the famed liberalism and tolerance entrenched in Dutch society, and yet, as the very existence of this absurd test abundantly testified, an aspect of Dutch culture that is nowhere in evidence. The language which I learnt to read ‘Rituelen’,<sup>LX</sup> seemed desecrated. However, I was very happy the questions were not related to geography or historical facts – a position generally in line with the liberal ideology: citizens themselves are to decide whether to quit smoking, read



books or love the motherland. Moreover, although it is abundantly clear that knowing the distance between Utrecht and Leeuwarden is unlikely to make you a better member of the community in which you have already spent many years, the test I faced was by far more absurd than any fact-based test would have been, since, unlike a test based on facts, it simply made no sense.

By introducing the test, the Kingdom killed two strange birds with one stone. It made it clear that besides being in contempt of my own culture and humanity, all that I considered important about Dutch culture and all that made me apply for naturalisation – that I was tired of being a ‘foreigner’ – actually did not count. Necessarily so, since it is your actual membership of the national community, your life with the other Dutch people in the same cities and villages, buying the same German bread, Iranian hummus and Flemish fries at the market, which creates the connection between a person and all the others around her, not your librarian skills or reading speed. Stranger things were important for the Dutch state, however. What counted was a handful of irritating clichés like ‘our trains are yellow’ and ‘our land is flat’, as well as an ability to fill in forms correctly (to which several questions in the culture test were dedicated). It takes passing this ‘secret’ test to realise that, in fact, the *imburgeringstoets* does not test any knowledge of anything and is not related to any culture whatsoever, however widely construed. Quite clearly, the test’s real purpose is the self-justification of the myth of the exceptionalism of the local ‘culture’ of the Kingdom. The account of mythologies provided by Barthes is instrumental in this regard: myths are not important for the story they tell, but for what they *do*, since ‘in a mythical system causality is artificial, false; but it creeps, so to speak, through the back door of Nature’.<sup>LXI</sup> Thus what counts in the context of the culture tests is not the rubbish content of these exercises, but the line they draw between ‘us’ and ‘them’, which is, however, entirely arbitrary.

My personal story is not exceptional. Neither is it all too country-specific. Increasingly many liberal democracies in the world are introducing tests to check how accustomed citizens-to-be are with their ‘culture’ and society.<sup>LXII</sup> This worrisome practice of attempting the annihilation of the ‘other’ by imposing on her the status of ‘one of us’, which Weiler abhorred<sup>LXIII</sup> and Kymlicka found suspicious,<sup>LXIV</sup> now seems to be accepted as a norm of daily life, generating a wave of scholarly criticism, a body of literature to which this essay aspires to contribute.<sup>LXV</sup> Indeed, ‘integration’ is a very interesting way of dealing with the ‘other’. In the words of Weiler such ‘come be one of us’ strategy functions in the following way.

It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the ‘be one of us’, however well intentioned, is often an invitation to the alien to be one of us by being us. Vis-à-vis the alien it risks robbing him of his identity. Vis-à-vis oneself, it may be a simple manifestation of both arrogance and the belief in my superiority as well as my tolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. [...] *It is a form of dangerous internal and external intolerance.*<sup>LXVI</sup>

Luckily, the tests promoted by a number of states are not and cannot possibly be ‘effective’. No matter what the stated goals of such tests are, they cannot possibly be reached, since the underlying assumption behind the tests is that of the cultural exceptionalism of the local society coupled with a belief that the state is entitled to brand some non-criminal lives as deficient and unworthy of official inclusion based on the local mythologies and prejudices. Despite the frequent complacency on the part of those passing



the test (having no other choice), states simply cannot impose any ‘nation-specific culture’ on the new citizens, neither can they invent it. Furthermore, requiring knowledge of a local language does not make one forget the other five, let alone the lullabies,<sup>LXVII</sup> since the private realm, our biological existence, is bound to be separated from the sphere of the political, to which citizenship is confined and where the tests take place: we are not in ‘1984’.<sup>LXVIII</sup>

The strongest point of culture is its universality, its appeal to the whole of humanity, which unavoidably plays against any messianic feelings in the legislatures introducing ‘culture’ tests. Indeed, the content of the tests exemplifies the impoverished character of the myths of national exceptionalism. The duo of globalisation and liberalism has done its job. While classical myths are rich, colourful and intriguing, the myths of cultural exceptionalism adopted by the liberal democracies can only be dull and deeply embarrassing. If the Dutch example I provided does not seem convincing enough, any other citizenship test would do the job.<sup>LXIX</sup>

### III. State-mandated étalons of culture

My first thesis is that liberal democracies have simply lost the luxury being able to invent themselves as nations in a substantive vein.

