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**University of Southampton**

Faculty of Social Sciences

School of Law

**Reconceptualising the Area of Freedom, Security and Justice: A Social Empathy Approach**

by

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Thesis for the degree of Doctor of Philosophy

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**Abstract**

*The thesis explores the citizenship and migration discourses within the AFSJ and argues that this area, which functions beyond its legal and geographical frameworks, is a space within which communication and meaning takes place. The inclusive and securitisation narratives around the legal subject of the EU, triggered by the free movement framework, indicate the close connection between the politico-legal structures of the AFSJ with questions on identity. Incorporating elements from Foucault's notion of power, the thesis argues for a reconceptualisation of the AFSJ by looking at the EU as an entity in motion. Through Aristotle's concepts of actuality and potentiality the main objectives of the EU are identified placing the individual at the centre of EU law and policy. The thesis argues for a social empathy approach that encompasses reflexivity and recognises vulnerability but also requires acknowledgment of social responsibility. The theoretical aspect is explored through a practical application of social empathy in the context of the Court of Justice.*

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**Research Thesis: Declaration of Authorship**

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                                  Empathy Approach

I declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
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Dedication

*To giagiá Maria, giagiá Anna, and Mateo.*

**Abbreviations**

AG Advocate General

AFSJ Area of Freedom, Security and Justice

CIREA Centre for Information, Discussion and Exchange on Asylum

CIREFI Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration

EASO European Asylum Support Office

EC European Community

ECHR European Convention on Human Rights

EU European Union

EMU Economic Monetary Union

ECSC European Coal and Steel Community

EEC European Economic Community

EPC European Political Community

Euratom European Atomic Energy Community

Europol

IIP Individual Investor Programme

JHA Justice and Home Affairs

SIS Schengen Information System

TCN Third Country National

TEU Treaty of the European Union

TFEU Treaty on the Functioning of the European Union

UN United Nations

UNHCR United Nations High Commissioner for Refugees



# Introduction

The highly interconnected nature of postmodern relationships, including economic transactions, market, industrial and environmental considerations with impact on human, and other life on the planet, all remind us of our inescapably co-dependent nature and the urgent need for meaningful cooperation and solidarity. At the same time, the current state of technological advancements within a 'risk society' raises further questions about the relationship between the individual, the state and its institutions and point us toward a direction where a reflective awareness and action is needed to approach contemporary challenges.<sup>1</sup> The 2030 Global Agenda on Sustainable Development reflects this urgent need for action through its goals and targets that aim to 'stimulate action over the next fifteen years in areas of critical importance for humanity and the planet'.<sup>2</sup> The most relevant goal of the Global Agenda to the present thesis is Goal 16 which sets out the need for peaceful and inclusive societies, the provision of access to justice for everyone and the development of 'effective, accountable and inclusive institutions at all levels'. The focus of this thesis is the Area of Freedom Security and Justice (AFSJ) of the European Union (EU) because it combines crucial policy areas connected to justice, fundamental rights and freedoms, and the protection of individuals through its institutional and constitutional design. It functions, as will be presented in this thesis, not only as a legal framework and as a collection of policies but also as a space of communication and interaction, where meaning takes place. The AFSJ has, consequently, a vital role to play in the way European societies are structured and how they function. Studying questions of identity become, therefore, relevant as they are connected to how the self relates to the social environment. Exploring the social environment and its embedded structures is consequently important in order to understand how the self is constructed in society while simultaneously acknowledging that the self is always in a society conditioned by its processes but also constructing them. The developments and transformations of social structures, influenced by the legal and political framework, inform us about the relationship that exists between these structures and the self and allow us to examine aspects of personal and social identities, which are inextricably connected to behaviour.<sup>3</sup>

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<sup>1</sup> See generally Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE 1992)

<sup>2</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, last accessed at <https://bit.ly/316pyzy> on 31 July 2019 (henceforth 2030 Global Agenda)

<sup>3</sup> George Herbert Mead, *Mind, Self And Society* (Charles W. Morris ed, The University of Chicago Press 1934); Peter L. Berger & Thomas Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (First Anchor Books 1966); Sheldon Stryker & Peter J. Burke, 'The Past, Present, and Future of an Identity Theory' (2000) 63 (4) *Social Psychology Quarterly* 284

The present thesis focuses on the specific narratives of citizenship and migration within the AFSJ as these have developed in parallel within the developmental history of the EU (Chapter One) and interact with issues of identity (Chapter Two). The post-national notion of European citizenship offers, therefore, an opportunity to explore how identities beyond the national level are constructed but also allows us to identify power relations that influence these identities. The thesis is discourse orientated and is interested in exploring how knowledge and meaning are produced in the context of the AFSJ and how the realities of citizenship and migration are organised and generated. This will help us reconceptualise the AFSJ from a human-centred approach that focuses on the welfare of individuals and the flourishing of societies consistent with the aims of the European project.

### **Why reconceptualise the AFSJ now?**

With the introduction of European citizenship and its codification in the Treaty of Maastricht, narratives about a transnational form of citizenship and a new conceptualisation of collective European identity became subjects of debate. The Community worker was no longer the only receiver of rights under Community law but all citizens holding the nationality of a Member-State were now considered to be European citizens with rights emanating from the European legal order. However, despite the ambitious project of European integration to bring together not only states and their economies but also people, it has not been without its problems and challenges. As it will be shown in Chapter One, the substance of EU citizenship is still debated today, while at the same time, fundamental rights and residence rights have been expanding towards non-EU citizens, albeit selectively.

At the same time, the intensification of the security dimension as a result of increased security threats globally has led to policies that have been strongly orientated towards an emphasis on national identities with restrictive implications for citizenship and migration, particularly indicating a securitisation aspect around issues of migration, evidenced particularly in the Treaty of Amsterdam but also present before the Single European Act.<sup>4</sup> Progressively, however, a common legal framework was brought about in the field of justice and home affairs, and consequently the area of freedom, security and justice (AFSJ), now set out in the Treaty of Lisbon

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<sup>4</sup> see also Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008) 5, 33-35; Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 (5) *Journal of Common Market Studies* 751

which seeks to enhance the democratic aspect of the EU. With the entry into force of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights (Charter) gained constitutional significance, while progress was made in the establishment of a Common European Asylum System (CEAS) indicating a tendency towards cooperation and departure from the previous tensions between intergovernmentalism and supranationalism.<sup>5</sup> Importantly, the Treaty of Lisbon introduced the de-pillarisation of the previous policy structure, resulting in citizenship and migration to fall within the shared competences of the EU and the Member States. The constitutional framework established in the Treaty of Lisbon is the legal framework that is currently in place, and it is, therefore, important to revisit it having in mind current challenges, their impact on the role of individuals, and their relationship with the political and legal structures. The impact of the European debt crisis which is still felt today since the end of 2009, has resulted in multiple bailouts and austerity measures implemented in various Member States and has shown weaknesses in the Economic and Monetary Union (EMU) with impact on social cohesion depicting a rather cold and impersonal Union.<sup>6</sup> Similarly, the “migration crisis” climaxing during the summer of 2015, but with ongoing effects, has indicated gaps in the implementation of the CEAS and raised questions about the responsibility towards migrants and refugees.<sup>7</sup> At the same time, the Brexit referendum that took place in 2016, with its continuing negotiations, has reignited a debate about the meaning and status of European citizenship and its relationship with matters concerning nationality, national citizenship and identity.<sup>8</sup>

The impact of these phenomena on the social and political terrain are significant and suggest that the landscape of citizenship and migration is changing. The rise of different forms of populism<sup>9</sup> and Euroscepticism across Europe, the salient and highly politicised issue of migration, as well as

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<sup>5</sup> Supranationalism is used to describe the transfer of power above the nation-state, for example, to Community institutions, while intergovernmentalism explains the cooperation between nation-states rather than the transfer of powers to higher institutions.

<sup>6</sup> see also Dora Kostakopoulou’s conclusion in Nuno Ferreira & Dora Kostakopoulou (eds) *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press 2017); Yiannis Varoufakis, *And the Weak Suffer What They Must? - Europe, Austerity and the Threat to Global Stability* (Vintage Digital 2016)

<sup>7</sup> Elspeth Guild, Cathryn Costello, Madeline Garlick & Violeta Moreno-Lax, The 2015 Refugee Crisis in the European Union, CEPS Policy Brief No. 332, September 2015 last accessed at <https://bit.ly/2LQFCBE> on 31 July 2019; Sergio Carrera, Steven Blockmans, Daniel Gros & Elspeth Guild, The EU’s Response to the Refugee Crisis Taking Stock and Setting Policy Priorities, CEPS Essay No. 20 / 16 December 2015 last accessed at <https://bit.ly/31ccbxT> on 31 July 2019

<sup>8</sup> Liav Orgad & Joule Lepoutre (eds), Should EU Citizenship Be Disentangled from Member State Nationality? (2019) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/24 last accessed at <https://bit.ly/2GFp2AD> on 31 July 2019

<sup>9</sup> For an academic debate on nationalism see Bart Bonikowski, Daphne Halikiopoulou, Eric Kaufmann, Matthijs Rooduijn, ‘Populism and Nationalism in a Comparative Perspective: A Scholarly Exchange’ 2019 25 (1) *Nations and Nationalism* 58; See also Manuela Caiani & Paolo Graziano ‘Understanding Varieties of Populism in Times of Crises’ 2019 42 (6) *West European Politics* 1141

the balance between the economic and social aims of the Union, raise questions about the future of the European polity and the role of the individual within European integration. Questions of identity are, therefore, inextricably connected to the aspects of the AFSJ as they require us to consider our future as communities and individuals and to re-evaluate the values and principles that guide our actions. This means that the EU, as a polity, needs to re-imagine itself and to re-examine its narratives in ways that reflect its constitutional standards. This further requires it to re-think its responsibilities towards its citizens and the people it affects while the latter must also engage in wide public discussions about their role in the EU.

### **Contribution of the thesis and structure**

The purpose of this thesis is to provide a framework in which the AFSJ can be reconceptualised by enquiring about its discourses and narratives concerning the EU's current constitutional structure under the Treaty of Lisbon. It, therefore, does not merely aim to revisit the legal structures of the AFSJ and understand its underlying mechanisms, although this is part of the reconceptualising exercise. Instead, it seeks to utilise the historical development of the AFSJ, and more specifically citizenship and migration, in a way which allows us to view the AFSJ as part of the broader aims of the European polity by providing an alternative multidisciplinary-orientated lens for the way forward. The original contribution of this thesis is the argument for a social empathy approach, which is developed in Chapter Three as an additional lens through which to understand matters that fall within the AFSJ. The argument for a social empathy approach is built upon two concepts that I borrow from Aristotle, namely actuality and potentiality, which are developed in Chapter Two. Primarily, the use of Aristotle's theoretical concepts allows us to situate the AFSJ within the broader project of European integration and to identify the central role of individuals within this project. Secondly, as these concepts were developed as part of Aristotle's theory of motion and were used to explain how change takes place, I believe they provide a creative framework which can be used to identify weaknesses and gaps in the changing landscape of the AFSJ, particularly in the context of citizenship and migration but also in other policy areas. Simultaneously the theoretical framework developed in Chapter Two further provides a normative dimension about the future of the European polity and can be used to approach questions such as:

*What is the purpose of the EU?*

*What is (or should be) the future of the European polity according to its constitutional structure?*

*What is the role of individuals within the European project?*

In applying the theoretical framework developed in Chapters Two and Three, Chapter Four engages in a substantive exercise whereby I show how a social empathy approach can be valuable when analysing the case law of the Court of Justice in cases that arise within the CEAS, which is part of the AFSJ. I use the concept of proportionality as a balancing exercise in order to explore the Court of Justice's approach in cases where conflicting fundamental personal and state rights and principles are at stake, and I examine this in the context of social empathy.

As will become evident the thesis embraces the constructivist premise that recognises that knowledge and meaning arise through interaction, which is thus socially constructed, while also adopts from post-structuralism the premise that the perception of the self is a construct influenced by different structures and discourses.<sup>10</sup> Another critical element adopted from post-structuralism, which is particularly relevant for the analysis in Chapter Three, is the challenge towards binary oppositions and the emphasis on how knowledge is produced primarily through discourses, including language. However, as the aim is not to reduce the discussion to the confines of these two theoretical approaches but rather to reflect upon the close relationship between the politico-legal framework of the AFSJ with the more socio-psychological aspect of the subject, there will be no analysis of the various approaches within social constructivism and post-structuralism. Instead, for the current purposes, their premises are taken to be well-founded and useful as established extensively in the literature.<sup>11</sup>

### **Break down of chapters and terms**

In reconceptualising the AFSJ as an area of communication, interaction and meaning, it is essential to understand its substantive outline. Chapter One aims to do that by analysing the developmental history of citizenship and migration by incorporating the element of power, which is critical in discussions of discourse. In order to understand the notion of power, it is important

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<sup>10</sup> see for example in relation to social constructivism the various contributions in Jeffrey Checkel & Peter J. Katzenstein (eds) *European Identity* (Cambridge University Press 2009) and Thomas Risse, Social Constructivism and European Integration in Antje Wiener & Thomas Diez (eds) *European Integration Theory* (Oxford University Press 2009); Jeffrey T. Checkel, 'Constructivism and EU Politics' p.57 in Knud Erik Jørgensen, Mark Pollack & Ben Rosamond (eds) *Handbook of European Union Politics*, (Sage 2007); Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 1999) and in relation to post-structuralism, particularly within the field of security studies, David Campbell, 'Poststructuralism', p. 203 in Tim Dunne, Milja Kurki, Steve Smith (eds) *International Relations Theories: Discipline and Diversity* (Oxford University Press 2007); Huysmans J., (2006) 37 (1) *International Politics of Insecurity: Normativity, Inwardness and the exception*. *Security Dialogue*, 11; Barry Buzan, Ole Wæver & Jaap De Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998); Barry Buzan & Lene Hansen, *The Evolution of International Security Studies* (Cambridge University Press 2009); David Campbell, *Writing Security: United States Foreign Security and Politics of Identity* (Manchester University Press 1992)

<sup>11</sup> *ibid*

first to define how discourse is used in the context of this thesis. Discourse is embraced here as a practice that is linked to identity as it can be used to understand structures in society which produce meaning, create subjectivities, and categorise realities.<sup>12</sup> It loosely describes how language is used in practice and how meaning is communicated between individuals, but discourse is more than language and more than communication.<sup>13</sup>

[A] discourse is something which produces something else (an utterance, a concept, an effect), rather than something which exists in and of itself and which can be analysed in isolation. A discursive structure can be detected because of the systematicity of the ideas, opinions, concepts, ways of thinking and behaving which are formed within a particular context, and because of the effects of those ways of thinking and behaving.<sup>14</sup>

When we talk about the AFSJ we therefore not merely refer to a legal framework or a geographical area surrounded by borders but also about the interaction between the legal, political, social, and juridical structures and their impact on the broader social environment in which identities are constructed and reconstructed.

To enter into the study of discourse, therefore, is to enter into debates about the foundations on which knowledge is built, subjectivity is constituted and society is managed.<sup>15</sup>

In Chapter One, one of the discourses explored is that of securitisation, which is often invoked by scholars to capture developments in the area of immigration and asylum. Much of this scholarship has been guided or inspired by the work of Foucault, whose focus on the subject (in this case the human being) and the subject's relationship to discourses of power has been more than influential. The impact of his work has been widely recognised in international relations studies and used extensively on migration debates as well as within the critical security and border studies.<sup>16</sup> It is essential therefore to understand the context in which securitisation is examined as

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<sup>12</sup> Margaret Wetherell, Stephanie Taylor & Simeon Yates, *Discourse Theory and Practice: A Reader*, (SAGE Publications and The Open University 2001) ; Sara Mills, *Discourse* (Routledge 2004)

<sup>13</sup>Wetherell et al. *ibid* 3

<sup>14</sup> Mills (n.12) 15

<sup>15</sup> Wetherell et al. (n.12) 5

<sup>16</sup> There has been a vast amount of scholarly papers and books that engage with Foucault's approach to power, biopolitics and governmentality and the effect on the fields of migration, security, and borders (among others) but we need only mention a few here as an indication. Nick Vaughan-Williams, 'The generalised bio-political border? Re-conceptualising the limits of sovereign power' 2009 35 (4) *Review of International Studies* 729; Nick Vaughan-Williams, 'The UK Border Security Continuum: Virtual Biopolitics and the Simulation of the Sovereign Ban' 2010 28 (6) *Environment and Planning D: Society and Space* 1071; William Walters, 'Reflections on Migration and Governmentality' 2015 1(1) *Movements: Journal for Critical Migration and Border Regime Studies* 1; William Walters, *Governmentality: Critical Encounters* (Routledge 2012); Virginie Guiraudon & Christian Joppke (eds), *Controlling a New Migration World* (Routledge 2001);

a discourse of the AFSJ in Chapter One, which first necessitates an explanation as to what power means and why it is relevant.

Foucault's understanding of power as not merely negative and repressive is particularly relevant in the context of this thesis because it allows us to explore the development of the subject within the AFSJ and to identify power structures that reflect current realities of citizenship and migration. The notion of power used by Foucault has aimed to explain different ways by which 'human beings are made subjects'.<sup>17</sup> Power, for Foucault, has not constituted a philosophical theory or comprehensive concept but a historical enquiry into the construction of social relations and construction of knowledge in the social space. He saw power dispersed everywhere and understood the concept not as a coercive mechanism imposed upon individuals but rather as discursive. He explained that '[i]t is a way in which certain actions modify others [...] power is not a function of consent. In itself it is not a renunciation of freedom, a transference of rights, the power of each and all delegated to a few.'<sup>18</sup> He further explained that 'what defines a relationship of power is that it is a mode of action which does not act directly and immediately on others. Instead, it acts upon their actions [...]'<sup>19</sup> Foucault meant that a relationship of power is different from a relationship of violence as a relationship of power recognises the Other 'as a person who acts'. As he put it:

In itself the exercise of power is not violence; nor is it a consent which, implicitly, is renewable. It is a total structure of actions brought to bear upon possible actions; it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action. A set of actions upon other actions.<sup>20</sup>

In examining the substantive aspects of citizenship and migration, I draw a connection between Foucault's definition of power with the notion of mobility in the AFSJ. The AFSJ is understood as

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Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' 2002 26 Alternatives 63; Didier Fassin, 'The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate' 2001 17 (1) Anthropological Today 3; Didier Fassin, 'Policing Borders, Producing Boundaries : The Governmentality of Immigration in Dark Times' 2011 40 Annual Review of Anthropology 213; Jef Huysmans, *The Politics of Insecurity* (Routledge 2006); Huub van Baar, 'Evictability and the Biopolitical Bordering of Europe' 2017 49 (1) Antipode 212; On a review of biopower in IR literature see Angélica Guerra-Barón, (2017, November 20) 'Biopower and International Relations' Oxford Research Encyclopedia of International Studies, last accessed at <https://bit.ly/2STkyLE> on 31 Oct. 2018

<sup>17</sup> Michel Foucault, 'Why study power? The question of the subject' 1982 8 (4) Critical Inquiry 777

<sup>18</sup> *ibid* 788

<sup>19</sup> *ibid* 789

<sup>20</sup> *ibid*

either being triggered by the free movement framework (Article 21 TFEU) or as entailing some element of movement (i.e. to enter or be required to leave from EU territory). From this conceptualisation of movement, citizenship and migration can be understood as being embedded within a relationship of power which acts upon the actions of individuals.<sup>21</sup> The relationship of power suggested here is not merely reflective of the legal provisions of citizenship and migration, instead it is about the law as a producer of meanings, categories and relationships, which affects the conduct of individuals, their self-perception, and perception of others, which is what connects Foucault to discussions of identity. The conceptualisation of movement as central to citizenship and migration within the legal construction of the AFSJ embedded within power relations reflects what Foucault has explained as ‘the law operat[ing] more and more as norm’, which leads to what he calls ‘normali[s]ing society’ to indicate the taken for granted actions, practices and ideas which are perceived as normal in everyday life.<sup>22</sup> How, then, can power be applied in order to explore the AFSJ? Scholars have talked about ways in which Foucault’s conceptual tools can be used to examine specific areas within migration, such as the crossing of borders, the biopolitical aspect of biometric databases, detention and accommodation of asylum seekers, among others.<sup>23</sup> However, for the purposes of this thesis I will use Foucault’s approach to power in a more general way, which remains relevant and productive when we consider the AFSJ as part of the broader aims of the European polity.

In Chapter One, I explore the politico-legal framework of citizenship and migration, which provides, I argue, such a ‘total structure of actions brought to bear upon possible actions’.<sup>24</sup> Two main themes are identified in relation to the subject: the first depicts an instrumentalist and reactive approach to the development of the legal subject, including the development of citizenship and fundamental-human rights, as integral to the European project, which has been underpinned by market-orientated and economic-driven aims. At the same time, the second theme is characterised by a normative element that situates the citizen at the centre of the European polity through notions of European identity and an emphasis on a democratic dimension. These two themes become entangled resulting in a simultaneously inclusive and exclusive regime of the EU in terms of accessing certain rights and freedoms. The narrative of exclusion is evidenced by the securitisation discourse as well as by the definition of the

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<sup>21</sup> n.16

<sup>22</sup> Michel Foucault, *History of Sexuality: Vol. 1 An Introduction*, (Robert Harley (tr), Pantheon Books 1978) 144 This is also seen later on in Chapter Two regarding Bourdieu’s concept of doxa.

<sup>23</sup> Fassin *Policing Borders* (n. 16); Jonathan Darling, ‘Domopolitics, Governmentality and the Regulation of Asylum Accommodation’ 2011 30 (5) *Political Geography* 263; Btihaj Ajana, *Governing through Biometrics: The Biopolitics of identity* (Palgrave Macmillan 2013)

<sup>24</sup> Foucault, *Why study power*, (n.17) 789

substantive rights connected to European citizenship, including residence rights for TCN family members of EU citizens. Ultimately, as I argue in Chapter One, these discourses aim to identify the ideal, temporary or permanent, subject of the European polity, and it places the subject at the centre of the AFSJ.

This brings us to Chapter Two, which, together with Chapter Three, provides the main theoretical framework of the thesis. In Chapter Two, I argue for a reconceptualisation of the AFSJ using Aristotle's concepts of actuality and potentiality as a metaphor to identify the centrality of the subject as both a prerequisite for the European project as well as EU's beneficiary, as the EU ultimately seeks to create a 'Union of people'. Consequently, Chapter Two seeks to contextualise the instrumentalist and securitised discourses and to situate them within the EU's broader aims. To understand the dialectical relationship between the legal structures of the AFSJ and the subjects (as legal subjects and as individuals with personal identities) I engage with the work of Bourdieu, who, like Foucault, provides a useful theoretical toolkit to questions of power. Through concepts like the habitus, fields, and different forms of capital, Bourdieu is interested in understanding the social world and the effects of power in specific contexts, such as, I argue, the AFSJ. Bourdieu's theory of practice is important for understanding discourses within the AFSJ, and their relationship to individuals as these discourses function as power. However, unlike Foucault, who explored power in terms of its historical evolution, Bourdieu approached power as operating in fields through the habitus providing a complex network that helps us understand the dominant and dominated positions of agents. This ultimately enables us to understand how meaning is socially constructed in a given social space, as the AFSJ, and to approach questions of identity which are connected to how the Self is socially constructed. In turn, the (re)construction of the Self is connected to behaviour which is why I bridge Bourdieu with approaches to social psychology, mainly, Moscovici, Mead, and Castoriadis.

The requirement for a reflective awareness and a reflexive process is substantial for the reconceptualisation of the AFSJ as and is particularly explored through the concept of social empathy in Chapter Three. In that chapter, I argue that a process of reflection requires a human-centred approach in the context of the EU which combines the recognition of the ability to influence and be influenced by our social environments. This causal relationship is often understood as the affective turn within the humanities and social sciences, which involves both

reason (i.e. through law) and emotion.<sup>25</sup> I argue that a social empathy approach in the context of the AFSJ has this capacity.

In order to situate the social empathy approach, it is first useful to briefly mention at the outset that within the last decade, it has become more evident that a more affective turn in understanding and solving contemporary challenges that arise with globalisation has been highlighted within different disciplines. Rifkin, based on a socio-biological approach, has argued in favour of an empathic turn based on solidarity towards other humans and other species that is grounded on the recognition of our human imperfections and vulnerabilities which he also understands as a 'deeply democrati[s]ing experience'.<sup>26</sup> In the same spirit Morell, adopting an interdisciplinary approach to democratic theory, proposed to create room for empathy in deliberative democracy and to recognise the importance of emotions in democracy.<sup>27</sup> Similarly, scholars have approached the notions of vulnerability and human rights to argue for a re-focus on the universality of pain and suffering<sup>28</sup> as well as intimacy and joy.<sup>29</sup> Consequently, they argue for the reconstruction of institutions to be able to respond to these vulnerabilities and provide protection and support.<sup>30</sup>

The current thesis is situated alongside existing scholarship that has begun to explore a more affective and human-centred approach (understood here as focusing on the wellbeing and flourishing of the human being) specifically in the context of the European polity. It is, consequently, written in the spirit of the work paved by scholars, most notably, in the field of European citizenship, by Ferreira and Kostakopoulou, who have called for a new narrative for European integration and who advocate for a reflexive, democratic humanist philosophy.<sup>31</sup> In *The human face of the European Union* Ferreira and Kostakopoulou understand law as a key tool through which to implement EU's objectives and values and as a policy instrument that binds people, justifying, therefore, the need for a humane approach within law and policy. I take their

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<sup>25</sup> On the growing significance of the role of affect see Patricia Ticineto Clough, Jean Halley (eds.) *The Affective Turn: Theorizing the Social* (Duke University Press, 2007); Paul Hoggett, Simon Thompson (eds.) *Politics and the Emotions: The Affective Turn in Contemporary Political Studies* (Bloomsbury, 2012)

<sup>26</sup> Jeremy Rifkin, *The empathic civilization: The Race to Global Consciousness in a World in Crisis* (J.P. Tarcher/Penguin 2009) 427

<sup>27</sup> Michael E. Morell, *Empathy and Democracy: Feeling, Thinking, and Deliberation* (Pennsylvania State University Press 2010) 8, 17, 126-127, 173

<sup>28</sup> Bryan S. Turner, *Vulnerability and Human Rights* (Pennsylvania University Press 2006)

<sup>29</sup> Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010)

<sup>30</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 2008 20 (2) *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman & Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge, 2013)

<sup>31</sup> Nuno Ferreira & Dora Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press, 2016)

approach as a point of convergence with the present thesis the latter of which aims to develop a practical, theoretical framework that embraces a human-centred approach through a social empathy model and which can be implemented at the institutional and broader social and public spheres. Two other relevant studies I have encountered concerning EU citizenship and migration, which also provide an alternative and a human-centred approach, explore, on the one hand, the importance of listening as social and political practice, as opposed to only expressing voice in the socio-political terrain,<sup>32</sup> and, secondly, the role of emotion and compassion within immigration policies and debates.<sup>33</sup> These contributions indicate a need towards reflexive form of empathy and can be interpreted as essential aspects of a social empathy approach.

Chapter Three, begins with the metaphor of braiding of languaging and emotioning as has been developed by Maturana, used to capture the relationship of communication and interaction in the social space with emotions. I then explore the relationship of emotions in the context of law and justice guided by Sen's approach to justice focusing, therefore, not on the establishment of perfect institutions but by understanding current realities and how people can live their lives. I revisit some political and moral perspectives concerning the entanglement of reason and emotion, which can be used to understand the legal framework of the AFSJ as a producer of meaning and knowledge and its affective dimension.

The chapter proceeds by exploring the concept of empathy within different disciplines and sets out the elements of empathy that are used in the context of the present thesis. Finally, I explore the notion of social empathy, as has been developed in the field of social work by Elizabeth Segal. Social empathy goes beyond inter-personal empathy and can be applied in wider social systems such as the EU. Social work is an important discipline which is involved with how individuals, groups, and communities function in society while it is interested in their wellbeing. It is, therefore, linked to aspects of sociology, psychology, social justice, and social policy, as well as the application of laws in the social context.<sup>34</sup> In this thesis, I draw aspects from all these disciplines from sociological theorists like Foucault and Bourdieu, social-psychological approaches from Moscovici, Mead, and Castoriadis, and social justice perspectives from Sen, while these are all drawn together in order to understand and reconceptualise the legal and policy framework of citizenship and migration within the AFSJ. Threading the various disciplines together through a social work perspective comes as a natural outcome if we want to shift the focus towards practice

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<sup>32</sup> Leah Bassel, *The Politics of Listening: Possibilities and Challenges for Democratic Life* (Palgrave Pivot, 2017)

<sup>33</sup> Ala Sirriyeh, *The Politics of Compassion: Immigration and Asylum Policy* (Bristol University Press, 2018)

<sup>34</sup> Mark Doel, *Social Work: The Basics* (Routledge, 2012) 5-7

and re-evaluate how people can thrive in their social environments and, more particularly, how a new approach towards the AFSJ, as a social space, can be beneficial towards this aim.

In Chapter Four, I engage in an exercise whereby I examine how the theoretical approach of social empathy can be used in a practical way to understand issues within the AFSJ. More particularly, I take the Court of Justice as one of the EU's main institutions, whose part has been prominent in the development of citizenship (Chapter One), while its role has increased in the context of migration following the Treaty of Lisbon. The chapter focuses on the analysis of case law within the asylum policy area of the EU and examines cases of migrants' treatment in Member States, including cases of detention. The cases chosen involve a conflict between a personal right and a public interest, which is important to examine in order to identify what values and principles guide the Court in constitutional cases. In that chapter, I explore how social empathy becomes relevant in the judicial context as I develop the argument that the principle of proportionality as a balancing exercise is central to enhancing a human-centred dimension of the European polity in the context of the Court. Proportionality, is therefore central to the status of individuals, the recognition of their autonomy as well as to the collective autonomy of society which is identified in Chapter Two as pivotal for the future of the European polity. Balancing is understood in this thesis as a method used to determine which right or principle takes priority in cases where a personal fundamental right conflicts with a public right. Proportionality is understood both in a substantive and procedural sense; as a doctrinal principle of general application as well as a structured test that guides judges through their reasoning.<sup>35</sup>

In Chapter Five, which is the conclusive chapter, I review the main arguments made throughout the thesis and reflect upon the way forward.

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<sup>35</sup> Generally see on balancing and proportionality Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) Chapters 6 & 7

# Chapter 1 Evolution of the European treaties

## 1.1 Integrating economies: Treaty of Paris (1951) and Treaty of Rome (1955)

It was within the broader climate in the aftermath of World War II that the idea of European integration began to emerge as an acceptable equilibrium for international stability starting with economic recovery in what was proposed by the US as the European Recovery Program in 1948,<sup>36</sup> and previously envisioned by Churchill as a 'kind of United States of Europe' during his speech in 1946.<sup>37</sup>

A partnership between Germany and France was introduced as the next step and was reinforced in the Hague Congress (1948). There, it was stated that 'the time has come when the future of European nations must transfer and merge some portion of their sovereign rights to secure common political and economic action for the integration and proper development of their common resources.'<sup>38</sup> On 9 May 1950, this idea was substantiated in the Schuman Declaration in which the pooling of coal and steel industries of Germany and France was considered as the initial step towards European unity.<sup>39</sup> The sectoral integration of coal and steel industries under the European Coal and Steel Community (ECSC) would provide the needed solidarity between the two countries and ensure that future war would be averted. The integration of these industries provided both a symbolic as well as a concrete barrier for future conflicts through collaboration in

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<sup>36</sup> Also known as the Marshall Plan; Desmond Dinan (ed) *Origins and Evolution of the European Union* (Oxford University Press, 2006) 37; A digital volume of the original Marshall Plan can be accessed at The George C. Marshall Foundation website at <https://bit.ly/2MufKeo> last accessed on 31 Jul 2019

<sup>37</sup> Speech by Mr. Winston S. Churchill at Zürich University, 19 September 1946, found in Patijn S. (ed), *Landmarks in European Unity* (A. W. Sijthoff, 1970) 31-33;

<sup>38</sup> Resolution of the Political Commission of the Congress of Europe, The Hague, May 1948, found in Patijn S. *ibid* 37

<sup>39</sup> Foundation Robert Schuman, Declaration of 9<sup>th</sup> May 1950 delivered by Robert Schuman 2011 European Issue No. 204 (10<sup>th</sup> May 2011) accessed at <https://bit.ly/2xgbiqv> 31 July 2019

these fields under a high authority. <sup>40</sup> Monnet, had envisioned the creation of the coal and steel community as the foundation to a European federation<sup>41</sup> but this would be subsequently challenged with the Community's expansion and the various notions surrounding its identity and future. Consequently, in 1951, Germany, Italy, France and the Benelux countries signed the Treaty of Paris and created the ECSC.<sup>42</sup> The Community combined intergovernmentalism, through Member States' shared powers in the Council of Ministers as well as supranationalism, through the High Authority. <sup>43</sup>

In 1955 the Foreign Ministers of the Member States extended integration into more areas<sup>44</sup> and established the European Economic Community (EEC)<sup>45</sup> on the creation of a common market, and the European Atomic Energy Community (Euratom)<sup>46</sup> in the field of nuclear energy.<sup>47</sup> While the EEC was economically driven, seeking to enhance integration through a common market that would be achieved at different stages, including the freedom of movement of persons, services, and capital, Euratom was largely created to encourage research and development in the area of nuclear energy. Both treaties shared an institutional structure with an Assembly, a Council, a Commission<sup>48</sup> and a Court of Justice.<sup>49</sup> The freedom of movement has created, as will be seen, additional levels of integration with social, civil, and political dimensions. This was explained as a "spillover" effect that was part of the theory of neo-functionalism that sought to explain regional integration in Europe and operated on the notion that integration in one economic sector would

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<sup>40</sup> See further Martin Dedman, *The Origins and Development of the European Union 1945-2008: A History of European Integration* (Routledge, 2<sup>nd</sup> ed, 2009) 52-54; Schuman Declaration *ibid*; Philip Thody, *An historical Introduction to the European Union* (Routledge, 1997) 1-3

<sup>41</sup> Statement by R. Schuman, Minister of Foreign Affairs of France, 9 May 1950 found in Patijn S. (edt), *Landmarks in European Unity*, (A. W. Sijthoff, 1970) 49

<sup>42</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (ECSC Treaty or Treaty of Paris). This treaty expired by its own terms on July 23, 2002.

<sup>43</sup> During the Schuman plan negotiations, other proposals were also put forward including the Pleven plan, which proposed a European Defence Community (EDC) with a common European army, and a European Political Community (EPC). Although the plan had failed at the time, nevertheless, the development of migration and citizenship shows that a political community was eventually developed through the institutionalisation of citizenship, and a defence community was to be reflected in the foreign and security policy of the EU in subsequent treaties, currently under the Area of Freedom Security and Justice (AFSJ).

<sup>44</sup> Richard McAllister, *From EC to EU: An Historical & Political Survey* (Routledge, 1997)14-16

<sup>45</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome)

<sup>46</sup> Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 259, 5 Eur. Y.B. 454 (Euratom Treaty)

<sup>47</sup> See further Dedman (n.40) 87-88, McAllister (n.44) 15

<sup>48</sup> Previously High Authority

<sup>49</sup>McAllister (n.44) 14; Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005) 5-7; CVCE, *From Messina Conference to the Rome Treaties (EEC and EAEC)* last accessed at <https://bit.ly/2KSGNOB> on 18 August 2019

encourage integration in other sectors.<sup>50</sup>

At the same time, tensions between the two forms of governance of supranationalism and intergovernmentalism began to develop during these early stages. These modes of governance are important to understand the evolution of the treaties and the tensions concerning who was to benefit from Community law. These governance models are particularly relevant as the competences of the EU and the Member States in areas such as migration become increasingly blurred. In broad terms, supranationalism is used to explain the transfer of power above the nation-state, i.e. to Community institutions, while intergovernmentalism refers to cooperation between nation-states instead of transfer of powers to higher institutions. The two concepts are linked to the idea of sovereignty, i.e. the power of the state or a governing body to govern itself,<sup>51</sup> which is connected to 'power, authority, independence, and the exercise of will',<sup>52</sup> and has to do with claims of control over the legal subject within the territory in which this power is exercised.

The way supranationalism and intergovernmentalism relate to European integration reflects the tensions and complexities of the EU as a socio-political community with an impact on the relationship between the nation-state and the legal subject and, consequently, the balancing of public interests and personal rights and freedoms. For instance, federalist conceptions of European integration can be viewed through the notion of supranationalism,<sup>53</sup> later envisioned by Tindemans and influencing the development of the community's social policy, particularly concerning special rights for the future citizens, which will be seen in subsequent sections in this chapter. At the same time, intergovernmentalism is particularly epitomised through the cooperation of Member States outside the treaty framework in areas concerning migration and security (e.g. post-SEA). With the signing of the Treaty of Rome and the establishment of the EEC, power was shifted from the Commission to the Council of Ministers, which was the main decision-making body, giving more weight to intergovernmentalism although combining intergovernmental and supranational arrangements. The Council of Ministers, which consisted of national representatives from each Member-State, was a separate authority as opposed to the Parliamentary Assembly and the Court of Justice, which were shared with the ECSC. The Council of

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<sup>50</sup> Ernst B. Haas, 'International Integration: The European and Universal Process' 1961 15 (3) *International Organization* 366; Ben Rosamond, 'The uniting of Europe and the foundation of EU studies: Revisiting the neofunctionalism of Ernst B. Haas' 2005 12 (2) *Journal of European Public Policy* 237

<sup>51</sup> see further Daniel Philpott, 'Sovereignty', *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta (ed) Summer 2016 Edition) accessed at <https://stanford.io/2Yjvh8f> 31 Jul 2019; Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015)

<sup>52</sup> see in relation to the EU Neill Nugent, *The government and the politics of the European Union* (Duke University Press, 6<sup>th</sup> ed, 2006) 558

<sup>53</sup> For example, in the institutional context of the ECSC the central organ, viz. the High Authority, was the first supranational institution that was responsible for ensuring that the objectives of the treaty are met.

Ministers represented national interests while the Commission, also composed of members from the Member States, was an independent body representing the interests of the Community. The Council held the power of a unanimous vote in relation to proposals from the Commission and held significant executive power over the agenda setting and the signing of international agreements, while the Parliamentary Assembly had a more minimal role in decision making.<sup>54</sup> This approach mirrored the approach in international law and the United Nations, whereby states remained the main subjects of international law,<sup>55</sup> an aspect which the Court of Justice gradually sought to change in the context of the European Community by creating direct links between the Member States' nationals and the Community through concepts like primacy and direct effect (later institutionalised through the concept of European citizenship).<sup>56</sup>

Tensions between the two modes reflect the willingness of Member States to cooperate on a regional basis (i.e. sectoral integration in the ECSC) yet a reluctance to transfer power to supranational institutions as was in the EEC. Despite the EEC's intergovernmental tendencies, several aspects enhanced the role of the Community. In the context of the common market and the approximation of Member States' economies (Article 2EEC), the European Social Fund was introduced to improve the employment sector and create opportunities for workers,<sup>57</sup> while the European Investment Bank was established to boost support in various sectors.<sup>58</sup> This made the Community more visible in the area of employment and led the way for the Community's involvement in the socio-economic field. The EEC included social provisions with socio-economic rights, such as those found in Articles 117-119EEC in relation to working conditions and equal pay for equal work, to ensure the proper functioning of the internal market. Further, Articles 7 and 48EEC prohibited discrimination on the grounds of nationality and Article 48EEC spoke particularly of non-discrimination in relation to workers 'as regards employment, remuneration and other conditions of work and employment'. While a similar provision existed in the ECSC, which provided for the protection against discrimination of coal and steel workers, consumers, producers, and buyers,<sup>59</sup> the EEC extended the non-discrimination principle to all workers without, however, any particular reference to TCN workers, suggesting a weakness that could

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<sup>54</sup> See Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press, 6<sup>th</sup> ed, 2015) 4-5; see also Part V of the EEC on the institutions of the Community and their role.

<sup>55</sup> On the concepts of supranationalism and intergovernmentalism in the development of the EU see SchützeR., *From dual to cooperative federalism: The changing structure of European Union Law* (OUP, 2009) 41; and Lindseth P.L., *The contradictions of supranationalism: Administrative governance and constitutionalization in European integration since the 1950s*, 2003 *Loyola of Los Angeles Law Review* 37, 363

<sup>56</sup> These will be discussed in subsequent sections in this chapter.