Post WW II developments leading to the rise of international migration – as well as international marriages producing children directly disproving the dogma of unitary identities and exclusive nationhood<sup>LXX</sup> – coupled with the global rise of human rights and liberalism,<sup>LXXI</sup> have rendered it impossible for states to continue shaping their nations.<sup>LXXII</sup> States effectively lost any legal possibility to imagine themselves as rooted in homogeneous monocultural societies, unable to ask of their own nationals and of the growing numbers of new-comers anything more than mere respect for the liberal ideology: ‘societies that lack or suppress [...] other affiliations, allowing only allegiance to the nation-state, are rightly condemned as totalitarian’.<sup>LXXIII</sup>

Nationality as such has been reinvented in a procedural vein, becoming merely a ‘*Kopplungsbegriff*’<sup>LXXIV</sup> connecting a state and a person. Proceduralisation of the idea of nationality means that lacking certain mythical characteristics of a ‘worthy citizen’ cannot cause either deprivation of nationality nor block access to naturalisation, as “‘abstract character’” of state membership [...] is decoupled from rights and identity’.<sup>LXXV</sup> The citizenship test I had to pass was so embarrassing not only because its patriotic drafters were unwise.<sup>LXXVI</sup> Quite on the contrary in fact, they knew the limits of what they could legally do all too well. Once state membership has become abstract and there is an obligation to introduce a nation-specific ‘culture’ test for those willing to naturalise, the test is bound to be at least as abstract as the belonging itself, *i.e.* a waste of time – unless one is blinded by madness, of course.

Contemporary liberal democracies are bound to accept social realities, which necessarily entails acknowledging the differences between citizens, as well as welcoming as citizens the residents who do not think, act or look like the majority. As a consequence, when they refer to ‘being one of us’, their ‘particularism’ is necessarily bound to stop at the restatement of liberal values: there is no more such a thing, legally speaking, as differences between ‘Britishness’, ‘Frenchness’, ‘Danishness’ etc.<sup>LXXVII</sup> Today, ‘the national particularisms which immigrants and ethnic minorities are asked to accept across European



states, are but local versions of the universalistic idiom of liberal democracy'.<sup>LXXVIII</sup> This makes it exceedingly difficult for liberal democracies to justify the outdated logic of 'naturalisation' to which they historically expose the 'new-comers'.

Faithful to the inertia of the modern times of nation-formation and in spite of the general shift away from assuming the responsibility for nation-forming, states have not stopped using the quasi-messianic rhetoric of national 'specificity', of which 'culture' and language testing are clear illustrations. Interestingly, as Weiler has compellingly demonstrated, the same also applies to the very idea of national *constitutional* specificity, which the Member States of the EU often embark on 'protecting' (rhetorically at least).<sup>LXXIX</sup> In the current context there is a need for critical reassessment of constitutionalism, an idea building – whether we want it or not – on the assumptions of monocultural nationalism.<sup>LXXX</sup>

Whatever the mythical cultural exceptionalism of liberal democracies today might mean, in addition to the questions about a *mevrouw de Jong*, it is clear that it is powerless before the task of the generation and preservation of social cohesion. Actually, it is actively destroying such cohesion. Neither the embarrassing questionnaires about local 'culture', nor the tests of proficiency in the local language are able either to replace, or to provide added value to the simple socialisation of the 'new' members of a society. Indeed, instead of promoting socialisation, they merely play a role of 'mobilisation bias'.<sup>LXXXI</sup> – a well-known conclusion of social scientists which is hardly new. Agreeing with Kostakopoulou, 'a sense of belonging to community develops with inclusion in society and politics, rather than as a result of citizenship ceremonies and language proficiency tests'.<sup>LXXXII</sup> There is nothing scary about a natural evolution in society, where people eat what they want, pray when they want and choose a language suitable, as far as they can judge, for the occasion.

Given that states are bound to exercise self-restraint in nation-building, it becomes apparent that 'the paradigm of societies organised within the framework of the nation-state inevitably loses contact with reality'.<sup>LXXXIII</sup> With the rise of human rights ideology and the proceduralisation of nationality, the array of exclusive entitlements which nationality could bring weakens, as the deprivation of rights on the grounds of not being a citizen becomes more difficult to explain and justify.<sup>LXXXIV</sup> Consequently, a number of key social and some political rights previously associated with the idea of 'belonging to a nation', came to be connected with residence only,<sup>LXXXV</sup> watering down the citizen-foreigner dichotomies.<sup>LXXXVI</sup>

As a result of the developments described, national borders are genuinely irrelevant for increasing numbers of people in planning their lives. This makes it impossible, wholeheartedly to embrace the fictions taught to our great-grand fathers by the public school systems of the day in the expression of a reality masterfully exposed by Renan: 'l'oubli, et [...] l'erreur historique, sont un facteur essentiel de la création d'une nation'.<sup>LXXXVII</sup> School curricular research in the liberal democracies in Europe demonstrates that the idea of national glory – the cornerstone of the school programs of the past – is being supplanted.<sup>LXXXVIII</sup> 'British national pride', like any other similar institution, is in decline.<sup>LXXXIX</sup> States are trying hard to come up with their 'own' culture<sup>XC</sup> but there is no such thing, beyond tolerance – and tolerance can be embraced, but not owned.

#### IV. EU citizenship/Member State nationalities: Diverging vectors



My second thesis is that, when viewed through the lens of EU integration, language and ‘culture’ tests seem even less justified, running counter the very idea of European integration, let alone that of EU citizenship.

The EU adds to the transformative potential of liberalism, human rights, and migration in general. Precisely because EU citizenship is a contingent and complementary status, the power of the Member States, who remain in charge of nationalities,<sup>XCII</sup> is severely weakened. This is because while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the nationality acquisition regimes are not harmonised, at least to some extent. Huge disparities between the citizenship laws of all the Member States<sup>XCIII</sup> lead to the multiplication of the routes to the acquisition of the same status of European citizenship. In failing to regulate the issue of access to EU citizenship effectively, the Member States opted for the illusion of control rather than the resolution of outstanding problems, which include most importantly, the need to design an effective immigration policy for the Union, while ensuring that the rights of EU citizens and third-country nationals are protected.

In a borderless Union the current approach means that more than twenty-seven ways of acquiring the same status applicable in all the Member States are in existence.<sup>XCIII</sup> Informed third-country nationals are free to choose the Member State where access to nationality is framed in the most permissive terms,<sup>XCIV</sup> in order to move to their ‘dream Member State’ later in their capacity as EU citizens. Obviously, when comparing the number of rights associated with EU citizenship with that associated with the nationality of a particular Member State, it becomes clear that at present ‘for third-country nationals residing in the EU it is becoming increasingly irrelevant in which Member State to naturalise’.<sup>XCV</sup> The main status they are likely to benefit from, in any event, will be EU citizenship, ‘a fundamental status of nationals of the Member States’,<sup>XCVI</sup> not the particular Member State’s nationality *per se*.<sup>XCVII</sup>

Consequently, the Member States are unable to make a coherent claim to be able to control the access of non-nationals to their territories.<sup>XCVIII</sup> No matter how they frame their citizenship laws, the mere existence of the internal market has already destroyed any direct logical connection between the territory of a particular Member State and the ‘people’ of that Member State. The conceptual contradiction between the nationality policies of the Member States and the main EU citizenship rights is clear. While the Member States grant nationality to those connected with their territory or populace, assuming that the nationals would keep such connections, EU citizenship follows an opposing rationale, aiming at encouraging people to move, to benefit from the opportunities that the internal market has to offer and to think beyond their Member States. Consequently, third-country nationals naturalising in a particular Member State can do this for two very different, if not opposing reasons – both of them perfectly legitimate: either to stay in the Member State or to leave (immediately), benefiting from the main right of EU citizenship.<sup>XCIX</sup>

Currently, the Member States seem to assume that the latter choice is not an option, since all the naturalisation policies are built on the assumption that a new citizen will *stay* in the Member State, which provides justification for the linguistic, cultural and other tests the newcomers are asked to pass before EU citizenship is conferred on them. Once the EU dimension is taken into account, however, the illusory world in which the Member States are still living crumbles in a second: why would you ask of an applicant for naturalisation to be proficient in Latvian, a language which virtually no-one speaks in the EU (and the world), if it is known that the main right that naturalisation confers is to *leave*



Latvia and to benefit from EU citizenship rights in a wider Europe where hardly anything ‘Latvian’ will help? This is so obvious and, at the same time, so stubbornly ignored by the Member States that the situation can hardly be characterised in optimistic terms. However, given the lasting impact of European integration on the nationalities of the Member States, it is unavoidable that change will come. Pronounced in a slightly different context, these words of AG Poiares Maduro certainly apply to the awkward situation of those persons who, when naturalising in the EU, are exposed to ‘culture’ and language tests:

Citizenship of the Union *must* encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the *society of peoples of the Union*.<sup>C</sup>

Viewed from the other side, any Latvian policy of language and ‘culture’ promotion targeting uniquely third-country nationals is by definition futile, since Latvia is just a tiny spot on the map of the EU, where borders do not exist for EU citizens. The latter can rely on EU law to come to Latvia and settle there. Given that any discrimination on the basis of nationality, either direct or indirect, is squarely prohibited by Article 18 TFEU,<sup>CI</sup> the application to EU citizens of any kind of tests in any circumstances is legally impossible.<sup>CI</sup> And if a Belizean naturalised on the island of Curaçao by virtue of passing an exam of the knowledge of Papiamentu,<sup>CI</sup> or an Inuit from Greenland can settle in Latvia without any tests, how can the preservation of cultural specificity be used as an argument for asking a Moldovan to pass them? Is Papiamentu less ‘dangerous’ for the survival of Latvian culture than Romanian written in Cyrillic script? Obviously, the same observations apply to any of the Member States of the Union in a situation where, as Somek put it, ‘the [EU] does no longer yield’.<sup>CI</sup>