<sup>57</sup> Article 3 (i) EEC

<sup>58</sup> Articles 3 (j) EEC

<sup>59</sup> Articles 7(b) and 69 ECSC

lead to discrimination.<sup>60</sup>

Council Regulation 1612/68 on the freedom of movement for workers, referred only to nationals of Member States while omitting reference to other workers. Thus, what appeared as a provision preserving equality for all workers, eventually opened the door to differential treatment concerning TCN workers, who would work under the same conditions as Community nationals. In line with this, Kostakopoulou explained that the exclusion of TCN workers was a political decision of the Member States wishing to retain the right to determine the beneficiaries of free movement through their definition of nationality.<sup>61</sup> Coupled with further limitations to free movement and non-discrimination on the grounds of public policy, security and health,<sup>62</sup> the intergovernmental aspects were apparent. Nevertheless, the seeds for a political community were sown as links between nationals and the European institutions started to form.<sup>63</sup> This would eventually require identifying the legal subject as a beneficiary of this Community through the institutionalisation of European citizenship. This intention was indicated by the preamble of the EEC, which highlighted the determination of the Member States 'to lay the foundations of an ever-closer union among the peoples of Europe'. At this stage, however, the rights derived from the EEC were through the four freedoms, (goods, capital, services, and labour) and were conditional upon a Member-State's nationality.

## **1.2 Groundwork for the socio-political dimension**

### **1.2.1 Free movement and non-discrimination**

During the 1960s and early 1970s, an increased emphasis on mobility and residence was evident through the adoption of a series of regulations and directives intended to implement the free movement.<sup>64</sup> These included Regulation 15/61<sup>65</sup> that set in motion the initial measures to

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<sup>60</sup> Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press, 2001) 42

<sup>61</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 43

<sup>62</sup> Article 48(3) EEC

<sup>63</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 39-44

<sup>64</sup> See also Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 42; Elspeth Guild, Steve Peers, Jonathan Tomkin, *The EU citizenship directive: A commentary* (Oxford University Press, 2014) 111

<sup>65</sup> Regulation 15 of 16 August 1961 on initial measures to bring about free movement of workers within the Community (1961 OJ 57/1073) (hereinafter Regulation 15/61)

implement free movement of workers and the 1961 Directive<sup>66</sup> on the administrative procedures and practices governing issues of entry, employment and residence of workers and their TCN family members. As Guild et al. explain, despite these initial steps in the implementation of free movement of workers, the reality was that these were applied restrictively.<sup>67</sup> Community workers were afforded the right to move only when there was lack of appropriate applicants from the regular labour force of the host state and, similarly, the purpose of movement and residence in a host Member-State was attached to accepting employment that had been offered to them.<sup>68</sup> This represents a type of instrumentalism, which treats Community (and non-Community) workers as instruments to further integration and economic expansion, which at that point was consistent with the main focus of the European project, i.e. economic and market integration.

Further to Regulation 15/61<sup>69</sup> and the 1961 Directive,<sup>70</sup> Directive 64/220<sup>71</sup> and Directive 64/240<sup>72</sup> extended the right to free movement to workers and their families and to nationals of Member States with regard to establishment and the provision of services, respectively, thereby extending the principle of non-discrimination and contributing to the expansion of the definition of family members, who would derive rights based on their relationship to a Member-State national.<sup>73</sup> In *Rutili*, the Court stated that a Member-State could not impose prohibitions on residence which were 'territorially limited' unless these also applied to the Member-State's nationals.<sup>74</sup> Regulation 1612/68,<sup>75</sup> expanded on the right to free movement, and it enhanced the acquisition of social rights in the Member States by providing that a national of a Member-State could take up employment within the territory of another Member-State<sup>76</sup> and was not to 'be treated differently from national workers because of his nationality, in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, [...] reinstatement or re-employment'.<sup>77</sup> However, as previously, these applied to nationals of Member States and not to

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<sup>66</sup> Council Directive of 16 August 1961 on administrative procedures and practices governing the entry into and employment and residence in a Member State of workers and their families from other Member States of the Community (1961 OJ 80/1513) (hereinafter 'the 1961 Directive')

<sup>67</sup> Guild et al. (n.64) 112

<sup>68</sup> *ibid*

<sup>69</sup> n.65

<sup>70</sup> n.66

<sup>71</sup> Council Directive of 25 February 1964 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to the establishment and the provision of services ([1964] OJ 845/64) (hereinafter Directive 64/220)

<sup>72</sup> Council Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member States' workers and their families within the Community (1964 OJ 64/981)

<sup>73</sup> See further Guild et al. (n.64) 113

<sup>74</sup> Case 36/75 *Roland Rutili v Minister for the Interior*, EU:C:1975:137 [1975] ECR 1219, para 50

<sup>75</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community ([1968] OJ L 257/2) (hereinafter Regulation 1612/68)

<sup>76</sup> Article 1 Regulation 1612/68

<sup>77</sup> Article 7 *ibid*

all workers. However, Title III of Regulation 1612/68 was dedicated to the families of Community workers, who could accompany the workers, provided that the latter had exercised their right to move. Consequently, the family of a worker could also enjoy the freedom of movement and to take up employment or attend schools in the host Member-State.<sup>78</sup> This provision could, therefore, be used by non-nationals based on their relationship to Community nationals. In the same spirit, Directive 68/360<sup>79</sup> abolished restrictions on the movement and residence of workers and their families and allowed for entry into any of the Member States upon valid passport, while it stated that Member States 'may not demand from the nationals [...] any exit visa or any equivalent document'.<sup>80</sup> Subsequently, Regulation 1408/71<sup>81</sup> set out measures on the application of social security schemes to employed persons and their families moving within the Community.

Initially, the Court interpreted the principle of non-discrimination more restrictively and mainly based on economic activity as was the case in *Walrave* (1974),<sup>82</sup> while in *Michel S.* (1973) the Court did not extend the right to access benefits to a family member of an Italian worker resident in Belgium, as the benefit could only be claimed on the basis of employment.<sup>83</sup> This, however, gradually changed in cases like *Cristini* (1975) where the Court ruled that family members of a deceased worker had access to social and tax advantages despite of the absence of a connection to employment.<sup>84</sup> This approach was confirmed in the subsequent case of *Inzirillo* (1976)<sup>85</sup> which indicated that the right to equal treatment began to be closely tied to legal residence rather than strictly on a basis of economic activity and employment. However, the status of workers remained fundamental as was the exercise of free movement as a requirement to trigger rights under Community law.

The provisions on equal treatment and the gradual expansive interpretation of the Court regarding legal residence introduced direct legal connections between individuals, Member States, and the Community, which surpassed the connection established by traditional

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<sup>78</sup> Articles 10,11,12 *ibid*

<sup>79</sup> Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families ([1968] OJ L.257/2) (hereinafter Directive 68/360)

<sup>80</sup> Article 2 (4) Directive 68/360 *ibid*

<sup>81</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community ([1971] OJ L. 149/2) (Hereinafter Regulation 1408/71)

<sup>82</sup> Case C-36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo,, EU:C:1974:140

<sup>83</sup> Case C- 76/72, Michel S. v Fonds national de reclassement social des handicapés, EU:C:1973:46, [1973] ECR 00457

<sup>84</sup> Case C-32/75 Anita Cristini v Société nationale des chemins de fer français, EU:C:1975:120, [1975] ECR 01085

<sup>85</sup> Case C-63/76, Vito Inzirillo v Caisse d'allocations familiales de l'arrondissement de Lyon, EU:C:1976:192, [1976] ECR 02057

international law with individuals. Although these rights were only attached to Community workers and their families, it is important to note that even when Community workers would lose their status as workers, they could still derive rights under Community law and could remain in the territory of the host Member-State with their family.<sup>86</sup> The development from economic integration towards a level of social integration, through social policies and social rights for Community workers, not only indicated the future expansion of Community law but also started to raise questions about who would benefit from the new legal order. These initial stages of identifying the legal subject indicated the spillover effect<sup>87</sup> whereby the economic sector necessitated integration into other areas, such as social policies concerning the rights and freedoms of workers and the conditions of their employment, to facilitate the completion of the internal market. However, the idea that rights derived directly from the worker's status and, therefore, the emphasis of the Court on the economic objectives, provided an image or vision of who the legal subject would be. In the case of *Fracas*, the Court extended access to benefits for the teenage child of a Community worker based on the principle of equal protection but disregarded the fact that the child was born and had lived in Belgium his whole life.<sup>88</sup> Instead, the reasoning was market-orientated suggesting that without access to this benefit for his son the migrant worker's freedom of movement would be impeded, signifying that the principle of equal treatment was conditional upon, and subordinate to, the freedom of movement and functioned as a means towards achieving the internal market.<sup>89</sup>

These rulings, however, must be viewed with reference to the Court's jurisprudence from the 1960s - 1980s which involved landmark judgments on primacy and direct effect and the incorporation of fundamental rights protection within the Community's legal order. The activity of the Court during this period was set against a backdrop of disagreements at the political terrain involving tensions between visions of the Community and its governance mode. This culminated in the Empty Chair crisis (1965) resulting in the Luxembourg Compromise, which safeguarded the intergovernmental nature of the EC while it limited the supranational powers of the European Commission.<sup>90</sup> Despite the willingness of the Member States for further integration and enlargement in 1969, the EMU and the regional policy were abandoned in light of the international financial crisis and the devaluation of the sterling, the franc, and the dollar. At the

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<sup>86</sup> Article 7 Directive 68/360 (n.79)

<sup>87</sup> earlier in this chapter

<sup>88</sup> Case C - 7/75 M. Fracas and wife v. Belgian State, EU:C:1975:80

<sup>89</sup> see further Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination: Studies in Employment and Social Policy* (Kluwer Academic Publishers, 2001) 107-110

<sup>90</sup> see further McAllister (n.44) 41-60; More specifically on the Luxembourg Compromise see Nicholl W., 'The Luxembourg Compromise' 1984 23 *Journal of Common Market Studies* 35; Anthony L. Teasdale, 'The Life and Death of the Luxembourg Compromise' 1993 31(4) *Journal of Common Market Studies* 567

same time, efforts to revive economic integration ultimately failed with the collapse of the Bretton Woods system and the first oil crisis in 1973.<sup>91</sup> This period often referred to as Eurosclerosis on the assumption of stagnation concerning institution-building at the Community level, has set the groundwork for further integration culminating in the SEA and EMU.<sup>92</sup>

### 1.2.2 Judicial activism<sup>93</sup> and the nature of EU law: 1960s -1970s

During the Eurosclerosis period, the Court seized the opportunity to expand on the nature of the Community's legal order through the concepts of direct effect and supremacy in the two important cases of *Van Gend en Loos*<sup>94</sup> and *Costa*.<sup>95</sup> Although these are not directly connected to citizenship or migration, they have advanced the Community's character and established its superiority over national legal orders.<sup>96</sup> In the case of *Van Gend en Loos*, the Court distinguished between traditional international law and the 'new legal order' of Community law, whose subjects were not only Member States but also their nationals. It underlined that Community law 'not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'<sup>97</sup> Importantly, the Court added that the idea of individuals deriving rights and being able to claim them through direct effect would supplement the Commission and Member States' power to refer matters before the Court where another Member-State did not fulfil its treaty obligations.<sup>98</sup> This meant that a national of a Member-State assumed a scrutinising role against the effective application of Community law, which was to be viewed in the light of its *sui generis* nature.<sup>99</sup> In *Van Gend*, the Court contributed to the development of Community law not just as a legal order separate from the socio-political context;

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<sup>91</sup> See further, Thody (n.40) 18-20, Michael J. Geary, 'The Process of European Integration from The Hague to Maastricht, 1969-92: An Irreversible Advance?' 2012 6 *Debater a Europa* 6; Derek W. Urwin, *The Community of Europe: A history of European Integration since 1945*, (Longman, 2<sup>nd</sup> ed, 1995) 150-151; McAllister R., (n.44) chapter 5

<sup>92</sup> see further Anil Awesti, 'The Myth of Eurosclerosis: European Integration in the 1970s' 2009 3/4 (n 353-354) *Dans l'Europe en Formation* 39, last accessed at <https://bit.ly/2M73PB5> on 1 Aug 2019

<sup>93</sup> On the wider issue of judicial activism see Patrick Neill, *The European Court of justice: A Case Study in Judicial Activism* (European Policy Forum, 1995)

<sup>94</sup> Case C-26/52, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1

<sup>95</sup> Case C - 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66, [1964] ECR 00585

<sup>96</sup> On the significance of *Van Gend en Loos* see further Joseph H.H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', 2014 12 (1) *International Journal of Constitutional Law* 94

<sup>97</sup> *Van Gend en Loos* (n.94) para 12

<sup>98</sup> *ibid* para 11

<sup>99</sup> See further Joseph H.H. Weiler, 'The transformation of Europe' 1991 100 (8) *Yale Law Journal* 2403, 2413-2414

instead it was bringing the individual “in” as a constitutive element.<sup>100</sup> It is in this sense that the term judicial activism is used in this section, namely that that Court has involved itself in matters of the legitimacy of the legal order by contributing to the development of the legal subject. The Court’s initial steps to carve out the Community’s identity brought out another issue regarding its nature; i.e. on whose authority would it be decided which provisions would have direct effect? This raised jurisdictional questions that go back to the on-going tension between supranationalism and intergovernmentalism.<sup>101</sup> At the same time, it was becoming clear that the Court was determined to expand the relevance of the Community’s legal order and elevate the role of the individual within the European legal structure.

The approach in *Van Gend* was expanded in the subsequent case of *Costa* where the Court developed the principle of primacy of Community law by placing an obligation on the national courts to interpret national legislation in line with Community law.<sup>102</sup> The Court had expressly stated that ‘by contrast with ordinary international treaties, the EEC treaty has created its own legal system [...] an integral part of the legal systems of the Member States and which their courts are bound to apply’.<sup>103</sup> Further, it stated that Member States have limited their sovereign powers and ‘created a body of law which binds both their nationals and themselves’.<sup>104</sup> According to the Court, the transfer of sovereignty incorporated a permanent limitation of sovereign rights, which meant that any subsequent act that was incompatible with Community law would be set aside.<sup>105</sup> By clarifying the hierarchy of Community law and the incorporation of the individual as a legal subject, the Court contributed to shaping European identity by establishing and re-enforcing connections with the legal subjects.

In *Stauder*<sup>106</sup> and *Internationale Handelsgesellschaft*,<sup>107</sup> the concept of primacy and the incorporation of human rights within the European legal order were further discussed; the Court restated the hierarchical level of Community law but also highlighted that not even national constitutional provisions incorporating protection of fundamental human rights could be invoked to discredit the validity of Community law or its effect. The Court nevertheless stated that:

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<sup>100</sup> see also Weiler, *Van Gend en Loos* (n.96)

<sup>101</sup> Bruno de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in Paul Craig & Grainne de Búrca, *The Evolution of EU Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 326-327

<sup>102</sup> See also de Witte *ibid* 329

<sup>103</sup> *Costa* (n.95) p.593

<sup>104</sup> *ibid*

<sup>105</sup> This approach was reaffirmed later in *Simmenthal*, Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49, [1978] ECR 00629, para 15

<sup>106</sup> Case C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, EU:C:1969:57

<sup>107</sup> Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114

Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community.<sup>108</sup>

It is worth noting that no reference to human rights or international law was made in the EEC hence, demonstrating the Court's role in the constitutionalisation of human rights in the Community legal order which, as we will see below, was triggered by national constitutional courts. Evidently, while establishing that human rights constitute an integral part of the general principles of Community law, the main emphasis was on clarifying the hierarchical position of the Community and the Court in relation to the Member States.

Tensions regarding primacy over the standards of human rights can be traced back to the 1950s, which was around the same time during which other instruments of human rights law were established.<sup>109</sup> De Búrca explains that human rights had occupied an important status in discussions during the European Political Community (EPC) and there was pressure by the German government to include a reservation clause in both the EPC as well as the EEC.<sup>110</sup> This would mean that in cases where fundamental rights were involved, the national constitutional laws would apply and supersede Community law. This was rejected by other states and by the Court in rulings such as *Stork*,<sup>111</sup> *Geitling*,<sup>112</sup> and *Sgarlata*<sup>113</sup> in which it rejected the examination of cases concerning fundamental rights and principles as being part of Community law, even if these were protected within national constitutions.

As de Búrca explains, the rejection of fundamental rights and principles, not only showed that fundamental rights protected at the national level were treated as limiting Community power but also that the Court had not considered the inclusion of human rights as part of its general principles at the time.<sup>114</sup> At that point, early case law did not seek to rely on fundamental rights but rather on a functional interpretation of the four freedoms and the supremacy of the Community legal order. It was the response and reaction of some of the national constitutional courts such as, but not limited to, the Italian and German constitutional courts, examined below,

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<sup>108</sup> *ibid* para 4 Emphasis added

<sup>109</sup> such as the UDHR and ECHR; see De Búrca G., *The evolution of Human Rights law*, in Craig & De Búrca (n.101)

<sup>110</sup> *ibid*

<sup>111</sup> Case C- 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* , EU:C:1959:4

<sup>112</sup> Case C- 13/60, "*Geitling*", *Ruhrkohlen-Verkaufsgesellschaft mbH and others v High Authority of the European Coal and Steel Community*, EU:C:1962:15

<sup>113</sup> Case C- 40/64, *Marcello Sgarlata and others v Commission of the EEC*, EU:C:1965:36

<sup>114</sup> De Búrca G., *The evolution of Human Rights law*, in De Búrca & Craig, (n.101)

concerning issues of primacy and fundamental rights that had contributed to the development of a human rights framework at the Community level, as they treated fundamental rights as necessitating explicit protection at both national and European levels. Consequently, *Stauder*<sup>115</sup> and *Handelsgesellschaft*<sup>116</sup> constitute significant steps within the development of human rights within the EU legal order especially as part of the general principles of Community law. However, this development remained within the context of the primacy of Community law and ‘within the framework of the structure and objectives of the Community’.<sup>117</sup> The initial recognition and incorporation of fundamental rights in the Community legal order was, as Reid explains, ‘essentially reactive’ and an attempt to reassure Member States that fundamental rights indeed limited the EC.<sup>118</sup>

The Member States engaged in a “dialogue” with the Court of Justice concerning the issue of supremacy and fundamental rights protection and highlighted the primacy of fundamental rights over Community law.<sup>119</sup> The Italian Constitutional Court in *Frontini* (1973)<sup>120</sup> approached the issue of primacy by prioritising fundamental rights, while it explained that although the Italian Constitution accepted Community law as a form of higher law, this also meant that fundamental principles and rights, which are guaranteed by the Italian Constitution, had to be safeguarded by the European institutions.<sup>121</sup> The German case, known as *Solange I*,<sup>122</sup> similarly highlighted the tension regarding the doctrine of supremacy and protection of basic rights protected by the German Basic Law. In that case, the German Federal Constitutional Court questioned and rejected the authority of the Court of Justice on matters concerning fundamental rights that were protected in the German Constitution.<sup>123</sup> These decisions were crucial for the future development of fundamental rights within the Community legal order and the competences of the Community and its Member States, as well as the scope of EC law and the jurisdiction of the Court of Justice.<sup>124</sup> Simultaneously, questions about the relationship between Community law and other international human rights instruments, such as the European Convention on Human Rights

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<sup>115</sup> n.106

<sup>116</sup> n.107

<sup>117</sup> para 4 *Internationale Handelsgesellschaft* (n.107)

<sup>118</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lesson from the EU Experience* (Hart Publishing, 2015) 26

<sup>119</sup> Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of Legal Order’ in Craig & de Búrca, (n.101)

<sup>120</sup> *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372

<sup>121</sup> *ibid* 384; Paul Craig & Grainne De Búrca, *EU Law Text, Cases and Materials* (Oxford University Press, 4<sup>th</sup> ed, 2007) 364.

<sup>122</sup> Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle ffir Getreide und Futtermittel*, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.) (*Solange*)

<sup>123</sup> See further Mark Killian Brewer, ‘The European Union and Legitimacy: Time for a European Constitution’ 2001 34 (3) *Cornell International Law Journal* 555, 565-573

<sup>124</sup> These issues were clearly emphasized in the judgments of the national constitutional courts in *Frontini* (n.120) and *Solange* (n.122)

(ECHR), were bound to be raised, something that continued to be the case throughout the development of the EU as evident in Opinion 2/13 in which the Court of Justice rejected a draft agreement for EU's accession to the ECHR.<sup>125</sup>

The response of the Court to the national courts' dissent can be seen in subsequent judgments as in *Nold (1974)*,<sup>126</sup> where the Court of Justice confirmed the idea of fundamental rights as general principles of Community law while it further explained that 'in safeguarding these [fundamental] rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States'.<sup>127</sup> The Court also confirmed its commitment to international law and identified the importance of international treaties, which could serve as guidelines for the protection of fundamental rights,<sup>128</sup> an approach which was subsequently reiterated in the case of *National Panasonic*.<sup>129</sup>

The dialogue between national courts and the Court of Justice demonstrates the inter-constitutive nature of national and European orders both of which were developing within the broader international framework and part of which was the development of human rights law. The implications for the legal subject are significant as the universality of human rights began to impose stricter obligations and responsibilities at the national and European legal orders which would imply an expansion of the legal subject at both levels.

The multifaceted and complicated nature surrounding the legal subject can also be seen through the limits of the non-discrimination principle. In *Van Duyn*,<sup>130</sup> a distinction was made between Member States' nationals and Community nationals as the latter could be prevented from exercising their free movement on the basis of public policy,<sup>131</sup> while the Member-State's nationals, *vis* citizens, of the host state, were protected by international law through the safeguarding of their residence rights within their own state, even if both subjects were engaged in the same activities. This distinction in treatment was well within the logic of the Community legal order at the time as the non-discrimination principle only applied within the scope of EU law, which had only now begun to incorporate the individual as an autonomous subject who derives

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<sup>125</sup> Opinion of 18 December 2014, Opinion 2/13 pursuant to Article 218(11) TFEU, Case Opinion 2/13, EU:C:2014:2454 (hereinafter Opinion 2/13)

<sup>126</sup> Case C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, EU:C:1975:114, [1975] ECR 00985

<sup>127</sup> *ibid* para 13

<sup>128</sup> *ibid*

<sup>129</sup> Case C-136/79, National Panasonic (UK) Limited v Commission of the European Communities, EU:C:1980:169, [1980] ECR 02033, para 18

<sup>130</sup> Case C-41/74, Yvonne van Duyn v Home Office, EU:C:1974:133, [1974] ECR 01337

<sup>131</sup> Van Duyn was involved with the Church of Scientology which was considered by British government as dangerous to the public *ibid* paras 2-3

direct rights and freedoms from Community legal order.

Up to this point in the developmental history of the EU, different categories of (potential) subjects who derived (either directly or indirectly) rights from Community law can be identified. The main subjects were the Community workers, who exercised their freedom of movement and triggered the associated rights and freedoms attached to intra-Community mobility, including the rights of their family members. Non-employed family members, who were Community nationals, as well as TCN family members of a Community worker, could also derive rights from Community law based on their relationship to the worker. The third category, which gradually began to be included within Community law, was that of stateless persons and refugees who resided within the territory of a Member-State.<sup>132</sup> Regulation 1408/71,<sup>133</sup> which set out measures on the application of social security schemes to employed persons and their families moving within the Community, included provisions extending the application of social security schemes and benefits related to, inter alia, maternity, sickness, unemployment and old-age to stateless persons and refugees. These provisions reflected those in the Stateless Persons Convention<sup>134</sup> and the Refugee Convention,<sup>135</sup> which provide under Article 24 (in both conventions) that these categories are to receive equal treatment as nationals in the area of social security.<sup>136</sup> This regulation did not extend any right to enter, reside or work in the host Member-State and, in fact, the Court of Justice had ruled in two later joined cases in *Khalil* and *Addou*<sup>137</sup> that a link to Community law was needed in order for it to apply.<sup>138</sup>

Nevertheless, the Court had begun to place the first concrete building blocks of citizenship through a synthesis of concepts, like primacy, fundamental rights, and direct effect, in an attempt

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<sup>132</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community ([1971] OJ L. 149/2) (hereinafter Regulation 1408/71) Article 2; and Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community ([1972] OJ L. 74/1) (hereinafter Regulation 574/72)

<sup>133</sup> Regulation 1408/71 *ibid*

<sup>134</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, last accessed at <https://bit.ly/2KV5jOV> on 12 August 2019

<sup>135</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, last accessed at <https://bit.ly/2GCrFUA> on 12 August 2019

<sup>136</sup> see Article 2 Regulation 1408/71 (n.132)

<sup>137</sup> Joined cases C-95/99 to C-98/99 and C-180/99, *Mervett Khalil* (C-95/99), *Issa Chaaban* (C-96/99) and *Hassan Osseili* (C-97/99) v *Bundesanstalt für Arbeit* and *Mohamad Nasser* (C-98/99) v *Landeshauptstadt Stuttgart* and *Meriem Addou* (C-180/99) v *Land Nordrhein-Westfalen*, EU:C:2001:532, [2001] ECR I-07413

<sup>138</sup> see also Steve Peers, *EU Justice and Home Affairs Law: Vol II EU Criminal Law, Policing, and Civil Law* (Oxford University Press, 4<sup>th</sup> ed, 2016) 431-432 and in relation to the category of stateless persons in EU law see Tamás Molnár, 'Stateless Persons under International Law: A comparative analysis concerning their legal status, with particular attention to the added value of the EU legal order', 2010 51 (4) *Acta Juridica Hungaria* 293

to bring the legal order closer to the individual. At the same time, by incorporating other international law instruments, the Court was asserting a future expansion of competences in the field of fundamental-human rights and the possibility of a closer connection with individuals through direct access to rights from Community law.

In the following sections, I examine a series of reports and policy documents that were primarily prepared to mobilise integration and economic development in the political plane but have ultimately provided a solid basis for the introduction and institutionalisation of European citizenship.<sup>139</sup> The focus is on the relevant reports prepared following the Paris Summit Conference (1974),<sup>140</sup> which contributed to the development of citizenship through the idea of Passport Union and paved the way for the establishment of special rights for Member States' nationals leading to a more coherent framework on how the legal subject would develop. These documents together with the existing legal framework of the treaties at the time are part of the citizenship narrative of the EU and constitute part of its discursive structures as they indicate how the legal subject of the European polity was gradually constituted. These discursive structures are further linked below to Foucault's notion of power, introduced at the beginning of this thesis, which explained that a connection between power and mobility in the context of the AFSJ is important as it helps explain the different ways through which 'human beings are made subjects'.<sup>141</sup>

### **1.2.3 Developing the legal subject: Special rights for the future citizen**

In 1974 the Heads of States had recognised the need to move forward 'with a view to progress towards European unity'.<sup>142</sup> The idea of a uniform passport was introduced and expanded by the Commission.<sup>143</sup> In the Commission's report, a passport union would attach a different character to the Community that would be acknowledged by the rest of the world. The passport would be issued nationally, but it would also constitute evidence of a 'definite connection with the

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<sup>139</sup> see also Peo Hansen and Sandy Brian Hager, *The Politics OF European Citizenship: Deepening Contradictions in Scoail Rights & Migration* (Berghahn Books, 2012) 46

<sup>140</sup> Final communiqué of the meeting of heads of Government of the Community (Paris, 9 and 10 December 1974), Bulletin of the European Communities. December 1974, No 12. Luxembourg: Office for Official Publications of the European Communities (23/10/2012) lastaccessed at <https://bit.ly/2TKzjRI> on 18 August 2019

<sup>141</sup> Foucault, Why study power? (n.17)

<sup>142</sup> Meeting of the Heads of Government, Paris 9-10 December 1974 Bull. EC 12-1974, 7

<sup>143</sup> Towards European citizenship: implementation of point 10 of the final communiqué issued at the European Summit held in Paris on 9 and 10 December 1974 Bull. EC, Suppl 7/75 COM (75) 322 1975 27

Community'.<sup>144</sup> Notably, 'the introduction of such a passport would have a psychological effect, one which would emphasise the feeling of nationals [...] of belonging to the Community'.<sup>145</sup> This illustrates an early attempt to establish symbols attached to the Community that were aimed to appeal to a collective identity, which Kostakopoulou related to the process of identity-building at the national level.<sup>146</sup>

The early recognition of the social-psychological aspect of European citizenship reflects the multidimensionality of this concept and its relationship to identity, which is an aspect that is taken up in Chapter Two. The dynamism exerted by the Community at this time is remarkable as it acknowledges that the only way forward for a political union would be the incorporation of the individual through the development of the legal subject, which the Court had already begun to shape. Following the Paris Summit, Commissioner Davignon had expressed the need for Europe to be more 'personalised' and 'more human',<sup>147</sup> while ideas around the notion of belonging, European identity and citizenship had been expressed by state leaders like the Belgian Foreign Minister Van Elstande and Italian federalist politician Altiero Spinelli.<sup>148</sup> These pronouncements occurred within a period of scepticism and tension between intergovernmentalism and supranationalism,<sup>149</sup> however, it is important to recognise at this point that citizenship was seen as a concept that would directly influence the lives of the future EU citizens and which meant to normalise a new form of identity at the Community-EU level, not unlike Foucault's approach towards the law operating as a norm.<sup>150</sup> This normalising effect of citizenship would mean that once it would become institutionalised later in the Treaty of Maastricht, it would be taken for granted as something normal and natural.

The concept of equal treatment of non-Member States nationals by all Community Member States through the abolition of control of persons at the internal borders was similarly another way to foster the development of an internal European space, which although open on the inside, would be protected at the outside.<sup>151</sup> What we witness up to this point in the developmental history of European identity is an attempt by the Community to reproduce or redefine the

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<sup>144</sup> *ibid* para 2.2.1

<sup>145</sup> *ibid* para 2.2.3

<sup>146</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 46-47; see also Antje Wiener, 'From Special to Specialized Rights' in Michael P. Hanagan & Charles Tilly (eds), *Extending Citizenship, Reconfiguring States* (Rowman & Littlefield 1999) 195

<sup>147</sup> cited in Wiener, *From Special to Specialized Rights*, *ibid*, 205

<sup>148</sup> *ibid*

<sup>149</sup> pp. 24-25 of this chapter

<sup>150</sup> Foucault, *History of Sexuality* (n.22)

<sup>151</sup> *Towards European citizenship*, COM (75) 322 paras 2.4 and 2.5; see further Wiener, *From Special to Specialized Rights* (n.146)

concept of citizenship based on the national model,<sup>152</sup> potentially creating the same distinctions found in the nation-state.<sup>153</sup>

Distinctions such as “nationals” and “foreigners” as well as “internal” and “external” borders, although conceived of as a natural part of the state structure, when used beyond the national level may be more problematic. In the attempt to construct a supranational conception of identity through the more traditional notion of citizenship, the perception of the ‘other’ risks of implicating discriminatory aspects against settled TCNs or TCN workers, which could further extend towards a general discriminatory perception of “others”. The development of migration within a security framework attests to this aspect later in the chapter. This aspect of distinction and differentiation is particularly relevant in the context of power as approached by Foucault, who identified several points connected to the analysis of power, which will be discussed as the chapter progresses. The first point was the ‘system of differentiations’ which is determined by law, economic, cultural or other differences.<sup>154</sup> In building upon distinctions for the development of the future citizen, we can see how the EU citizenship, and the free movement upon which is built, can be understood in the context of power.

The framing of the Other as part of EU’s effort to define European identity is an important aspect of the development of the legal subject within the free movement and involves a paradox; on the one hand, as European integration expands into more areas and as the internal market moves closer to completion, the rights and freedoms of non-Community nationals would become more relevant. This was recognised, to an extent, in the *Action Programme in favour of migrant workers and their families* where the Commission had pointed out that TCN workers, who did not derive their rights from Community law, were often found in a disadvantageous position in relation to social security, vocational training and housing, while they were also said to be easily subjected to deportation measures.<sup>155</sup> For that reason, the Commission proposed the expansion of the principle of equality to apply not only to Community workers but to TCN workers through steps like the elimination of the condition of nationality for receiving benefits and the application of Community law for all workers and their families living in a Member-State. However, extending the non-discrimination principle to TCN workers, although positively contributed to enhancing equality among workers, it must be said that it also responded to the gap in the workforce in the Member States after the two world wars, which had caused the deaths of hundreds of thousands

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<sup>152</sup> This is particularly observed following the entry into force of the Treaty of Maastricht.

<sup>153</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 47

<sup>154</sup> Foucault, *Why Study Power*, (n.17) 792

<sup>155</sup> *Action Programme in Favour of Migrant workers and their Families*, E.C. Bull., Supp. 3/76 COM(74) 2250 14 December 1974

of Europeans but also to large waves of emigrating Europeans overseas.<sup>156</sup> In this sense, the incorporation of TCN workers was necessary for the reconstruction of the European economy as part of the solution to a wider functional problem without, however, suggesting that the implications of non-discrimination would not eventually extend to more social aspects. At the same time, as the Community undergoes enlargements and develops its internal security, the perception of groups of migrants as a threat to the security and prosperity within the free movement area risks reinforcing perceptions about migrants, especially if they are no longer viewed as desirable assets for the functioning of the internal market.

Contrary to this paradox of inclusion and exclusion in relation to TCN workers, Community workers were to gain further rights and freedoms under the European socio-legal order as the Commission set out in its report *Towards European Citizenship*.<sup>157</sup> These special rights were to take a political form, such as voting and standing for elections while also set forward that even though 'complete assimilation with nationals as regards political rights is desirable in the long term', for the time being, some of these rights, such as being eligible for election at the national level, would need to be postponed.<sup>158</sup> The Commission identified that, although equality between nationals of the Member States was accepted in the economic and social fields, the public was not ready to accept this kind of integration in the political field.<sup>159</sup> Nevertheless, the idea of 'a future Community nationality or citizenship' was now put on the agenda.<sup>160</sup> At this point, although an affective dimension was advocated through the establishment of rights and freedoms that would divide Community nationals from 'foreigners' and formulate the legal subject that would give legitimacy to the Community, at the same time the market citizen had started to be placed within more political dimensions as the concept of citizenship was gaining momentum.

It is noteworthy to mention that the Commission had recognised the possible differentiation between the two types of citizens, i.e. market and political citizen, stating that '[t]he problem is to what extent these two views clash or can be reconciled.'<sup>161</sup> What this indicated was that there was an acknowledgement of the different notions of the 'citizen' by the Commission, which was, up to that point, unclear as to which one would prevail. Although the Commission had not expanded on this distinction, it is evident that a transition from a mainly economic subject to a socio-political subject was being cultivated. However, this is an issue that remains open today as

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<sup>156</sup> Lewin K., 'The Free Movement of Workers' 1965 2(3) Common Market Law Review 300

<sup>157</sup> Commission of the European Communities, *Towards European Citizenship* COM (75) 321 final (2 July 1975)

<sup>158</sup> *ibid*

<sup>159</sup> *ibid* para 3.3

<sup>160</sup> *ibid* para 3.4

<sup>161</sup> *Ibid* para 2 Annex 2

integration has expanded outside the economic and political sectors to more social and cultural ones raising further questions about the role of the individual in the European social space as well as EU's contribution and role in developing its legal subject. This point will become clearer in Chapter 2, which situates the individual at the centre of the AFSJ but more significantly at the centre of the European project itself.

At this point, Foucault's second point in relation to analysing power becomes relevant and concerns the 'types of objectives' involved in acting upon other's actions;<sup>162</sup> for example, what privileges are sought to be maintained? The development of special rights for citizens and the expanded rights for TCN workers in favour of economic and market objectives signify an instrumentalist and reactive approach as to how the legal subject began to form in the European legal order. The need to establish and maintain legitimacy necessitated, in a way, the development of a form of European citizenship and identity, suggesting that economic and market-driven aims functioned as important objectives for expanded rights and freedoms for both Community nationals and TCNs. Understanding the development of citizenship and the expansion of the free movement in terms of power does not suggest a cynical view of European citizenship; rather it suggests that approaching it in terms of power we can identify its various effects and elements as well as identify gaps and weaknesses.

Further to this, a federalist dimension which envisioned a united Europe in the form of states and people was evident in the following, and final report, drafted by Tindemans.<sup>163</sup> In his report, Tindemans did not describe an ideal vision of Europe, even though he 'remain[ed] personally convinced that Europe will only fulfil its destiny if it espouses federalism'; instead, he focused 'at the present time' which constituted only part of a 'continuous process'.<sup>164</sup> It must be recalled that his report was drafted as a response to the crisis faced at the time following the "empty chair" policy and financial crisis, which resulted in perceived political inertia particularly as it regarded institution-building at the Community level.<sup>165</sup> Tindemans placed significant emphasis on cooperation and stated that:

[t]he aim of European Union should be to overcome the age-old conflicts which are often artificially maintained between nation States, to build a more humane society in which along with mutual respect for our national and cultural characteristics, the accent will be

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<sup>162</sup> Foucault, *Why Study Power* (n.17) 792

<sup>163</sup> On the concept of federalism in the historical development of the EU see Michael Burgess, *Federalism and the European Union: The Building of Europe, 1950-2000* (Routledge, 2000)

<sup>164</sup> Leo Tindemans (1976) *European Union. Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76* (hereinafter Tindemans Report)

<sup>165</sup> earlier in this chapter

placed more on the factors uniting us than on those dividing us.<sup>166</sup>

Tindemans supported the strengthening of supranational institutions and encouraged the formulation of common goals as one step closer to a unified Europe. In his proposals, the identity of the Community was rooted to the idea of unity and cooperation, central to which would be the people of Europe. He considered common policies in important fields as essential for the external recognition of the Community, economic interdependence between Member States, solidarity between the European peoples, and visibility of the Community in the everyday lives of individuals.<sup>167</sup> For Tindemans, a united Europe was an inevitable step if European countries were to flourish and avoid isolation, as it would only be through this Union that people's voices could be heard at the international stage. Tindemans expressed the need to expand in several areas including rights and freedoms for citizens, consumer rights, and environmental protection, as well as the need to encourage intra-EU mobility, especially in the area of education.<sup>168</sup> Further, he saw the role of the EU as balancing instabilities around Europe, building relationships with other states, and dealing with the issue of security.<sup>169</sup> Evidently, Tindemans saw Europe as a global political player, and citizenship was a mechanism that would provide not only legitimacy but also support for attaining this aim.<sup>170</sup> This vision is still encompassed within the Treaty of Lisbon as we will see in Chapter Two and the main objectives of the European project.

The development of citizenship through special rights and the expansion of free movement signifies the dialectical relationship between the politico-legal structures and identities, and the affective dimension of the European polity through aspects of inclusion and exclusion that built around the relationship of law and emotion. These discursive structures, through the use of the language of common passport, special rights, and future citizenship, reflected a significant change transnationally in Europe. The foundations of who these citizens were as members of a community, and as individuals would be altered; that is, to witness and accept the presence of the Community in their everyday lives, to build solidarity with other Member States' nationals, and to speak with one voice at the international arena. We see, therefore, how aspects of free movement and citizenship can function as power that is dispersed in the social furniture and embedded within the production meaning in the social space. To use Foucault's words '[i]t is a way in which certain actions modify others [...] power is not a function of consent. In itself it is not a renunciation of freedom, a transference of rights, the power of each and all delegated to a

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<sup>166</sup> Tindemans Report (n.164) 6

<sup>167</sup> *ibid*

<sup>168</sup> *ibid* 26-28

<sup>169</sup> *ibid* 16

<sup>170</sup> *ibid* 14

few.<sup>171</sup> The new lexicon of special rights and future citizenship was, therefore, connected to self-perception and feelings of collective identity, in other words, a common vision that would bind nationals from different Member States together.

Freedom of movement was by now acquiring a two-faceted dimension, which, until today, forms part of two dynamic forces that are in perpetual tension. On the one hand, freedom of movement acts as a contributor to the restructuring and opening of identities by facilitating mobility within the internal space and embracing an element of inclusion, diversity and plurality. At the same time it can act as a delimiting factor that divides the internal and external borders of Europe that restricts access, controls and regulates movement and essentially divides those *within* from those on the *outside*. In Chapter Two, I engage with the work of Bourdieu to explore further the underlying mechanisms through which perceptions and modes of thought can be generated in the AFSJ and how they are internalised by subjects rather than identifying, as this chapter does, the effect of these mechanisms on the status of the subject.

The reality of free movement indicates a nuanced permutation of these forces which, as will be seen, involves questions about the meaning of European citizenship as well as the role of fundamental-human rights especially in relation to rights of residence and family reunification,<sup>172</sup> as well as the aspect of non-economic activity of EU citizens in the host Member States.<sup>173</sup> With the introduction of the European citizenship, the division between inside and outside would introduce and build upon distinctions as part of the foundation of European identity, as on the other side of citizenship there was migration which was slowly being institutionalised as an issue of security. This approach towards European citizenship does not aim to undermine its potential or its positive impact nor to condemn it for failing to achieve any particular ideals. Rather, as will be developed further in Chapter Two, it may be more constructive to try to understand it in terms of EU's ongoing narrative and to encourage us to reimagine EU's future while understanding its

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<sup>171</sup> Foucault, *Why study power?* (n.17) 788

<sup>172</sup> These will be discussed further in the context of the treaty of Nice but as an indication such cases include: Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), EU:C:2011:124 [2011] ECR I-01177; Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department, EU:C:2011:277 [2011] ECR I-03375; Case C-40/11, Yoshikazu Iida v Stadt Ulm, EU:C:2012:69; C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, EU:C:2011:734 [2011] ECR 00000; Joined Cases C-356/11 and C-357/11 O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, EU:C:2012:776; Case C-87/12, Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration, EU:C:2013:291; Case C-165/14, Alfredo Rendón Marín v Administración del Estado, EU:C:2016:675; Case C-218/14 Kuldip Singh and Others v Minister for Justice and Equality, EU:C:2015:476; Case C-133/15, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others, EU:C:2017:354; C-82/16, K.A. and Others v Belgische Staat, EU:C:2018:308

<sup>173</sup> For example, Case C-140/12 Pensionsversicherungsanstalt v Peter Brey, EU:C:2013:565; Case C-333/13, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, EU:C:2014:2358; C-67/14, Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others, EU:C:2015:597

historical roots.