Even though European citizenship does not directly question the dubious nature of the claims of the nation-specific cultures, it clearly flushes out the inconsistency of the policy of ‘culture’ and language testing by the Member States. Even if a specific testable culture existed – which is not the case, as the previous two sections of this essay have demonstrated – and even if the knowledge of particular state-selected languages were indispensable for successful functioning in a society – which is equally untrue – the claim for pre-naturalisation tests still makes no sense, as it ignores all those who do not intend to naturalise and simply live in a territory of the given Member State,<sup>CV</sup> especially all those EU citizens coming from other Member States who are given virtually *all* the rights associated with the nationality anyway, no naturalisation required.<sup>CVI</sup>

Should one be alarmed by this state of affairs? Most certainly not: the examples provided simply point to the fact, once again, that the assertions of messianic cultural exceptionalism by the Member States are routed in prejudice, rather any legitimate concerns. On the issue of language, one can spend days in Luxembourg without hearing Luxembourgian. We are likely to hear less of it in the near future, just as we will hear less Dutch in the streets of Amsterdam, or less Latvian in the streets of Riga. Is this a valid reason to make a handful of third country nationals naturalising in the Grand Duchy to pass a language exam? Of course not, since, firstly, knowing a language does not necessarily mean using it. Secondly, should the new Luxembourgians opt to benefit from their free movement right and leave the country, they will not have anyone to speak to (too bad they were pushed to learn the language they will never need). Lastly, given that language requirements do not apply to non-naturalising third country nationals and EU citizens already settled in Luxembourg, their imposition clearly cannot have anything to do with



Luxembourgian society, of which the latter two groups form an all too important part. Rather, it is about the distorted self-image of the state, which opts to intrude into the lives of the most vulnerable among the populace with its unjust demands. How else can this be characterised if not as ‘*apartheid européen*’?<sup>CVII</sup>

Putting ‘culture’ and language testing into EU context demonstrates with clarity how arbitrary, random and nonsensical these policies are. All in all, the picture of inclusion and exclusion as applied to different entitlements in the EU is such that, agreeing with Aziz, it ‘fails to adequately account for the *status quo* in the Union and the spheres of belonging which, to some extent, make a mockery of vertically defined hierarchical interpretations of citizenship’.<sup>CVIII</sup> Much needs to be changed.

## Conclusion

Whatever liberal democracies think about the stand-off between a culture of humanity and their ‘own culture’, when connecting the state-approved possession of the latter with the newly-reinvented notion of citizenship, to which the ‘culture’ and ‘integration’ tests testify, it is inevitable that the obvious is bound to prevail. The return to the logic of modern states actively shaping their nations and annihilating the ‘other’ within their borders is highly unlikely. Moreover, in their present form, the tests do not actually test anything even closely related to culture, despite trying to reassert citizenship against the personhood of those taking them. This is wrong and can lead to increasing tensions in the societies making this mistake, just as any other arbitrary divide unjustifiable on its face would. Bosniak is right when she submits that ‘the very idea of personhood in liberal-egalitarian thought is ethically expansive ... [this idea] contains the normative and rhetorical resources to challenge every context in which it is situated – including the national constitutional context itself’.<sup>CIX</sup> The battle for self-serving myths fought by all the ‘integrationist’ states against those of their inhabitants who remain willing to be accepted is thus lost, just as it started.<sup>CX</sup>

Invention of cultural exceptionalism through ‘culture’ testing of permanent residents should stop as soon as possible. The idea that every liberal democracy in the EU is in possession of its own unique culture which must be imposed on a random sample of the new-comers is the first problem I promised to outline. The second problem concerns the chronic blindness of the Member States unwilling to see the effects of European citizenship and the successful functioning of the internal market on their societies. In reframing naturalisation policies, attention should be paid to the fact that the Member States no longer represent closed container societies and that the vectors of EU citizenship and of their nationalities are diametrically opposed. Asking someone to learn Slovenian to become an EU citizen can thus be counterproductive, a mistake. This is a *fact* that the Member States need to have the courage to admit. Lastly, it is greatly troubling that the Member States – in a somewhat old-fashioned quasi-totalitarian drive – do not feel the need to respect the private realm of those willing to naturalise: language and culture should be left to every individual human being to choose and to practice. By demonising those who have not yet answered the questionnaire about *mevrouw de Jong*’s preferences, social cohesion is undermined and numerous lives derailed. While pointing all this out is to restate the obvious, it is most unfortunate that these issues are not seriously discussed in the Union today. It is easy to predict, however, that in the medium term future



naturalisation procedures in the EU will be radically different from what we now have – taking reality into account in framing the policy is bound to happen sooner or later. That the naturalisation procedures are to become more open and less restrictive seems to be an inevitable consequence of the creation of the Union, where borders are non-existent and the federal-level status<sup>CXI</sup> has already taken the lead.<sup>CXII</sup>

Returning to my personal story, all the nuisances of the process notwithstanding, I am very happy to have become an EU citizen. Although the literature seems to be unanimous on the fact that the EU cannot generate any emotional appeal,<sup>CXIII</sup> I am one of the few for whom the contrary is true: it is EU citizenship, not the Dutch nationality that matters most to me. That I was bound to receive EU citizenship via the Dutch Kingdom is just a minor element of my story – other Member States happen to be just as short-sighted in putting widely-held prejudices into their naturalisation laws. Having dedicated several years of my academic enquiries to the analysis of the regulation of the accession of states to the EU,<sup>CXIV</sup> I am particularly happy to have acceded to the Union personally. I thus wholeheartedly thank my Queen, a British subject<sup>CXV</sup> in whose name I became an EU citizen.

In the practice of day-to-day life, however, tests change little – it is still a great pleasure to hear ‘welkom thuis’ in the plane landing from New York or Singapore – the same feeling as the one I experienced every time before the Dutch state set me the test which gave me my first serious doubts about my homeland – the Netherlands.



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<sup>II</sup>Bickel, 1975, 53. For an illuminating analysis of this statement see Bosniak, 2010, 9, 10.

<sup>III</sup>Brague, 1992, 179.

<sup>III</sup>Joppke, 2007, 1.

<sup>IV</sup>For an overview and analysis see Bauböck and Joppke, 2010.

<sup>V</sup>Oosterwaaland Torenvlied 2010, 258. Oosterwaal and Torenvlied demonstrate that the national policy with regards to immigration and minorities which changed the Netherlands after the death of Pim Fortuyn is detached from the opinions held by the majority of the Dutch.

<sup>VI</sup>The majority of EU Member States, including Austria, Denmark, France, Germany, the Netherlands and the UK now require ‘culture’ and language testing. For overviews see *e.g.* Carrera, 2006; van Oers, Ersbøll and Kostakopoulou, 2010b, 307. For up-to-date naturalisation regulations in all the Member States please consult the EUDO CITIZENSHIP database, available at <[www.eudo-citizenship.eu](http://www.eudo-citizenship.eu)>.

<sup>VII</sup>In the majority of cases, ironically, the ‘new-comers’ are permanent residents who have successfully functioned in their country of residence for many years. The most minimal measure of ‘success’ is required in this context, *i.e.* not going beyond legality of stay and being clean of serious crimes (terrorism, murders etc.).

<sup>VIII</sup>See also Kostakopoulou, 2010.

<sup>IX</sup> I am not concerned here with the issue of bullying people to give up other nationalities (see, for a short overview of the problem, Jessurun d’Oliveira, 2007, 922), still accepted in a number of countries as a necessary prerequisite for naturalisation. In the EU, such countries include: Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Germany, Latvia, Lithuania, the Netherlands, Poland, Slovenia and Spain (numerous exceptions apply). See de Groot and Vink, 2008. See also the relevant database of the EUDO citizenship project: <[www.eudo-citizenship.eu](http://www.eudo-citizenship.eu)>. For analysis see Kochenov, 2011b. Such bullying always comes at the price of closing one’s eyes to the obvious inconsistencies of such policy, based solely on prejudices and empty claims (see on this issue *e.g.* Brøndsted Sejersen, 2008, 523; Sassen, 2006, 13; Howard, 2005, 697, 700 *et seq.*; Hansen and Weil, 2002, 1; Zolberg, 2000, 511; Rubinstein, 1998, 183). A good example is provided by my own country, the Netherlands, where 10% of the population are double or triple nationals (de Groot and Vink (2008)), including Her Majesty the Queen (Jessurun d’Oliveira (2007), 923), while the official policy consists in the prohibition of dual nationality, against modern trends in international law (Spiro, 2010, 111).

<sup>X</sup>For analysis of the EU citizenship concept see, *inter alia*, Davies, 2010, 439; Kochenov, 2009, 169; Spaventa, 2008, 13; Kostakopoulou, 2005, 233; Jacobs, 2007, 591; Maas, 2007.

<sup>XI</sup> *e.g.* Spiro, 2011.

<sup>XII</sup>Rostek and Davies, 2006, 1 (and the literature cited therein); Kochenov, 2010c.

<sup>XIII</sup>Kochenov, 2009 ‘*Ius Tractum*’, 181. For an analysis of the legal possibility to decouple the two statuses on certain occasions see Kostakopoulou, 2010b; Kochenov, 2010c 29–33; Jessurun d’Oliveira, 2010, 785.

<sup>XIV</sup>Art. 20(1) TFEU.

<sup>XV</sup>This explains dubious linguistic and ‘cultural’ testing in place in all the Member States. For an up-to-date analysis of national naturalisation laws of all the European states please visit EUDO CITIZENSHIP observatory web-page: <<http://eudo-citizenship.eu/>>.