At this point in the developmental history of the EU, there was a political need for closer cooperation and some form of community that would speak in a united voice. The European Council issued a Solemn Declaration on European Union (1983),<sup>174</sup> setting as its objectives the creation of an ever-closer union among the peoples and the Member States with closer cooperation, common policies and joint actions in further areas. These could be carried out through 'closer cooperation on cultural matters, in order to affirm the awareness of a common cultural heritage as an element in the European identity', as well as through harmonisation of national legal orders to promote relationships between the nationals of the Member States as well as through a common approach towards international problems and organised crime.<sup>175</sup>

Following the Fontainebleau summit,<sup>176</sup> a follow-up report on *People's Europe* put forward the introduction of the right to reside in another Member-State albeit 'subject to requirements of public order and security',<sup>177</sup> and several other proposals concerning a uniform position in relation to the European Parliament's elections, increased transparency through citizens' right to petition to the European Parliament or the Ombudsman, a simplified version of Community law, and more action in the areas of culture and communication, as this was seen to have a direct impact on the establishment and promotion of European identity.<sup>178</sup> It was suggested that audio-visual co-productions should be introduced as well as a Euro-lottery and training in other languages in the field of education. At the same time, reference was also made to symbols to create awareness about the Community.<sup>179</sup>

These suggestions closely resembled Tindemans' federalist-orientated ideas, as not only the intention of creating a political Community was more clearly expressed, but also the symbolic tools for cultivating European identity were identified and established. These symbols are not particularly significant in themselves, but as they were to be part of a new focus on common European culture they reflected the intention to create an affective dimension of citizenship at the Community level indicating a potential transfer of identification with a political community beyond the nation-state. The emphasis on establishing European identity through the promotion of common culture that would strengthen the political community signified that the future

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<sup>174</sup> European Council, Solemn Declaration on European Union, Stuttgart (19 June 1983) E.C. Bull., No 6 (1983)

<sup>175</sup> *ibid* paras 1.4.2 - 1.4.3

<sup>176</sup> Conclusions of the Fontainebleau European Council (25 and 26 June 1984) E.C. Bull. No 6. (1984) 11-12

<sup>177</sup> A People's Europe: Implementing the conclusions of the Fontainebleau European Council, COM (84) 446 para 22

<sup>178</sup> *ibid*

<sup>179</sup> For example a European flag, an emblem, an anthem, and the establishment of Europe Day (9 May)*ibid*

European citizen was to be recognised as the primary legal subject who would move European integration forward, while rights of other individuals, i.e. TCNs, should also be recognised as part of the integration process.<sup>180</sup>

At this point, a ‘citizenship “problématique”’ started to develop in the sense that the Commission was willing to move away from ‘the prevailing assumption of the statist paradigm’ and was instead ready to give electoral rights to Community nationals and to promote equal treatment of TCNs.<sup>181</sup> This meant that more connections were to be created at the supranational level. The intrinsic tension between intergovernmentalism and supranationalism was reflected in the following treaty, namely the SEA, which expanded on aspects of security, further dividing citizenship and migration. Although the SEA focused primarily on the single market by providing a major institutional revision to enable its completion,<sup>182</sup> its impact is important for the development of citizenship and migration.<sup>183</sup>

### **1.3 In pursuit of the subject: Single European Act (1986)**

The SEA<sup>184</sup> widened the scope of who was to benefit from the free movement and expanded, consequently, on the existing narratives of exclusion through the discourse of securitisation. As the project of the single market raised questions relating to internal and external borders, immigration and asylum came to be considered as security issues.<sup>185</sup> The SEA continued to lean towards intergovernmentalism despite the Commission’s willingness to supranationalise the areas of immigration and asylum,<sup>186</sup> indicating the reserved approach adopted by Member States in this field. Despite becoming clear that mobility was not only about Member States’ nationals but also about everyone who would move to or within the Community, there was a persisting unwillingness to elevate matters to a supranational level.<sup>187</sup> This approach, however, seemed

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<sup>180</sup> see further Cris Shore, *Building Europe: The Cultural Politics of European Integration* (Routledge, 2000)

<sup>181</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 48

<sup>182</sup> Commission of the European Communities, *Completing the internal market*, White Paper from the Commission to the European Council, COM(85) 310, June 1985 (henceforth White paper, 1985); Clive H. Church & David Phinnemore, *The Penguin Guide to the European Treaties: From Rome to Maastricht, Amsterdam, Nice and beyond* (Penguin Books, 2000) 36-37; CVCE, *European Navigator*. Fabio Pappalardo, ‘The Single European Act’ 2012 last accessed at <https://bit.ly/31VVreH> on 18 August 2019

<sup>183</sup> The single market embodied the idea of free movement of goods, capital, services **and** persons

<sup>184</sup> Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506

<sup>185</sup> Andrew Geddes, *Immigration and European Integration, Towards fortress Europe?* (Manchester University Press, 2000) 67-68

<sup>186</sup> White Paper, 1985 supra note 66 at para 54

<sup>187</sup> An example of this is that despite the Qualified Majority Voting (QMV) having become the norm, it did not apply to the free movement of persons to which unanimity continued to be the voting procedure.

consistent with previous institutional stages that primarily focused on the expansion and completion of the single market before moving into other areas supranationally. Simultaneously, the emphasis on demarcating the external borders began to have a direct impact on the inclusion and exclusion of individuals as the future European citizen was being created against an Other and the European polity was being built on this distinction.<sup>188</sup> From Geddes' critical perspective, it was not really a free movement for all, but 'it was essentially a glorified plan for a functional right of free movement for workers'.<sup>189</sup>

These elements of inclusion and exclusion fall within Foucault's first point of the 'system of differentiations', which as we explained earlier, is related to how power operates through distinctions and differences within the law, and other economic and cultural areas.<sup>190</sup> The aspect of functionality in raising free movement rights further indicates Foucault's second point relevant to the analysis of power, namely, 'the types of objectives' pursued. In expanding free movement rights for Community and non-Community workers, the main objective was the completion of the internal market depicting, therefore, an instrumentalist approach to the development of free movement and citizenship rights.

Further to these distinctions based on who would be included and excluded from accessing free movement, the growing emphasis on international crime was accompanied by the increasing relevance of security, which began to develop alongside migration policies.<sup>191</sup> The increasing threat of transnational crime, including the rise of terrorism from the 1970s onwards, was to be dealt with based on intergovernmental cooperation through coordinating bodies such as the Trevi Group.<sup>192</sup> This shift towards security, although justified to an extent as a response to the international and transnational dimensions of threats, also had a significant effect on migration policies, which began to be shaped within a security framework and to operate within a discourse

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Similarly, the Palma document underlined the need for increased intergovernmental cooperation in relation to combating terrorism, drug and other trafficking, law enforcement and judicial matters, while pointing out that 'the creation of an area without internal frontiers would necessitate tighter controls at external frontiers'. This required Member States to harmonise their legal administrative and technical frameworks in relation to treatment of non-Community nationals including a common policy on asylum and refugees, conditions for entry into the Community by TCNs, and lists of individuals who would be refused entry.

<sup>188</sup> Hans Lindahl 'Breaking Promises to Keep Them: Immigration and the Boundaries of Distributive Justice', in Hans Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishers, 2009)137, 151

<sup>189</sup> Geddes (n.185) 72

<sup>190</sup> Foucault, *Why Study Power*, (n.17) 792

<sup>191</sup> Jef Huysmans 'The European Union and the Securitization of Migration' 2000 38 (5) *Journal of Common Market Studies* 751

<sup>192</sup> Declaration of Ministers of the Trevi Group, Paris, 15th of December 1989 last accessed at <https://bit.ly/2KDhkcC> on 18 August 2019; also Statewatch, Tony Bunyan, 'Trevi, Europol and the European state', last accessed at <https://bit.ly/2Mro27B> on 18 August 2019

of securitisation, explored below. The Trevi Group which was set up in 1976 by the Member States at the time to coordinate policing and counter-terrorism, included other sub-groups on terrorism, police co-operation, serious crimes, drug trafficking, policing, and security. At the same time, the Trevi group also developed the Ad Hoc Group on immigration, which assumed the task of developing policies in the areas of immigration and asylum and which was also subdivided into the groups of asylum, external borders, deportations and admissions, as well as data exchange.<sup>193</sup> The areas of immigration and asylum began to be framed within a framework of internal security policies, rather than as a human rights issue, contributing to the normalisation of migration as a security question even prior to the SEA.

Kostakopoulou explained that '[t]his symbolic framing of immigration reflected [...] the wider political and ideological regime which portrayed non-European migrants as “unwelcome” intruders and as “a law and order issue”'.<sup>194</sup> Huysmans further explained that this approach to migrants was different from the one in the 1950s and 1960s during which they were received as 'cheap and flexible workforce' that covered for gaps in the labour market in some Western European states.<sup>195</sup> During the 1960s and 1970s immigration became more restrictive, while in the mid-1980s it was no longer seen solely within the context of the labour market but instead through an internal security lens on the basis of the blurring of the lines between asylum, immigration, and illegal immigration.<sup>196</sup>

The politicisation and securitisation of immigration came about, according to Huysmans, through the securitisation of the internal market. The reason, as he explains, was that it was presumed that the abolition of internal controls for the facilitation of the internal market would bring about a challenge to the rule of law and public order.<sup>197</sup> In other words, as the same author put it, there was a spillover effect of the social and economic aspects of the internal market into internal security,<sup>198</sup> while economic and political integration began to introduce questions of political importance, i.e. policies in the field of immigration and asylum.<sup>199</sup>

In the introduction of this thesis, I referred to the aspect of securitisation as a discourse which is therefore capable of producing different effects and meanings in relation to the broader social

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<sup>193</sup> Elspeth Guild, 'Competence, discretion and third country nationals: The European Union's legal struggle with migration', 1998 24 (4) *Journal of Ethnic and Migration Studies* 613, 622

<sup>194</sup> Kostakopoulou, *Citizenship, Identity and Immigration* (n.60) 52

<sup>195</sup> Huysmans 'The European Union and the Securitization of Migration' (n.191) 753

<sup>196</sup> *ibid* 754-755

<sup>197</sup> Jef Huysmans, *The politics of insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006) 69

<sup>198</sup> Huysmans, *The European Union and the Securitization of Migration*, (n.191) 760

<sup>199</sup> See further Geddes, *Immigration and European Integration*, (n.185), and Andrew Geddes, 'Thin Europeanisation: The social rights of migrants in an integrating Europe', in Michael Bommes & Andrew Geddes (edt) *Immigration and Welfare, Challenging the borders of the welfare state* (Routledge, 2000) 209

space. A discourse, as was explained in the introduction, refers to the 'systematicity of ideas, opinions, concepts, ways of thinking and behaving which are formed within a particular context'.<sup>200</sup> So what do we mean by securitisation and how does it function as a discursive structure and, consequently, as a discourse of power?

Huysmans explains that the process of securitisation derives from a desire to control. This is done in an effort to secure a political space, which is considered as an integrated homogenous unit with an identity that needs to be protected from external threats.<sup>201</sup> He points to the inherent circularity in this process; he explains that the perceived threats to the political integrity and identity of this unit are used to create the unit itself. He states that the act of identifying potential dangers is 'a politically constitutive act that asserts and reproduces the unity of a political community'.<sup>202</sup> What this means is that the sovereignty of this unit is asserted by placing it against an 'existential threat'.<sup>203</sup> To illustrate further, the tripartite characteristic of how the securitisation process works, according to Huysmans, includes the distribution of fear and trust, the creation of inclusions and exclusions, and the attachment of the perceived threat to tendencies towards violence.<sup>204</sup> These securitisation markers can be identified in relation to the migration narrative within the AFSJ; in relation to the first characteristic, the link between migrants and asylum seekers with security problems as it began before the SEA risks of portraying them as a threat instilling a sense of fear towards them. This fear is addressed through the protection of the external borders and the control of movement justifying restrictions on entry, mobility, and residence that may not have been justified otherwise.<sup>205</sup> Similarly, the aspects of inclusion and exclusion are manifested through the attitude of controlling who enters the European space. The last element of securitisation is related to the first one whereby the normalisation of the link between immigration and asylum to international crime, terrorism, and trafficking imply a presumed tendency of migrants (or some groups of migrants) towards violence.

The systematic presentation of aspects of migration through the security lens, which continued in subsequent treaties, as we will see throughout this chapter, indicates how the distinctions of individuals in relation to the internal space of the Community had the ability to penetrate how perception about Self and Other would be structured in the context of the AFSJ showing the aspect of post-structuralism, which suggests how the Self is affected by different structures and

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<sup>200</sup> Mills (n.12)

<sup>201</sup> Huysmans, *The Politics of Insecurity*, (n.197) 47-49

<sup>202</sup> *ibid*

<sup>203</sup> *ibid* 49; see further Barry Buzan, Ole Wæver & Jaap De Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, 1998) 23-25

<sup>204</sup> Huysmans *The Politics of Insecurity*, (n.197) 51-62; see also Buzan et al., *Security*, *ibid* 26

<sup>205</sup> Buzan et al. *ibid* 25

discourses, and social constructivism, that suggests that the Self arises through interaction in the social context. The organisation of migration as a security aspect is further related to the notion of power as approached by Foucault who explained, in relation to the latter:

[It] applies itself to immediate everyday life which categori[s]es the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognise and which others have to recognise in him. It is a form of power which makes individuals subjects.<sup>206</sup>

The gradual development of an internal space without borders where people could move freely, automatically indicated an external space with borders where people could not move freely. This newly established internal space was imagined as a safe space which was initially aimed at accommodating the European workers and future citizens, who would exercise their freedom of movement and would, consequently, trigger other rights derived from Community legal order, such as family-related rights, employment and residence. This was contrary to the situation of other individuals with legal rights under national law (settled migrants, TCN workers) and international law (refugees, asylum seekers, stateless persons) introducing, therefore, a form of differential treatment based on nationality.<sup>207</sup>

As these inequalities gradually began to be acknowledged (i.e. through human rights), we notice the potential for a more inclusive approach towards individuals, i.e. TCNs, who are recognised as temporary legal subjects. However, along with the inclusive aspect of the development of the legal subject the distinction between “inside” and “outside” became more emphasised in terms of accessibility to rights and freedoms established at the Community level.<sup>208</sup>

Cases brought before the Court at the time indicated the economic roots associated with social rights, like those indirectly claimed by TCNs (based on their relationship to a Community national). In the earlier cases of *Cristini*<sup>209</sup> and *Inzirillo*<sup>210</sup> the Court had ruled on non-discrimination against a

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<sup>206</sup> Foucault (n.17) 781

<sup>207</sup> see for example in relation to TCNs Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination: Studies in Employment and Social Policy* (Kluwer Academic Publishers, 2001) 120

<sup>208</sup> see for example Antje Wiener, ‘Making sense of the new geography of citizenship: Fragmented citizenship in the European Union’ 1997 *Theory and Society* 26, 549 Antje Wiener explains in this article that what were introduced as special rights gradually developed as specialized rights for ‘special groups of Community citizens’ such as workers, old, young, unemployed.

<sup>209</sup> Case C-32/75, Anita Cristini v Société nationale des chemins de fer français, EU:C:1975:120 [1975] ECR 01085

<sup>210</sup> Case C- 63/76, Vito Inzirillo v Caisse d'allocations familiales de l'arrondissement de Lyon, EU:C:1976:192, [1976] ECR 02057

worker's widow and his dependent relatives and, following cases such as *Morson and Jhanjan*,<sup>211</sup> *Meade*,<sup>212</sup> and *Dzodzi*,<sup>213</sup> the Court continued to confirm that access to social rights would be permitted only based on a connection to the exercise of one of the four freedoms.<sup>214</sup> For example, in *Morson and Jhanjan* a residence permit was denied to TCN family members of Dutch citizens because they had not exercised their freedom of movement and the Court was unable to find any link to Community law.<sup>215</sup>

As will be seen further, even in the aftermath of the Treaty of Lisbon, which has attempted to enhance the social aspect of the EU, the element of mobility as the primary trigger for the enjoyment of substantial citizenship rights remains a contested aspect of EU citizenship. As we will see, many EU citizens (and their TCN family members) fall outside the scope of EU law because they do not satisfy the economic criteria or have not exercised their freedom of movement.<sup>216</sup> Although now, in the Post-Lisbon era, this aspect of European citizenship may seem as problematic especially in light of human rights, the Court's approach during the earlier stages of EU citizenship is not that surprising. Even in light of judgments that had begun to introduce fundamental rights and autonomy of the legal subject, with direct access to EU law, social rights remained inaccessible without the activation of one of the four freedoms at the time. This is a critical aspect in understanding the historical underpinnings of citizenship but also its current weaknesses as it remains primarily based on economic activity reflecting the instrumentalist discourse of citizenship.

At the same time, the security aspect of migration became more prominent in the aftermath of the SEA through intergovernmental cooperation. For example, the 1990 Dublin Convention<sup>217</sup> determined the Member-State responsible for examining asylum applications and functioned as a mechanism for cooperation attempting to provide a coordinated approach to asylum. While the Dublin Convention had been criticised, based on Member States failure to cooperate and on the possible injustices connected to asylum seekers,<sup>218</sup> there was an apparent willingness between

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<sup>211</sup> Joined Cases C- 35 and 36/82 Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie, EU:C:1982:368, [1982] ECR 03723

<sup>212</sup> Case C-283/83 Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade, EU:C:1984:250 [1984] ECR 2631

<sup>213</sup> Joined Cases C-297/88 and C-197/89 Massam Dzodzi v Belgian State, EU:C:1990:360, [1990] ECR I-03763

<sup>214</sup> For further analysis of case law during that period see Alexander W., 'Free Movement of Non-EC Nationals A Review of the Case-Law of the Court of Justice' 1992 3 (1) European Journal International Law 53

<sup>215</sup> *Morson and Jhanjan*, (n.211) para 16

<sup>216</sup> This will be examined further in subsequent case law

<sup>217</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention (15 June 1990) [1997] OJ C 254

<sup>218</sup> Agnés Hurwitz, 'The 1990 Dublin Convention: A comprehensive Assessment', 1999 11(4) International Journal of Refugee Law 646

Member States to share the “burden”. Article 14 of the Dublin Convention called upon the Member States to exchange information and statistical data concerning asylum applications and share information about the countries of origin of the applicants. In implementing this provision, the ministers of the Member States, who were responsible for immigration, agreed on the creation of CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration) to assist them in studying immigration, combating illegal immigration and immigration crime.<sup>219</sup> In addition to that, CIREA (Centre for Information, Discussion and Exchange on Asylum) was also established as an implementing mechanism of Article 14 of the Dublin Convention and was responsible for gathering and exchanging information on asylum from the Member States including relevant legislation, case law, policy documents and information about countries of origin.<sup>220</sup>

The intergovernmental approach towards migration was further evidenced through the signing of the Schengen Convention implementing the Schengen Agreement signed in 1985 by France, Germany, and the Benelux countries.<sup>221</sup> The Schengen Convention created the Schengen Area and proposed the complete abolition of border controls between its members, while it also introduced common rules on visas, and police and judicial cooperation. The contracting parties reserved under Article 2 (3) the right to initiate border checks where situations of public policy or national security arise. Article 92 referred to the establishment of the Schengen Information System (SIS), which would resemble a joint database where Member States would share information on individuals and properties and place alerts for border control purposes. Article 6(2) (a) stated that ‘[c]hecks on persons shall include not only the verification of travel documents and the other conditions governing entry, residence, work and exit but also checks to detect and prevent threats to the national security and public policy of the Contracting Parties’. This provision applies to all persons regardless of their citizenship or nationality status while Article 38 referred explicitly to the exchange of information on asylum seekers between the Member States including identity, travel documents, residence and routes taken, visas, and generally any relevant information for the purposes of implementing the Convention.

At this developmental stage, the shift towards internal security affected both Community nationals as well as external migrants. However, the implications of intergovernmental

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<sup>219</sup> para 1 Council Conclusions of 30 November 1994 on the organization and development of the Cirefi, [1996] OJ C 274, 50-51

<sup>220</sup> Ad Hoc Group Immigration, 7 October 1991, SN 3432/91 WGI 881, and, Ad Hoc Group Immigration, 21 May 1992, SN 2781/92 WGI 1107, in Statewatch, ‘From Trevi to Maastricht (68 key texts published in full by Statewatch), last accessed at <https://bit.ly/2KVoyrg> on 18 August 2019; *ibid*

<sup>221</sup> Convention Implementing the Schengen Agreement of 14 June 1985, [2000] OJ L 239,19-62

cooperation post- SEA created direct links between asylum and immigration with issues concerning internal security,<sup>222</sup> in the broader framework of free movement, while notions of European identity and references to common culture were developing. The discourse of securitisation of migration could, therefore, influence identity-building while it also involved a 'state-building logic'<sup>223</sup> by constructing the collective unit against an Other, particularly during a time when fundamental-human rights were still being developed.

However, considering Huysmans' approach, the process of securitisation, while useful and applicable to the case of the European polity, must be approached carefully and not be used in a cynical way which treats securitisation merely as an instrument for the facilitation of the internal market and the cultivation of European identity against an Other, or, on the other hand, as some vicious grand scheme to demonise others and control their movement.<sup>224</sup> In Foucault's words '[p]ower relations are rooted deep in the social nexus, not reconstituted "above" society'.<sup>225</sup> The implications of free movement as a form of power are, therefore, dispersed in the socio-legal and political structures of the European polity, suggesting that securitisation must also be understood within the broader context of free movement. This context includes the internal market and identity-building, the impact of globalisation and transnationalisation of crime, the ramifications of the two world wars which triggered cooperation in the first place, but also the colonial past of many of the European nations that are now members of a new and expanding Community.<sup>226</sup> All these developments have contributed in the construction and reconstruction of the European social space, not always in explicit ways, which makes it unwise to ignore their impact on the evolution of the EU and the subject. The developments concerning the security dimension of migration through a technological apparatus further indicate Foucault's third point related to power which is involved with how power relations are brought into being,<sup>227</sup> reflecting, therefore, the manifold ways through which power operates in a given social space. The rules and regulations on mobility and the introduction of technologies of surveillance and identification mechanisms through exchange and monitoring of personal data function as mechanisms through which power relations gradually developed in the context of the AFSJ.

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<sup>222</sup> See also Geddes (n.185) 82 He identifies three key points in relation to Schengen: securitization of immigration and asylum, contribution to the democratic deficit, and absence of scope for judicial scrutiny; Huysmans, *The politics of insecurity* (n.197)

<sup>223</sup> Ole Wæver, 'Securitization and Desecuritization' 46, in Ronnie Lipschutz (ed.), *On Security* (Columbia University Press, 1995) 58

<sup>224</sup> I want to thank Dr David Gurnham for bringing my attention to this point during my upgrade viva.

<sup>225</sup> Foucault *Why Study Power* (n.17) 791

<sup>226</sup> On the issue of Europe's colonial past having an impact on the perception of race see Alana Lentin, 'Europe and the silence about race', 2008 11 (4) *European Journal of Social Theory* 487

<sup>227</sup> Foucault *Why study power* (n.17) 792

In order to understand these points that are relevant to identifying power, it is important to refer to Foucault's governmentality which is connected to 'the way in which the conduct of individuals or of groups might be directed'.<sup>228</sup> Foucault explained that '[t]o govern, in this sense, is to structure the possible field of action of others'<sup>229</sup> without implying that this was imposed by a single government but that this operated within society itself. Governmentality is closely related to Foucault's biopower which he described as a 'new' type of power that focuses on life and the human body, without necessarily being connected to a sovereign.<sup>230</sup> Foucault identifies two forms of biopower, one is centred on the body as machine and involves disciplining the human body (i.e. to enhance its capabilities and to make it more efficient). The second form, which he calls biopolitics, is focused on the body from its biological aspect (i.e. it seeks to intervene and regulate matters of birth, health and mortality).<sup>231</sup> This type of power was not used by Foucault to condemn the state or specific institutions but to highlight the complicated processes involved in power relations, which are spread throughout the social structures and to underline a kind of ongoing power struggle that may occur both consciously and unconsciously.

Biopower falls within Foucault's governmentality as it is involved with the regulation and organisation of the human body and its movement. It helps trace, reflect and understand different expressions of power. Within the concept of governmentality, we can also place issues of security, which functions, according to Foucault, as such form of power that seeks to manage or govern the population. In his lectures concerning security, territory and population,<sup>232</sup> Foucault explains that security, or what he calls apparatus of security, differs from disciplinary mechanisms and the laying down of the law. In other words, it is not about what is permitted or prohibited nor is it about the specific ways that something is to be done; instead, the apparatus of security places a phenomenon within a series of probabilities, it calculates the cost and establishes an average that is accepted as ideal.<sup>233</sup> For this thesis, migration can be considered as such a phenomenon which falls within a security framework that seeks, inter alia, to calculate risk and probable events and to establish a balance about what is acceptable, or in the case of securitisation, what is the accepted average between safe and dangerous. In Foucault's words: '[t]he specific space of security refers then to a series of possible events; it refers to the temporal and the uncertain, which have to be inserted within a given space.'<sup>234</sup> He further explained that 'apparatuses of

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<sup>228</sup> *ibid* 790

<sup>229</sup> *ibid*

<sup>230</sup> Foucault, *History of Sexuality* (n.22) part V, 139

<sup>231</sup> *ibid* 139

<sup>232</sup> Michel Foucault, Michel Senellart (ed.), *Security, territory, population* (Palgrave Macmillan, 2009)

<sup>233</sup> *ibid* 5-6, 37, 45

<sup>234</sup> *ibid* 20

security have the tendency to expand, they are centrifugal. New elements are constantly being integrated: production, psychology, behaviour, ways of doing things [...].<sup>235</sup>

Foucault explains that the security apparatus, as opposed to discipline, does not seek to regulate everything, but rather it 'lets things happen'.<sup>236</sup> He connects this to the idea of freedom itself and explains that 'freedom is nothing else but the correlative of the deployment of apparatuses of security. An apparatus of security [...] cannot operate well except on condition that it is given freedom [...] The possibility of movement, change of place, and processes of circulation of both people and things'.<sup>237</sup> With the introduction of the four freedoms in the context of the single market we can see how the free movement of people, capital, services and goods opened the door for this security apparatus. Although migration aspects may not have been an explicit goal of the Community at the beginning, the instrumentalist discourse which sought to define the legal subject and identify who the beneficiaries of European integration would be, was accompanied by the parallel discourse of securitisation which, to use Foucault, gradually integrated new elements such as certain ways of understanding and doing things.<sup>238</sup>

With the introduction of the Treaty of Maastricht, we see that these distinctions based on inclusion and exclusion became institutionalised and can be particularly understood within Foucault's fourth point relevant to analysing power. This is the '*forms of institutionalisation*'<sup>239</sup> which can be a mixture of 'traditional predispositions, legal structures, phenomena relating to custom [...]'.<sup>240</sup> The argument set forth is that the introduction of the legal status of citizenship functions as such a form of institutionalisation through legal structures and it is also tightly connected to the way migration developed in parallel to the concept of European citizenship further suggesting the institutionalisation of migration through the lens of security. This approach supports the argument that migration, in the context of the AFSJ, operates within a security apparatus and has developed within such apparatus. This means that although the European polity may not have intended to demonise and control the mobility of Others, in its effort to calculate and normalise an acceptable equilibrium for the achievement of the European integration project, it has allowed certain exclusionary features to develop which are connected to the production of meaning within migration. This exclusionary dimension, however, constitutes only one theme in relation to the legal subject; the other being more normative orientated,

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<sup>235</sup> *ibid* 45

<sup>236</sup> *ibid*

<sup>237</sup> *ibid* 48

<sup>238</sup> *ibid* 45

<sup>239</sup> Foucault, *Why Study Power*, (n.17) 792

<sup>240</sup> *ibid* 792

seeking to include and invite, and to establish a community of people. We see the entanglement of these themes throughout this chapter.

#### **1.4 Institutionalisation of citizenship: Treaty of Maastricht (1992)**

In 1993 the special rights and freedoms given to Community nationals were officially recognised and institutionalised through Article 8 in Part Two of the treaty through the establishment of European citizenship.<sup>241</sup> This move can be viewed as part of the wider aims of the Community to enhance its democratic legitimacy and develop its social dimension but also as the most logical next step for European integration.

The Treaty of Maastricht introduced the three-pillar structure of the EU, namely the European Communities, the Common Foreign and Security Policy, and Cooperation in Justice Home Affairs, which eventually dissolved with the Treaty of Lisbon. The pillar structure distributed the competences of the Member States and the European institutions creating a fine line between the supranationalisation of certain policy areas and intergovernmental cooperation.<sup>242</sup> The first pillar, which was the supranational pillar, included the three Communities namely, the EC,<sup>243</sup> the ECSC, and the EURATOM. In contrast, the other two pillars were based on intergovernmental cooperation and consisted of the common foreign and security (in the second pillar)<sup>244</sup> and cooperation in the fields of justice and home affairs (in the third pillar).<sup>245</sup> Interestingly, while citizenship policies fell within the supranational pillar,<sup>246</sup> immigration and asylum continued to be under intergovernmental cooperation,<sup>247</sup> despite both being aspects of the free movement of persons.<sup>248</sup> Consequently, the pre-existing cooperation between the Member States on justice and home affairs matters became institutionalised and continued to fall outside Community law as Member States reserved their power to act on the basis of mutual cooperation, while at the same time institutionalised the special rights for Community nationals with the establishment of European citizenship.

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<sup>241</sup> Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253

<sup>242</sup> See further Kirschner H., *The Framework of the European Union under the Treaty of Maastricht*, 1994 *Journal of Law & Commerce* 13

<sup>243</sup> The term 'economic' was removed.

<sup>244</sup> Title V TEU

<sup>245</sup> Title VI TEU

<sup>246</sup> Title II TEU

<sup>247</sup> Title VI TEU

<sup>248</sup> Geddes (n.185) 92; Hendry I.D., 'The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs', 1993 36 *German Yearbook of International Law* 295

### 1.4.1 European citizenship

Article A of the Treaty of Maastricht, begins by stating that the treaty ‘marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.’<sup>249</sup> Article 8 of Part Two, which established the citizenship of the Union, proclaimed that every national of a Member-State shall be a citizen of the Union. The rights to free movement and non-discrimination were officially extended to all citizens who could now reside anywhere within the Union, while electoral and civic rights were introduced.<sup>250</sup>

Extending citizenship rights to all Member States’ nationals becomes a more substantive effort to introduce or emphasise a common identity through the establishment of vertical links between citizens and the European institutions, as well as between the different European publics and the Member States while expanding on the more political character of the legal subject. At the same time, the institutionalisation of European citizenship introduced the possibility of post-national membership in an evolving political community beyond the nation-state and contributed substantially to a dialogue about the future of the European polity. The horizontal relationships that now formally began to form between the citizens, at least in terms of substantive law, further raised questions about a European *demos* or many *demoi*,<sup>251</sup> while the foundations for the possibility of a European public sphere began to be set in place.

Member States’ nationals were granted shared citizenship, access to common institutions and courts in all of the official languages of the Union’s Member States, as well as access to official documents. Despite these, the symbolic aspect of the institutionalisation of European citizenship was at this point perhaps more important than the introduction of any substantial rights, let alone duties. The Treaty of Maastricht essentially codified the pre-existing framework that had primarily developed within the context of free movement while it introduced limited substantive provisions.<sup>252</sup> The potential of European citizenship at this early stage had been approached with caution but also acknowledged within a critical academic framework. For example, questions of

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<sup>249</sup> Although the Treaty of Rome had also referred to the creation of “an ever-closer union”, this had only been mentioned in the preamble.

<sup>250</sup> For instance the right to vote and stand as candidates in municipal and European elections, diplomatic and consular protection by any Member-State, the right to petition to the European Parliament, and the right to apply to the Ombudsman Article G (C) 8b and 8c TEU

<sup>251</sup> see for example Joseph Weiler who referred to the concept of concentric circles to explain the potential relationship between a European *demos* and the national *demoi*, Joseph H.H. Weiler, ‘To be a European citizen - Eros and Civilization’, 1997 4 (4) *Journal of European Public Policy* 495

<sup>252</sup> see further A. C. Evans, ‘European Citizenship: A Novel Concept in EEC Law’, 1984 32 (4) *American Journal of Comparative Law* 679; Dora Kostakopoulou, ‘European Union Citizenship: Writing the Future’ 2007 13 (5) *European Law Journal* 623, 625

legitimacy and a potential democratic deficit in light of the absence of a European *demos* became increasingly relevant.<sup>253</sup> At the same time others saw European citizenship as an opportunity for the nation-state to move towards a more reflective idea of Community that neither excluded nor was necessarily built on a traditional understanding of nationality.<sup>254</sup> Similarly, European citizenship analysed through its traditional national counterparts was, logically, perceived as weak and empty of any substantial meaning.<sup>255</sup>

The recognition of citizenship as more than a mere set of formal legal rights was important, if not necessary, for the evolving concept of European citizenship which, although at an embryonic stage, its historical and symbolic aspect could not have been ignored.<sup>256</sup> At this developmental stage, although European citizenship may have functioned as a legitimising mechanism and a further step towards political and economic integration within the wider European project, at the same time, it began to problematise around important issues such as identity, inclusion and democracy within and beyond the nation-state. This reflected an instrumentalist aspect, which saw citizenship as reflecting the free movement legacy but also a substantive and a normative aspect, which triggered questions on the future of European citizenship, the meaning of European identity and the role of individuals beyond the nation-state. These two discursive themes, i.e. instrumentalism and normative dimension concerning the legal subject, are entangled as will become evident by the end of this chapter giving rise to aspects of inclusion and securitisation in the context of European citizenship.

By acknowledging the multifaceted nature of European citizenship, it is possible to avoid deterministic and teleological approaches that are likely to capture only limited aspects of the EU's multidimensional character. At the same time, there is room to consider the various visions

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<sup>253</sup> Cris Shore, *Building Europe: The Cultural Politics of European Integration* (Routledge, 2000); Cris Shore, 'Whither European citizenship: Eros and civilization Revisited', 2004 7(1) *European Journal of Social Theory* 27, ; Simon Hix, *What's wrong with the European Union & how to fix it* (Polity Press, 2008) cf: Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing the Legitimacy in the European Union', 2002 40 (4) *Journal of Common Market Studies* 603

<sup>254</sup> Theodora Kostakopoulou, 'Towards a theory of constructive citizenship in Europe', 1996 4 (4) *Journal of Political Philosophy* 337, 346; Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union', 1992 29(6) *Common Market Law Review* 1137; Carlos Closa, 'European Union citizenship and supranational democracy' in Albert Weale & Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, 1998); Antje Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-historical Perspective' 1997 1 (17) *European Integration online Papers*; Gerard Delanty, 'Models of citizenship: Defining European Identity and Citizenship', 1997 1 (3) *Citizenship Studies* 285

<sup>255</sup> Hans Ulrich Jessurun d'Oliveira J., 'Union Citizenship: Pie in the Sky?', in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In search of a New Order* (Sage, 1995); Hans Ulrich Jessurun d'Oliveira, 'European Citizenship: Its Meaning its Potential', in Renaud Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (Springer, 1994).

<sup>256</sup> Jo Shaw, 'The interpretation of European Citizenship', 1998 61 (3) *The Modern Law Review* 293

that may exist.<sup>257</sup> A non-deterministic approach respects the structuring and constructive aspect of free movement policies and accommodates for the role of human agency particularly since Maastricht provides a legal basis, albeit contested as to its practical implications, for the involvement of the European citizen as a socio-political actor. A constructivist approach to European citizenship, and European integration more generally, allows for a flexible, non-teleological, and pluralistic method that acknowledges the mutually constitutive nature of individuals and their social environments.<sup>258</sup> For the current purposes, it suffices to explain regarding the EU that '[c]onstructivists emphasise that the EU deeply affects discursive and behavioural practices, that it has become part of the "social furniture" with social and political actors have to deal on a daily basis.'<sup>259</sup> This reflects what Shaw had explained early on in relation to European citizenship, namely that it is more than a bundle of legal rights but also practice with impact on everyday life.<sup>260</sup> This constructivist aspect of citizenship is what allows it to be explored as relevant to identity as it points us towards the "space" where meaning and perceptions about different people are structured and become embedded in everyday language and practice. The discourses of citizenship and migration, either through instrumentalism, securitisation or the normative dimension of finding the "ideal" subject, reflect a dimension of inclusion and securitisation of citizenship and identity in the context of the EU which further suggest the continuous development of the subject.

Although exclusion is an inherent element of citizenship and is thus no exception to the case of European citizenship, the introduction of special rights and citizenship rights, risked of excluding and discriminating against people who may have had stronger connections to a Member-State (such as settled TCNs) than Community nationals, who were now entitled to these rights regardless of any connection they may have had to any of the Member States.<sup>261</sup> Further to this, paradoxes based on the different policies governing nationality and citizenship in the various Member States were not unlikely to occur and lead to discrimination as people under the same circumstances could be denied access to European citizenship merely on the basis of different

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<sup>257</sup> For example Moravcsik and Majone have contented the idea of democratic deficit in the EU mainly based on a different understanding of the nature of the EU that should not necessarily be compared to national legal orders. See Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards', 1998 4 (1) *European Law Journal* 5; Moravcsik, In Defence of the "Democratic Deficit" (n.253)

<sup>258</sup> Emanuel Adler, 'Seizing the middle ground: Constructivism in World Politics', 1997 3(3) *European Journal of International Relations* 319; Thomas Risse, 'Social Constructivism and European Integration', in Antje Wiener & Thomas Diez, *European Integration Theory* (OUP, 2<sup>nd</sup> ed., 2009)

<sup>259</sup> Risse, *Social Constructivism*, *ibid*, 148

<sup>260</sup> Shaw *The interpretation of European citizenship* (n.256)

<sup>261</sup> Rainer Baübock, 'Citizenship and National Identities in the European Union', 1997 Jean Monnet Working Paper 4/97 last accessed at <https://bit.ly/2KE9jEk> 18 August 2019

naturalisation procedures.<sup>262</sup> The issue of nationality and the consequent differential treatment of TCNs was questioned as impeding fundamental rights and potentially clashing with the ECHR, for example, concerning the right to family life.<sup>263</sup> Similar challenges in relation to questions about TCN family members have accompanied supranational ideas of citizenship and identity and their relationship to human rights standards especially, as will be seen further, following the adoption of the Charter of fundamental rights.<sup>264</sup>

Consequently, as European citizenship was developing within the treaty framework at the same time issues concerning the Other became more relevant especially since with the Treaty of Maastricht, border, security, and immigration issues were separated from the first pillar and situated in the second and third pillars examined in the following section.

#### **1.4.2 Immigration and asylum**

Under the Treaty of Maastricht, asylum and immigration were considered as ‘matter[s] of common interest’ along with judicial cooperation in civil and criminal matters, police cooperation, and rules governing the external borders of the Member States,<sup>265</sup> where greater coordination and actions were enhanced.<sup>266</sup> The European Parliament was to be informed and consulted regularly regarding justice and home affairs matters and its views were to be adequately considered.<sup>267</sup> Although this would provide these decisions with more legitimacy, these obligations did not guarantee compliance as it was up to the Commission and the Member States to implement the procedures. Similarly, although Article K.2 confirmed commitment to the ECHR and the Refugee Convention, the provisions under JHA were rather vague and lacked decisiveness. Thus, despite the possibility of introducing new cooperation measures, no mechanisms were set in place to ensure compliance with international law obligations or protection of individuals potentially affected.<sup>268</sup> Nevertheless, this was consistent with the separation of the two intergovernmental pillars from the supranational one as governance of

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<sup>262</sup> *ibid*

<sup>263</sup> see further Andrew Evans, ‘Third-Country nationals and Treaty on European Union’ 1994 5 *European Journal of International Law* 199; see also Steve Peers, ‘Towards Equality: Actual and Potential rights of third-country nationals in the European Union’, 1996 33 (7) *Common Market Law Review* 50

<sup>264</sup> See for example, Niamh Nic Shuibhne, ‘Integrating Union Citizenship and the Charter of Fundamental Rights’, in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing, 2017) 209

<sup>265</sup> Article K.1 TEU

<sup>266</sup> Article K.3 TEU

<sup>267</sup> Article K.6 TEU

<sup>268</sup> see also Geddes (n.185) 93-104

immigration and asylum was based on cooperation between the Member States, which was the norm prior to the Treaty of Maastricht. As was the case with citizenship provisions, the treaty did not provide any substantial alterations to the fields of immigration and asylum but rather codified and placed within the constitutional framework how intergovernmental cooperation would function in practice.<sup>269</sup>

Within this framework, Europol was established to function as a system of sharing information among police forces in the Member States<sup>270</sup> resembling the Trevi group's approach. Europol was defined as a criminal investigation office to prevent and combat terrorism, drug trafficking and other types of international crime, as well as trafficking in human beings, illegal immigration and smuggling.<sup>271</sup> Thus, while on the one hand, the supranationalisation of citizenship and free movement is identified, on the other hand, an opposing attitude toward external migration can be witnessed. What this meant in practice was that the more barriers that were removed internally to facilitate freedom of movement, the more borders were created externally to secure it.