<sup>XVI</sup>For the analysis of relevant literature see Calavita, 2005, 401, 405–409.

<sup>XVII</sup>On the regional dimension see Kochenov, 2010b, 307.

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

<sup>XIX</sup>Such right is a characteristic of the majority of other federated entities around the world and goes to the core of the concept of federalism as one of the ways to promote freedom: Kreimer, 2001, 66; McDonnell, 1987, 1484, 1494; Tiebout, 1956, 416. For a compelling explanation why the EU is a federation within a classical sense of the word see Schütze, Robert, ‘2009, 1069; Schütze, 2009b.

<sup>XX</sup>See Kochenov, 2009b, 156.

<sup>XXI</sup> See, for a brief outline, Kochenov, 2010c.

<sup>XXII</sup>For a recent example see *e.g.* Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, judgment of 2 March 2010, ECR I-0000 annotated by Kochenov, 2010, 1831.

<sup>XXIII</sup>For accounts of exceptional clarity see Kostakopoulou, 2003, 85; Carens, 2002, 100, 109–113. See also Zilbershats, 2001, 689, 714 (in the potential duty to grant citizenship to a resident of a state).

<sup>XXIV</sup>Kostakopoulou, 2008.

<sup>XXV</sup>Carens, 2000.

<sup>XXVI</sup>Allott, 1991. See also Allott, 1991b, 2485, 2491: ‘[There was] an internal life of society which, put in ideal theoretical terms, could be labelled a rationalist-progressive pursuit of ever-increasing well-being for all the



people in accordance with a given society's highest values. And there also was an external life of society, seeking the well-being of the state by any means and at anyone's expense. And the reality of the relation of the European states over recent centuries reflected the theoretical structure: intrinsically unstable and conflicting, occasionally life-threatening on a very grand scale'. See also Blank, 2007, 411, 414.

XXVII<sup>I</sup>For an argument for multiculturalism see Kymlicka, 1995.

XXVIII<sup>I</sup>This is so because citizenship can be presented as the evolution/struggle for recognition both of formerly ignored groups (women, gays, racial minorities, the poor) and of new forms of rights. See also Sypnowich, 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).

XXIX<sup>I</sup> Anderson, 1991. See also Smith, 1986.

XXX<sup>I</sup>Scoditti, 2001. One might also characterise European integration, following J.H.H. Weiler, through the notion of 'European constitutional federalism': Weiler, 2003, 7.

XXXI<sup>I</sup>For a brilliant account see Scott, 1998. See also Sissenich, 2007.

XXXII<sup>I</sup>Sissenich, 2007, 347, 349.

XXXIII<sup>I</sup>Carens, 2002, 110.

XXXIV<sup>I</sup>The constitutional theory of a number of countries is built around solely the inclusion of citizens among the *Volke*, which amounts to persistent refusal to see the social reality. For examples see *e.g.* Lansbergen and Shaw, 2010, 50, 58.

XXXV<sup>I</sup>See also Chaney, 2002, 157.

XXXVI<sup>I</sup>Adorno, 1991, 107.

XXXVII<sup>I</sup>Aziz, 2004, 83.

XXXVIII<sup>I</sup>See *e.g.* Madison, 1799.

XXXIX<sup>I</sup>Mueller, 1992, 983.

XI<sup>I</sup>Weiler, 2003, 18.

XLI<sup>I</sup>*Id.* For an account of the death of democracy see Allott, 2003, 309.

XLII<sup>I</sup>de Witte, 2002, 137, 148. See also von Toggenburg, 2003, 273, 275–276.

XLIII<sup>I</sup>This is not to say that myths and cannot efficiently coexist with rationality, in fact, the contrary seems to be true: Della Sala, 2010, 1, 16.

XLIV<sup>I</sup>Kymlicka, 2006, 134. See also Davies, 2010b.

XLV<sup>I</sup>Weiler, 2003, 18. See also Davies, 2010b

XLVI<sup>I</sup> Kymlicka, 2006, 135.

XLVII<sup>I</sup>The exact number of years depends on the personal circumstances of the applicant, her family situation and her legal status in the country.

XLVIII<sup>I</sup>Chapter 4, Rijkswet op het Nederlanderschap.

XLIX<sup>I</sup>For the description of the complexity of the Dutch 'integration' policy see van Oers, de Hart and Groenendijk, 2009.

L<sup>I</sup>For the Dutch culture test with which I was confronted see <<http://docs.google.com/fileview?id=0B-z6p7DEIfUvNmZjNWQwMzgtNzM2OC00ZTIwLTgxNzItODAxNzVjMjRjNWRl&hl=en>> (the formulations are not identical to the ones in the test, as I had to reconstruct them relying on memory (taking notes during the test is prohibited)).

L<sup>I</sup>*Id.*

L<sup>II</sup>*Id.*

L<sup>III</sup>*Id.*

L<sup>IV</sup>Groenendijk, 2005, 9, 30, as quoted in van Oers, de Hart, and Groenendijk, 2009, 26.

L<sup>V</sup>The Dutch approach is opposed to the one in a number of other nations asking naturalisation applicants to pass tests. US test, for instance, which does not contain absurd value judgements, unlike the Dutch: Park, 2008, 999, 1032 *et seq.* (reproducing the standard questions of the US citizenship test).

L<sup>VI</sup>See Israel, 1998.

L<sup>VII</sup>See Goldgar, 2007.

L<sup>VIII</sup>See Casciato, 1996.

L<sup>IX</sup>See Overy, 1991.

L<sup>X</sup>Nooteboom, 2009.

L<sup>XI</sup>Barthes, 1972, 131.

L<sup>XII</sup>For an overwhelmingly informative analysis see also the discussion between Christian Joppke, Ines Michalowski, Kees Groenindijk, Ricky van Oers, Amanda Klekowski von Koppenfels, Dora Kostakopoulou,



Joseph Carens, Liav Orgad, Randall Hansen, Sergio Carrera, Elspeth Guild and Sara Wallace Goodman: Bauböck and Joppke, 2010.

LXIII Weiler, 2003, 7.

LXIV Kymlicka, 1995.

LXV See e.g. Kostakopoulou, 2010c; Kostakopoulou, 2010 1; Joppke, 2007, 1. See also Vinkand de Groot, 2010. For detailed country by country analysis of the integration testing policy in the EU see van Oers, , Ersbolland Kostakopoulou, (eds.), 2010.

LXVI Weiler, 2003, 19 (emphasis added).

LXVII For an informative account of the Soviet language policy in the Baltic States see Bychkov Green, 1997, 219. Liberal democracies in their illiberal phase cannot possibly be more effective in culture moulding than totalitarian empires.

LXVIII Agamben, 1998.

LXIX Consider a standard question from the US naturalisation test: ‘what colour are the stars on our flag?’. Park, 2008, 1032. Answering this question, among others, serves the purpose of convincing the US authorities that the applicant is ‘attached to the principles of the US Constitution’ (INA para. 316(a)).

LXX The proliferation of liberal ideology also caused similar developments in other spheres. Just as the dogmatic construct of ‘nation’, the notions of ‘race’ and ‘family’ undergo mutation. Acceptance of dual nationality and multiple identities can thus be compared with the acceptance of interracial marriage, as well as sexual minorities. On the latter two see Ball, 2008, 2733. Ball writes: ‘one of the reasons why same-sex marriage is so threatening to so many is that the raising of children by same-sex couples blurs the boundaries of seemingly pre-existing and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly pre-existing and static racial categories’ (at 2735). Just in the same vein, the existence of dual nationals undermines the ‘natural’ division of the world into nations and states.

LXXI Rawls, 1993; Sandel, 1994, 1765; Dworkin, 1995, 190. Joppke provides an excellent summary of the idea applying it to the context of nationality: Joppke, 2008, 533, 534–536.

LXXII See Falk, 2000, 5.

LXXIII Martin, 2002, 34, 39.

LXXIV de Groot, 1989, 5 (as quoted in Joppke, 2003, 433). See also Makarov, 1947. There is a huge literature on the negative impacts of globalisation on citizenship and the nation state: Bosniak, 2000, 447. See also Kuisma, 2008, 613; Wolf, 2001, 178; Falk, 2000; Rubinstein, 2000, 519; Lipschutz, 1999, 203.

LXXV Joppke, 2003, 433.

LXXVI Kostakopoulou, 2006, 73.

LXXVII Joppke, 2008, 536–542.

LXXVIII *Id.*, 541.

LXXIX Weiler, 2003, 16, 17. Although ‘protecting national identity by insisting on constitutional specificity is *à la mode*’ (at 16), ‘constitutional texts in our different policies, especially when it comes to human rights, are remarkably similar’ (at 17). Consequently, ‘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’ (*Id.*).

LXXX Tully, 1995. See especially Chapter 3: ‘The historical formation of modern constitutionalism: An empire of uniformity’, at 59–98.

LXXXI Lukes, 1975, 289.

LXXXII Kostakopoulou, 2006, 73; Kostakopoulou, 2010c.

LXXXIII Beck, 2000, 79, 80.

LXXXIV See in this respect *inter alia* ECt.HR *Gaygusuz v. Austria* [1996] Appl. No. 17371/90.

LXXXV Maillard, 2008; van der Mei, 2005, 210; Davies, 2005, 43.

LXXXVI Schuck, 2000.

LXXXVII Renan, 1992, 41.

LXXXVIII Joppke, 2008, 537 (and literature cited therein).

LXXXIX Tilley and Heath, 2007, 661.

XC And sometimes language: the invention of Montenegrin, which, although identical to Serbo-Croat is defined as ‘ethnically and culturally separate language’ by the Montenegrin Association of America is the latest example of this fascinating process (<<http://www.montenegro.org/language.html>> ).