As the immigration and asylum governance began to develop within an environment of security, regulated mainly by new technologies of control on movement, issues concerning discrimination and xenophobia arose. While Geddes pointed out that the Treaty of Maastricht had failed to adequately address these issues,<sup>272</sup> at the same time, it is possible that through the institutionalisation of immigration and asylum under the third pillar, the Treaty of Maastricht was providing fertile ground for the development of such attitudes. This did not necessarily actively promote particular forms of discrimination but did involve a risk that highly depended on policy setting by the Member States and the interpretation of European citizenship and identity.<sup>273</sup>

Consequently, following the Treaty of Maastricht concerns about racism, discrimination, and xenophobia suggested that the challenges brought with European integration and the definition and redefinition of the legal subject were not some trivial and marginal issues but were growing concerns within the developing European polity.<sup>274</sup>

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<sup>269</sup> For a more detailed review of the third pillar and the provisions on Cooperation in the fields of Justice and Home Affairs see I.D. Hendry 'The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs' 1993 36 *German Yearbook of International Law* 295

<sup>270</sup> Article K.1. (9) TEU

<sup>271</sup> *ibid*

<sup>272</sup> Andrew Geddes, 'Immigrant and ethnic minorities and the EU's "Democratic Deficit"' 1995 33 (2) *Journal of Common Market Studies* 197

<sup>273</sup> see also Jo Shaw 'The interpretation of European citizenship' 1998 61 (3) *The Modern Law Review* 305

<sup>274</sup> For example, see early article by Baimbridge et al. on the potential increase of racism that could follow from the economic impact of the Maastricht Treaty. Mark Baimbridge, Brian Burkitt & Marie Macey 'The Maastricht treaty: Exacerbating racism in Europe?' 1994 17 (3) *Ethnic and Racial Studies* 420

In the Commission's report titled *Legal Instruments to Combat Racism and Xenophobia*,<sup>275</sup> reference was made to the changing, but not novel, phenomenon of external migration, which was accompanied by several negative attitudes and beliefs despite the introduction of several instruments for their prevention. In the report, 'minorities' and 'foreigners' were presented as either to be victims of high levels of unemployment and poverty or, at an extreme opposite, to hold high professional positions.<sup>276</sup> This indicated that problems of discrimination involved economic aspects that were based on the socio-economic status of individuals. This potentially explained, to an extent, the failure of the existing legal instruments to combat such behaviours and beliefs. The Commission itself had recognised that measures attempting to deal with racism and xenophobia, may instead become their source when taken to an extreme.<sup>277</sup> In other words, attempting to regulate pre-emptively such discriminatory elements could lead to the reverse effect.<sup>278</sup> This indicated early on that problems of discrimination, xenophobia and prejudice, that lead to inequalities, were not (only) matters of race, religion, or nationality but were largely interwoven within a broader socio-economic web of power relations creating disparities within the labour market as well as within the social sphere, which was not consistent with the general aims and vision of the internal market. The socio-economic aspect of inequality became clearer from the 1994 White Paper titled *European Social Policy – A way forward for the Union*.<sup>279</sup> The White Paper underlined the economic aspect of the developing European legal system indicating the tight relationship between economic flourishing and social policy development which would lead to the development of the legal subject accordingly.

Nevertheless, while it mainly focused on the labour market and on ways to improve the labour force for higher competition in the world economy, at the same time, it acknowledged that social policy should not only focus on employment and the creation of jobs but also on the wellbeing of the workers when not at work. This would include their family life, health, and old age.<sup>280</sup> Within this framework, the Commission referred to the need for integrating the legally residing TCNs as

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<sup>275</sup> Commission of the European Communities, *Legal instruments to combat racism and xenophobia: Comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia and incitement to hatred and racial violence*, December 1992 (Office for Official Publications of the European Communities, 1993)

<sup>276</sup> *ibid* 10

<sup>277</sup> *ibid* 12-15

<sup>278</sup> It must be mentioned that the Commission does not explain why or how addressing such attitudes would in reality cause them to develop. In this author's opinion the Commission was possibly adopting an 'if it's not broken don't fix it' attitude.

<sup>279</sup> European Commission, 'European Social Policy - A Way Forward for the Union' (White Paper. Part A) COM (94) 333 final, 27 July 1994

<sup>280</sup> *ibid*, 1a ; Particularly, the Commission underlined that '[i]n the Union, increased confidence can come only from a reconciliation between economic growth policies and their translation into higher social development with upgraded living standards for all' (p.3) where '[t]he key resource will be a well-educated and highly motivated and adaptable working population.' (p.4)

part of the social policy with a view to strengthen their rights and bring them closer to those of European citizens. While this is an important step for the development of the European polity beyond the economic dimension of the internal market, the fact that the Commission mainly emphasised the rights of TCNs associated with their economic activities,<sup>281</sup> allows us to trace the roots of the different stages of the legal subject. At this point, the primary legal subject was the European citizen, who would provide legitimacy and support for the European project. At the same time, a secondary legal subject, i.e. the TCN resident, was to be incorporated to provide further support for the expansion and better functioning of the internal market. In the White Paper, integration was considered to be the appropriate mechanism for incorporating the foreign resident within the socio-economic sphere. The integration's function was to regulate and harmonise the lives of people within the internal space of the Community. At the same time, integration aimed for some form of social cohesion, while it simultaneously raised questions concerning inequality and discrimination relating to legal residents and European citizens as integration was only to be applied to the first group. This issue indicated a structural weakness within the European project which divided the previously established legal resident (including Community nationals and TCNs both of whom were primarily workers) into two categories based only on their nationality presuming, therefore, the need for integration only for the second category.

When these observations are considered alongside the efforts of the Community to promote a cultural dimension,<sup>282</sup> the individual becomes the subject of new structures with legal, political, and cultural dimensions enjoying rights and freedoms derived from Community law as a legal subject, i.e. through citizenship right. At the same time, from a market-orientated perspective, an external, conditional and temporary legal subject begins to develop within the context of the labour market. Consequently, the institutionalisation of European citizenship reflected an affective and cultural form of European identity with an effort to address specific human needs. However, the focus on the internal market began to introduce a more functional expansion of rights and freedoms for TCN workers while human needs were largely interpreted within the broader context of the market. At this point, an interesting paradox that reflects the complexities and contradictions of the European polity began to develop; the affective and culture-based aspect of European identity and citizenship was constructed against an Other, who raised security questions. At the same time the expansion of rights and non-discrimination within the internal market opened the door to many other individuals, who began to derive legal rights from the

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<sup>281</sup> Ibid 30

<sup>282</sup> Article 128 TEU

European legal order. Essentially, what was happening within the European Community from a more socio-political perspective was the imagining of the future legal subject, the development of a vision of those who could be part of the internal space, their characteristics, skills and lifestyles. In other words, the secondary legal subjects or future legal subjects were expected to integrate into something that was presumably common and shared. However, in reality both primary and secondary legal subjects were being invented in order to support and facilitate European integration and also to sustain it.

Up to this point we have seen how the discourses within citizenship and migration can be analysed through the lens of power. We have seen the 'system of differentiations' through which different categories of the subject develop gradually, the objectives which support the single market and the economically-orientated aims as well as the normative objectives of the European Community to define its ideal subject. Further, we have seen, Foucault's third point of analysing power and how power relations came into being in connection to citizenship and migration triggered by rules and regulations on mobility, which have been anchored in the four freedoms. With the Treaty of Maastricht, we can see Foucault's fourth point of power analysis, which is related to the forms of institutionalisation. Notably, the institutionalisation of European citizenship as part of the legal structures of the European polity but also the institutionalisation of aspects of migration within a security framework, indicate this power within the AFSJ from the early stages of the legal subject's development.

The developments in the Treaty of Amsterdam examined below, further indicated this effort to cultivate the legal subject, to define those who "qualified" to be within the internal European space and those who did not. The gradual expansion of human rights alongside matters of citizenship and migration signifies, as shall be seen with reference to the Treaty of Amsterdam and the Treaty of Nice, below, their centrality in the development of the legal subject but also the tensions that surrounded this concept within the different visions of governance (supranationalism and intergovernmentalism).

## 1.5 Security and human rights dimensions: Treaty of Amsterdam (1997) and Treaty of Nice (2001)

Identifying the need for further democratisation and expansion of fundamental rights within the third pillar, under which came the provisions on immigration and asylum, the Treaty of Amsterdam<sup>283</sup> contributed to the development of fundamental rights and the improvement of the JHA by expanding and clarifying the provisions of Maastricht without, however, eliminating the security framework already built around immigration and asylum; on the contrary, it appears to have enhanced and further expanded it by strengthening its institutional stance.<sup>284</sup>

In the common provisions, Article 6 TEU was amended to read:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]

The incorporation of these provisions primarily reflected the road previously paved by the Court of Justice and their gradual development within the European legal order. A significant provision inserted in the treaty was Article 7 TEU (further developed in the Treaty of Nice) which introduced the imposition of sanctions on Member States in cases of 'serious and persistent breach' of the principles provided in Article 6(1) TEU. This emphasized the commitment of the European polity and its institutions to human rights law which indicated the willingness and intention to better safeguard the legal subject (but also the temporary or secondary legal subject, i.e. TCN) within Community law.

The Treaty of Amsterdam reorganised the three pillars in order to enhance existing provisions on democracy and fundamental rights and similarly readjusted the field of immigration and asylum by partially transferring migration-related issues to the Community pillar. Police and judicial cooperation in criminal matters remained in the Third Pillar, which now included action against

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<sup>283</sup> Treaty on European Union (consolidated version 1997) OJ C 340 [1997] 145 Henceforth TEU); Treaty Establishing the European Community (Amsterdam consolidated version) OJ C 340 [1997] 173 (Henceforth TEC)

<sup>284</sup> see further Theodora Kostakopoulou "'The 'Protective Union': Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' 2000 38 (3) Journal of Common Market Studies 497; Jef Huysmans 'The European Union and the Securitization of Migration' 2000 38 (5) Journal of Common Market Studies 751;

racism, xenophobia, and offences against children.<sup>285</sup> The governance of migration was now exercised through “diluted” intergovernmentalism<sup>286</sup> making the involvement of the European Community more official. The treaty generally contributed to the empowering of the institutions, such as the European Parliament through the co-decision procedure, and strengthened the provisions on enhancing transparency in decision-making.<sup>287</sup> However, even with the partial communitarisation of immigration and asylum, intergovernmentalism was still the dominant form of governance since national executives still mostly held control over the decision-making and the implementation of measures,<sup>288</sup> leading to its characterisation as a ‘half measure’.<sup>289</sup> The weakness of migration and asylum transfer to the Community pillar is further exemplified through the fact that it was done due to the lack of consistency, coherence and meaningful cooperation in the third pillar.<sup>290</sup> However, as Kostakopoulou pointed out, by transferring migration-related aspects to the Community pillar absolute power would be removed from the hands of the Member States and were likely to contribute to their redefined role in these fields.<sup>291</sup> A persistent pattern detectable throughout the developmental history of the EU, particularly concerning the evolution of the legal subject is, on the one hand, the Commission’s attempts to expand the rights and freedoms derived under Union law to non-Member States’ nationals and, on the other hand, the reserved approach of Member States to preserve a more guarded attitude consistent with the approach paved by the Schengen acquis.<sup>292</sup> Thus, while the EU’s competences gradually increased and expanded to include aspects of immigration and asylum, it could still be considered as fragmented and asymmetrical in terms of governance.<sup>293</sup>

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<sup>285</sup> Article 29TEU

<sup>286</sup> Kostakopoulou, *The Protective Union* (n.284) 498

<sup>287</sup> An example is Article 255 TEC on the right to access documents; For more details on the institutional changes see Michael Nentwich & Gerda Falkner ‘The Treaty of Amsterdam: Towards a New Institutional Balance’ 1997 1 (15) *European Integration online Papers*; Kostakopoulou ‘The ‘Protective Union’ (n.284)

<sup>288</sup> See Article 67 TEC; see also Steve Peers, ‘Transforming decision making on EC immigration and Asylum Law’ 2005 30 (2) *European Law Review* 283, 286-287; Kostakopoulou, *The ‘Protective Union’*(n.284) 501

<sup>289</sup> Peo Hansen ‘A superabundance of contradiction: The European Union’s Post-Amsterdam Policies on Migrant “Intergration”, Labour Immigration, Asylum, and Illegal Immigration’, 2005 28 *Centre for Ethnic and Urban Studies* 5

<sup>290</sup> Arne Niemann ‘The dynamics of EU migration policy: from Maastricht to Lisbon’ in Jeremy Richardson (ed) *Constructing a policy-making state? Policy dynamics in the European Union* (Oxford University Press, 2012) 209-233; See also P. Noorlander & M. Colvin, Human rights and accountability after the Treaty of Amsterdam, 1998 2 *European Human Rights Law Review* 191, 203

<sup>291</sup> Kostakopoulou, *The Protective Union* (n.284) 511

<sup>292</sup> Moravcsik and Nicolaidis attribute national preferences to ‘issue-specific interdependence’ according to which Member States make decisions based on economic and political-military interdependence. See Andrew Moravcsik & Kalypto Nicolaidis ‘Explaining the Treaty of Amsterdam: Interests, Influence, Institutions’, 1999 37 (1) *Journal of Common Market Studies* 59

<sup>293</sup> see also Alex Balch & Andrew Geddes, ‘The Development of the EU Migration and Asylum Regime’ in Huub Dijkstra & Albert Meijer (eds) *Migration and the New Technological Borders of Europe* (Palgrave Macmillan, 2011) 22

The Treaty of Amsterdam, apart from communitarising immigration and asylum, albeit partially, also established that the free movement was to be exercised within an area of freedom, security and justice.<sup>294</sup> The security framework that was built around the fields of immigration and asylum continued to develop in the treaty while at the same time mobility within the free movement area was similarly increasingly being developed within a framework of control and protection against threats.<sup>295</sup> Article 61TEC authorised the Council to take measures in areas concerning immigration and asylum, external borders and crime, while Article 62TEC referred to standards and procedures regarding checks on persons, rules and conditions on visas. Importantly, Article 63TEC referred to the requirement to follow the rules set out in the Geneva Convention (1951) when dealing with immigration and asylum issues, as a step that aimed to harmonise international and European legal frameworks by bringing European law in line with international legal standards. The treaty also went a step forward in enhancing the involvement of the Court and Parliament in the fields of immigration and asylum,<sup>296</sup> although this was not absolute as the Court was excluded from matters relating to law and order, and internal security.<sup>297</sup>

It is worth mentioning that the UK, Ireland and Denmark had chosen to opt-out from the new Title IV,<sup>298</sup> suggesting that the transferring of migration aspects to the Community pillar still reflected tensions between powers that were to be shared between Member States and the EU while indicating the complex, asymmetrical and sometimes overlapping competences in this area. Tensions that are still present in the aftermath of the Treaty of Lisbon with anxieties and gaps in the CEAS. Further testament to the political anxieties surrounding the governing of the field of immigration at the time of the Treaty of Amsterdam was the incorporation of the Schengen acquis, which was now integrated into the framework of the European Union.<sup>299</sup> Despite these reservations at the national level, the strengthening of human rights at Union level suggested another step towards integration and the future expansion of the legal subject, only in a more indirect way, through the creation of a common platform of rights that were to be shared between citizens and non-citizens. The interpretation of these rights, as evidenced by the Court's jurisprudence, especially in the post-Amsterdam era, has not been clear and consistent as will be explored further.

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<sup>294</sup> Article 61 TEC

<sup>295</sup> See also Theodora Kostakopoulou, 'European citizenship and immigration after Amsterdam: Openings, Silences, Paradoxes', 1998 24 (4) *Journal of Ethnic and Migration Studies* 639; Henk Van Houtum & Roos Pijpers, 'The European Union as a Gated Community: The Two-faced Border and Immigration Regime of the EU', 2007 39 (2) *Antipode* 291

<sup>296</sup> Article 67; Noorlander & Colvin (n.290) 199

<sup>297</sup> Article 68 TEC

<sup>298</sup> Article 69 TEC

<sup>299</sup> Protol (No 2) integrating the Schengen acquis into the framework of the European Union TEC

Additionally, in the Treaty of Amsterdam, the principles of equality and non-discrimination were strengthened, for instance, Article 12TEC prohibited discrimination on the grounds of nationality and Article 13TEC empowered the Council to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Similarly, the principle of equality and equal pay between men and women was also enhanced under Articles 2, 7, 3, 141TEC, which meant better safeguards for the protection of gender equality in the employment sector.

While the emphasis on non-discrimination has been positive,<sup>300</sup>as Hansen explained,<sup>301</sup> this must be understood within the context of the political economy of free movement, which favoured the expansion of free movement and non-discrimination policies as a necessary step for the facilitation of the internal market. From this reading, “legal” migrants were primarily the TCN workers who needed to fill in gaps in the employment sector in the Member States reflecting, therefore, the market-orientated objectives of expanding movement and associated rights and freedoms in line with the single market logic. However, even if the driving force of the socio-political aspect of the EU may have been market-driven, the Treaty of Amsterdam moved further and incorporated not only Member States’ nationals in its civic dimension but also TCNs with the possibility of acquiring citizenship. Nevertheless, the pattern remained the same; workers were required to facilitate the internal market and could, as a result, acquire the status of legal migrants; once they had remained in the host state for sufficient time and had properly integrated into the European society, they could be “upgraded” to European citizens and become legitimate “legal subjects”. This conforms to the economic instrumentalism that was highlighted previously in relation to the introduction of European citizenship as a functional tool that would facilitate and legitimise the internal market only this time it extended to non-EU nationals. The Treaty began to move away from a market-based logic and spillover effect to involving more social aspects that were brought about with EU’s framing of migration, as an amalgamation of a positive contribution to the economy and a potential threat to the internal security.

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<sup>300</sup> see for example Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180; Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999)565; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180, 22; 2000/750/EC: Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), [2000] OJ L 303,23

<sup>301</sup> Peo Hansen, ‘A superabundance of contradiction: The European Union’s Post-Amsterdam Policies on Migrant ‘Intergration’, Labour Immirgation, Asylum, and Illegal Immigration’, 2005 Centre for Ethnic and Urban Studies, 12-13

To further illustrate the paradoxes of the opening up of the free movement area, on the one hand the Commission began to highlight the idea of pluralistic societies, the need to combat racism and xenophobia through diversity, and the promotion of harmonisation of asylum procedures.<sup>302</sup> On the other hand, the securitised language underpinning the area of freedom, security and justice was being strengthened through the construction of the EU in terms of, what von Houtum and Pijpers defined as, a ‘gated Community’ based on strategic selection of immigrants.<sup>303</sup> As Kostakopoulou explained ‘[w]hat is problematic here is that the Community inherits from the Member States the tendency to treat security threats and vulnerability as objective, that is, as independent realities which are not subject to verification and to critical inquiry.’<sup>304</sup> Fundamentally, this implied a false idea of security which becomes entangled with securitisation practices and technological devices. Security seen as an objective per se, reflects once more Foucault’s second point of power analysis that is related to the objectives sought to be maintained. In this case, security, as Kostakopoulou above explained,<sup>305</sup> was treated as an independent objective to be pursued outside of its social and political contexts.