XCI Case 135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000 (judgement of March 2, 2010), para 39.

XCII For overviews see e.g. de Groot and Vink, 2008; Bauböck, Ersbøll, Groenendijk and Waldrauch, 2006. For



detailed country-by-country information see the documents available on the web-page of the EUDO CITIZENSHIP project: <<http://eudo-citizenship.eu/>>.

<sup>XCIII</sup>Kochenov, 2009, 182–186.

<sup>XCIV</sup>This is exactly what happened in the *Chen* case, where a Chinese mother came to Belfast in order to give birth to little Catherine in defiance of the Chinese one-child policy. The girl acquired Irish nationality by birth and immediately fell within the scope of EU law as an EU citizen falling within the scope *ratione materiae* of EU law, since the birth actually took place in the UK, creating a cross-border situation: Case C-200/02 *Kunqian Catherine Zhu & Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925. As one can guess, '[t]he choice of Ireland as Catherine's place of birth had not been accidental but rather influenced by the peculiarities of Irish Nationality laws in force at that time, which had been brought to the Chens' attention by their lawyers': Hofstotter, 2005, 548.

<sup>XCv</sup>Kochenov, 2009, 183.

<sup>XCvI</sup>E.g. Case C-184/99 *Grzeleczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82; Case C-403/03 *Schempp* [2005] ECR I-6421, para 15. Among the most recent case law using the formula see e.g. Case C-135/08 *Janko Rottmann* [2010] ECR I-0000, para 43; Case C-103/08 *Arthur Gottwald v. Bezirkshauptmannschaft Bregenz* [2009] ECR 0000, para 23. Note that similar wording is contained in recital 3 of the Preamble to the Directive 2004/38 (OJ L 158/77, 2004): 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence' (emphasis added). This wording is significantly narrower than the ECJ's formula, but, helpful in interpreting the Directive, which is confined to regulating 'the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (as the title itself stipulates), such wording obviously cannot limit the scope of the relevant Treaty provisions.

<sup>XCvII</sup>For a detailed analysis of this point see Kochenov, 2010c,, on which the core of this and the previous section is based.

<sup>XCvIII</sup>See also Maas, 2007, 8.

<sup>XCIX</sup>Moreover, refusing naturalisation on the basis of a suspicion that a newly-naturalised citizen is likely to use the main EU citizenship right obviously cannot be a valid option.

<sup>C</sup>Opinion of AG Poiares Maduro in Case C-499/06 *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR 3993, para 23 (emphasis added).

<sup>C<sup>I</sup></sup>For assessment see Davies, 2003.

<sup>C<sup>II</sup></sup>See e.g. Case C-544/07 *Uwe Rüffler v. Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamieszony w Walbrzychu* [2009] ECR 0000, judgement of 23 April 2009, para 64; Joined cases C-396/05, C-419/05 and C-450/05 *Doris Habelt, Martha Möser and Peter Wachter v. Deutsche Rentenversicherung Bund* [2007] ECR I-11895, para 2.

<sup>C<sup>III</sup></sup>For the application of EU citizenship in the overseas possessions of the Member States see Kochenov, 2009c, 239; Kochenov, 2011.

<sup>C<sup>IV</sup></sup>Somek, 2007, 787, 789 (Somek does not quite appreciate such developments).

<sup>C<sup>V</sup></sup>A number of Member States have recently moved towards introducing 'culture' and language testing of some categories of migrants before admitting them to the territory, which is nothing but a most disappointing creation of obstacles in people's lives for no positive reason (besides racism and xenophobia, of course, which linger behind the scenes). For the analysis of the list of the countries as well as the analysis of the policy using the UK as an example see Kostakopoulou, 2010c.

<sup>C<sup>VI</sup></sup>For details see Kochenov, 2010c.

<sup>C<sup>VII</sup></sup>Balibar, 2001, 190, 191.

<sup>C<sup>VIII</sup></sup>Aziz, 2004, 79–80.

<sup>C<sup>IX</sup></sup>Bosniak, 2010, 29.

<sup>C<sup>X</sup></sup>This does not prevent the current policies to intrude into the lives of hundreds of thousands of people throughout the EU, derailing their lives for no reason, driven by sheer prejudice and a lack of common sense.

<sup>C<sup>XI</sup></sup>For a convincing analysis of the EU through the federal lens see Schütze, 2009b.

<sup>C<sup>XII</sup></sup>For a detailed analysis of the first signs of the anticipated transformation see Kochenov, 2010c.

<sup>C<sup>XIII</sup></sup>See e.g. Della Sala, 2010, 1. For a particularly balanced and illuminating account see Aziz, 2004, 82–84.

<sup>C<sup>XIV</sup></sup>Kochenov, 2008.

<sup>C<sup>XV</sup></sup>Jessurun d'Oliveira, 2007, 922.

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