The security aspect of free movement following the Treaty of Amsterdam became more substantive in the aftermath of the Tampere European Council Programme, which translated the justice and home affairs provisions of the Amsterdam Treaty into practice.<sup>306</sup> The emphasis on free movement within a “secure” area was to be achieved through a common immigration and asylum policy, better access to justice for everyone, increased cooperation against crime, and stronger external action.<sup>307</sup> The terrorist attacks in New York in 2001 followed by the attacks in Madrid in 2004 and London in 2005 accelerated the securitisation process of migration as they provided the ground for developing migration alongside terrorism.<sup>308</sup> For example, subsequent to the 9/11 attacks, the Commission, upon the US’s invitation, expressed the need to examine the link between internal security and the EU’s obligations for international protection, eventually

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<sup>302</sup> Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM/2000/0755 final; see also Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method COM/2001/0710 final

<sup>303</sup> von Houtum & Pijpers (n.295)

<sup>304</sup> Kostakopoulou, *The protective Union*, (n.284) 508

<sup>305</sup> *ibid*

<sup>306</sup> Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999

<sup>307</sup> *ibid*; European Commission & Directorate-General Justice and Home Affairs, Tampere: Kick-start to the EU’s policy for justice and home affairs last accessed at <https://bit.ly/2TGMwe5> on 18 August 2019

<sup>308</sup> see further Burcu Toğral Koca, ‘The Securitization of Migration in Europe in the Post-September 11 Era: A Comparative Analysis of Germany and Spain’ (DPhil Thesis Universität Hamburg, 2013); Christian Kaunert & Sarah Léonard ‘The collective securitisation of terrorism in the European Union’ 2019 42(2) *West European Politics* 261

connecting immigration and asylum to matters of internal security under the umbrella of terrorism.<sup>309</sup>

The need to balance security and freedom became even more prominent during this time in order to avoid impinging on personal freedoms unless it was absolutely necessary.<sup>310</sup> The need for increased protection of human rights amidst a global climate of insecurity was also reflected in the Treaty of Nice<sup>311</sup> through the incorporation of the Charter of fundamental rights which, had been previously drafted during the Cologne European Council and the Tampere Council (1999).<sup>312</sup> The Charter set out the civil, political, economic and social rights of EU citizens and residents under six parts: dignity, freedoms, equality, solidarity, citizens' rights, and justice.<sup>313</sup> Although at the time, the Charter was not strictly legally binding, it did carry significant weight having been proclaimed and signed by the three main institutions and used by the Court of Justice.<sup>314</sup>

The Charter's importance is multifaceted as it is not only related to the strengthening of human rights but also to the democratisation and constitutionalisation of the Union. In fact, de Búrca places great emphasis on the idea of democratisation through enhanced visibility, explaining that the Union intended to show what it had achieved thus far in the field of human rights.<sup>315</sup> Hence, while the strengthening of human rights within the European polity is positive, at the same time, it constituted a symbolic gesture that would demonstrate the democratic character of the EU without necessarily involving the citizens in the process.<sup>316</sup> This approach shows, for example,

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<sup>309</sup> Commission working document - The relationship between safeguarding internal security and complying with international protection obligations and instruments COM/2001/0743 final

<sup>310</sup> see for example, E.U. Network of Independent Experts on Fundamental Rights, 'Report on the Situation of Fundamental Rights in the European Union in 2004 (January 2005) CFR-CDF.rep.EU.en.2004

<sup>311</sup> Treaty on European Union, 2006 O.J. (C 321) 5 and Treaty Establishing the European Community, 2006 O.J. (C 321) 37

<sup>312</sup> Presidency Conclusions Nice European Council Meeting 7, 8 and 9 December 2000

<sup>313</sup> The Charter of Fundamental Rights of the European Union, [2012] OJ L 326, 391 (the Charter)

<sup>314</sup> For a more detailed analysis see Agustín José Menendez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 2002 *Journal of Common Market Studies* 40 (3) 471

<sup>315</sup> Grainne De Burca, 'The drafting of the European Union Charter of Fundamental Rights', 2001 26 (2) *European Law Review* 130

<sup>316</sup> De Burca, *ibid* 131; A similar observation can be made in relation to the revised Article 7 TEU within the Treaty of Nice, which introduced a preventive mechanism on determining a clear risk of a serious breach of the principles found in Article 6(1) TEU, which however remains underutilised up to this day, despite being used for political pressure see Anaïs Faure Atger & Sergio Carrera, 'L'affaire des Roms: A challenge to the EU's Area of Freedom, Security and Justice', CEPS Liberty and Security in Europe (September 2010) last accessed at <https://bit.ly/31KdX9A> on 18 August 2019; Glòria Budó, 'EU Common Values at Stake: Is Article 7 TEU an effective protective mechanism?', CIDOB Barcelona Centre for International Affairs, (Master in European Law, Institut d'Études Européennes, Université Libre de Bruxelles, 05/2014); Ulrich Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession', 2014 52 (1) *Journal of Common Market Studies* 105; Wojciech Sadurski, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider', 2010 16 (3) *Columbia Journal of European Law* 385

that incorporating human rights at the Community level, would benefit the citizens and non-citizens, where this would be applicable, while at the same time it would be proof of the democratic face of the EU. The construction of citizenship reflects, therefore, the dual characteristics of instrumentalism as well as a vision for the future subject who was gradually being constructed within the AFSJ.

In the sections below, I examine some of the landmark cases of the Court in relation to the interpretation of citizenship and free movement provisions and how, seeing it retrospectively, the Court has been gradually identifying the substantive elements of citizenship one piece at a time. The aspect of the substance of EU citizenship will be revisited in the context of the Treaty of Lisbon, where we will see that quest to define the subject of EU law is ongoing.

### 1.5.1 Identifying the substantive elements of citizenship: First steps

Following the codification of citizenship in the Treaty of Maastricht, the personal and material scope of the provisions concerning residence became the subject of several preliminary rulings seeking clarification on the conditions and limitations of citizenship.

One of the landmark decisions on citizenship concerning economically inactive and non-economically self-sufficient citizens is the case of *Martinez Sala*.<sup>317</sup> The case involved an economically inactive, but legally residing, Spanish national in Germany, who was refused a child-raising allowance on the basis of her nationality and lacking a formal residence permit. The Court relied upon the principle of non-discrimination to find these requirements discriminatory and considered that *Sala* was legally residing in Germany and fell within the *ratione personae* of the provisions concerning citizenship. In *Trojani*,<sup>318</sup> the Court highlighted the requirement of legal residence in order to be able to rely on Article 12EC (non-discrimination) but left it for the Member-State to define whether a national of another Member-State, who had recourse to social assistance, would continue to fulfil the conditions of a right of residence.<sup>319</sup> Further, in the cases of *Baumbast*,<sup>320</sup> *Chen*<sup>321</sup> and *Garzia Avello*<sup>322</sup> the Court confirmed that citizens derived a direct

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<sup>317</sup> Case C-85/96, *María Martínez Sala v Freistaat Bayern*, EU:C:1998:217, [1998] ECR I-02691

<sup>318</sup> Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)*, EU:C:2004:488, [2004] ECR I-07573

<sup>319</sup> *ibid* para 46

<sup>320</sup> Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493, [2002] ECR I-07091

<sup>321</sup> Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, EU:C:2004:639, [2004] ECR I-09925

<sup>322</sup> Case C-148/02, *Carlos Garcia Avello v Belgian State*, EU:C:2003:539, [2003] ECR I-11613

right of residence under Article 18(1) EC (now Article 20 TFEU). These cases indicate the early attempt of the Court to interpret the substantive meaning of citizenship and its associated and derived rights but at the same time, its limits and conditions.

For example, one of the issues in *Baumbast* concerned the right of residence of children of an ex Community worker for the purpose of attending general education courses (under Article 12 Regulation No 1612/68) in the host state. The Court stated that children have the right to reside for those purposes regardless of whether the children themselves were Union citizens, and despite divorce of their parents, only one of whom was Union citizen.<sup>323</sup> The Court's reasoning was based on the fact that those children derive rights from Community law, which were activated by their father's exercise of free movement and, therefore, refusing their parents the right to stay in the host Member-State during their education 'might deprive those children of a right which [was] granted to them by the Community legislature'.<sup>324</sup> The Court importantly further referred to the fundamental right to family life under Article 8 ECHR as a fundamental right recognised by Community law and which must be observed.<sup>325</sup> Incorporating fundamental rights as part of the Court's reasoning is important. The Court revisits the significance of fundamental rights in cases following the Lisbon Treaty, which also elevated the legal status of the Charter. Nevertheless, as we will see, the Court has not always been ready to refer to the relevance and applicability of the Charter in similar cases.

Another critical aspect of the judgment in *Baumbast* for citizenship rights was that the Court stated that the EU citizens could derive direct rights of residence from the citizenship provisions even if they were no longer workers, but this was subject to limitations and conditions laid down in the treaty,<sup>326</sup> which was in turn subject to judicial review.<sup>327</sup> The Court explained that the limitations and conditions (i.e. in this case sufficient resources and comprehensive sickness insurance) must be in accordance with the general principles of Community law and particularly the principle of proportionality, which meant that the national measure 'must be necessary and appropriate to attain the objective pursued.'<sup>328</sup> Similar reasoning was followed in *Garcia Avello*, involving the refusal by the Belgian authorities to change the surnames of EU citizens who were children.<sup>329</sup> The Court found the Belgian practice and refusal discriminatory and unjustified as the

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<sup>323</sup> see *Baumbast* (n.320) paras 47-55

<sup>324</sup> *ibid* para 71

<sup>325</sup> *ibid* para 72

<sup>326</sup> *ibid* paras 84-85

<sup>327</sup> *ibid* para 86

<sup>328</sup> *ibid* paras 91, 94

<sup>329</sup> *Garcia Avello* (n.322)

differential treatment was ‘neither necessary nor appropriate’ for promoting integration of other Member States’ nationals and was, therefore, disproportionate.<sup>330</sup>

Similarly, in *Chen*, the primary caregiver, who was a TCN, was granted a derivative right of residence on the basis of Article 18EC (Now Article 21TFEU) which gives residence rights to a Union citizen, who is covered by comprehensive sickness insurance and has sufficient resources not to become a burden on the public finances.<sup>331</sup> Based on the Court’s reasoning, in order for the Union citizen (minor) to enjoy her citizenship rights the primary carer needed to reside with the child and provide for her.<sup>332</sup> On that basis, a requirement as to the origin of the resources was considered by the Court to constitute ‘disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC’ as it was ‘not [...] necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States’.<sup>333</sup>

In the landmark decision of *Zambrano* the Court of Justice held that the citizenship provisions precluded 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.’<sup>334</sup> This meant that there was no requirement to activate free movement and that Member States were prevented from denying a right of residence to TCN family members (particularly parents and caretakers) of children enjoying EU citizenship rights. Although at first sight, this may have suggested that Article 18EC (Now 20TFEU) could be triggered without a cross-border element, this was only limited to specific cases where the EU citizen would be deprived of the genuine enjoyment of Union citizenship rights and was the exception rather than the rule.<sup>335</sup> The exceptionality of this rule was, as will be seen in the post Lisbon case law, confirmed in subsequent cases such as *Alokpa*<sup>336</sup> and *Chavez-Vilchez*.<sup>337</sup>

*Zambrano* involved the personal rights of the freedom of movement and residence of children who were Union citizens and their TCN father, who was their primary carer and was staying and

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<sup>330</sup> *ibid* paras 43-44

<sup>331</sup> *Chen* (n.321) para 47

<sup>332</sup> *ibid* paras 45-48

<sup>333</sup> *ibid* para 33

<sup>334</sup> Case C-34/09 *Zambrano* (n.172) para 42

<sup>335</sup> see case comment on *Zambrano*, *Dereci* and *MacCarthy* by Alicia Hinarejos, ‘Citizenship of the EU: Clarifying “genuine enjoyment of the substance” of citizenship rights’, 2012 71 (2) *The Cambridge Law Journal* 279

<sup>336</sup> Case C-86/12, *Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de l’Emploi et de l’Immigration*, EU:C:2013:645

<sup>337</sup> C-86/12 *Alokpa* *ibid*; Case C-133/15, *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, EU:C:2017:354

working without authorization in Belgium.<sup>338</sup> These personal rights were balanced against state rights, i.e. right to deny residence, without however any specific reference to proportionality (taken up in Chapter Four) or any discussion concerning fundamental-human rights. This outcome was despite an extensive analysis of proportionality and fundamental rights found in the separate opinion of Advocate General (AG) Sharpston, who, however, opined that the fundamental right to family life could not, at that point, be invoked autonomously.<sup>339</sup> The Court instead of delving into considerations of fundamental rights simply reasoned that in the absence of residence permit for their father the children would be denied a 'genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'<sup>340</sup> as they would be obliged to leave the territory of the EU in order to accompany their father who was their sole carer.<sup>341</sup> This would interfere with their citizenship status which, as was reiterated by the Court, was 'intended to be the fundamental status of the nationals of the Member States'.<sup>342</sup> The *Zambrano* judgment raised questions about the interaction between the citizenship provisions (now Article 20 TFEU) and the provisions concerning the exercise of freedom of movement (now Article 21 TFEU) the latter of which could not apply due to the absence of a cross-border element, as well as what would constitute deprivation of the enjoyment of the substance of citizenship rights other than an obligation to leave EU territory entirely.<sup>343</sup>

In the following case of *McCarthy*, which involved an EU citizen who had not exercised her right to free movement the Court found, unsurprisingly, that Article 21 TFEU did not apply due to lack of the cross-border element.<sup>344</sup> When the question turned to whether she could derive direct rights from her citizenship status under Article 20 TFEU, which would, if successful, give rise to derivative residence rights for her Jamaican spouse, the Court found that the applicant was not deprived of genuine enjoyment of the substance of citizenship rights nor was she impeded from exercising her freedom of movement. Consequently, she could not be brought within the scope of Article 20 TFEU.<sup>345</sup> The Court's reasoning was based on the idea that Ms McCarthy, unlike the minor children in *Zambrano*, would not be forced to leave the UK if she was not brought within

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<sup>338</sup> Case C-34/09 *Zambrano* (n.172) para 18

<sup>339</sup> Case C-34/09, EU:C:2010:560 [2011] ECR I-01177, Opinion of AG Sharpston, paras 109-122 on proportionality, paras 151-177 on fundamental rights; para 176 The AG states 'family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law'

<sup>340</sup> Case C-34/09 *Zambrano* (n.172) paras 43-45

<sup>341</sup> *ibid* para 44

<sup>342</sup> *ibid* para 41

<sup>343</sup> see further Koen Lenaert, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach' 2015 1 *International Comparative Jurisprudence* 1

<sup>344</sup> Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*, EU:C:2011:277, [2011] ECR I-03375, para 46

<sup>345</sup> *ibid* para 49

the scope of EU law.<sup>346</sup> While the Court was silent on the application and relevance of the Charter, as was in *Zambrano*, AG Kokott had referred to Article 8 ECHR and opined that Ms McCarthy's spouse may have a right of residence derived from the ECHR but said that this was not a question of EU law.<sup>347</sup> The same reasoning was applied in *Dereci*,<sup>348</sup> however in that case the Court also added that if the situation falls outside the scope of EU law and, consequently, outside the scope of the Charter, the situation must instead be examined in the light of Article 8(1) ECHR which is the equivalent of Article 7 Charter.<sup>349</sup>

In determining whether there will be a deprivation of the substance of the rights protected under the citizenship provisions, the Court does not rely on fundamental rights but instead these rights are relevant only after there is a connection with EU law, in the absence of which the ECHR applies instead and it is for the national court to determine.

In these earlier citizenship cases, which also involve the derivative rights of TCN family members, the Court is evidently preoccupied with treating the freedom of movement and residence as constituting fundamental rights-freedoms of EU citizens,<sup>350</sup> capable of justifying the setting aside of restrictive national measures that impede the exercise of the respective rights. By attaching the element of 'fundamental' to the right of movement and residence, the Court attempts to clarify the substantive aspect of European citizenship while, although not always clear, uses the principle of proportionality and at this point reluctantly refers to, but does not rely upon, fundamental rights protected in the Charter (as opposed to the fundamental rights of movement and residence). The Charter at this point only becomes relevant once a connection to EU law is established while human rights considerations retain a marginal significance at this point and are, at best, additional to the fundamental right to free movement. From the *Zambrano* ruling,<sup>351</sup> however, we learn that EU citizenship does have a certain substance attached to the enjoyment of rights that are meant to be protected by EU law and this substance is gradually identified by the Court, although not always clearly.

At this point in the developmental history of citizenship, we can reflect upon the inclusive and the securitisation aspects of the citizenship narrative and, consequently, we can see the power effects of free movement in Foucault's terms in more tangible ways:

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<sup>346</sup> *ibid* para 50

<sup>347</sup> *ibid* ECLI:EU:C:2010:718 Opinion of AG Kokott, para 60

<sup>348</sup> Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734, [2011] ECR 00000

<sup>349</sup> *ibid* paras 72-73

<sup>350</sup> Case C-200/02, *Chen* (n.321) para 33

<sup>351</sup> Case C-34/09 *Zambrano* (n.172)

[...] it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action.’<sup>352</sup>

The consideration for the protection of the substance of citizenship rights in *Zambrano*<sup>353</sup> indicates the positive effect of “making it easier”, or perhaps more accurately not making it more difficult, for children and their family members to remain in the Member-State and on EU territory. On the other hand, in *McCarthy*<sup>354</sup> we see the “constraining and forbidding” aspect of free movement even in the case of European citizens. In the case of *McCarthy*, we see that not all forms of relationships and connections would be accepted as constituting part of the substance of EU citizenship and that the logic of European citizenship based on free movement was and is a specific kind of citizenship attached to specific aims, i.e. economic activity and exercise of cross-border mobility. This dual aspect of inclusion and exclusion has been captured by the idea of revolving doors developed by Acosta and Mertire to describe the welcoming and simultaneously hostile and securitisation regime of citizenship and migration explaining that it is now more about a flexible way of controlling access and exit, a continuous process of possibilities, rather than automatic and more permanent exclusion or inclusion.<sup>355</sup> This metaphor captures the discourses of citizenship and migration not only in terms of power, which enables or constrains the actions of individuals, but also reflects the idea that the quest to define the ideal subject of EU law has been ongoing. It is not, therefore, about European citizens against non-European others but it is about who can access what rights under specific circumstances. This will become particularly evident in Chapter Two, through the application of Bourdieu’s theory of practice, particularly when we discuss the role of the different forms of capital which give access to specific rights and freedoms in the social space, and the example of the realities of citizenship by investment, which clearly show the weaknesses of the regime of citizenship and particularly the substance of EU citizenship as being largely characterised by economic capital.

The next section reviews the developments in the Treaty of Lisbon and importantly, the recognition of the Charter as having the same legal effect as the treaties. At the end of this section, I examine some of the prominent case law by the Court of Justice concerning rights of TCN family members in the context of European citizenship as well as citizenship rights of economically inactive citizens. The chapter concludes by highlighting that the Court of Justice

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<sup>352</sup> Foucault, *Why Study Power* (n.17) 789

<sup>353</sup> Case C-34/09 *Zambrano* (n.172)

<sup>354</sup> Case C-434/09, *McCarthy* (n.344)

<sup>355</sup> Diego Acosta Arcarazo & Jacopo Mertire, ‘Trapped in the Lobby: Europe’s revolving doors and the Other as Xenos’ 2014 39 (3) *European Law Review* 362

continues to uncover the substantive elements of European citizenship, albeit slowly, contributing to the ongoing quest to (re)define the legal subject of EU law. This has implications for the widening of European citizenship rights and is (sometimes) inclusive of TCNs, however, this privilege is not, as we will see, for everyone.

## 1.6 Democratisation: Treaty of Lisbon (2007)

In 2001, a year following the entry into force of the Treaty of Nice, the European Council adopted the *Declaration on the Future of the European Union*,<sup>356</sup> aiming to transform the EU into a more democratic and transparent entity by introducing, for the first time, the idea of a constitution for European citizens. A draft constitution was proposed, although subsequently rejected by Dutch and French voters, causing a constitutional crisis about the future of the EU, not unlike the more recent 2016 referendum on Brexit.<sup>357</sup> Although the rejection revealed a level of disengagement of European citizens with the EU and disagreement about its future,<sup>358</sup> it is still part of the constitutional process of the EU.

Prior to the signing of the Treaty of Lisbon, the European Council had adopted the Hague Programme with a view to strengthen the AFSJ.<sup>359</sup> The Hague programme was built on the work and aspirations of its predecessor (Tampere programme) and set up ten main priorities and an action plan for the governance of the AFSJ. The measures focused, among others, on enhancing fundamental rights and citizenship, adopting anti-terrorism measures, improving the management of migration by fighting illegal migration, and protecting the external borders.<sup>360</sup> The

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<sup>356</sup> It is also known as Laeken Declaration

<sup>357</sup> see for further Dagmar Schiek 'On the never-ending road to Brexit: Perspectives for the European Union' 2018 69 (3) Northern Ireland Legal Quarterly 221; Francis B. Jacobs, 'Will the EU Become Stronger or Weaker or Even Disintegrate as a Result of Brexit?' in Francis B. Jacobs, *The EU After Brexit: Institutional and Policy Implications* (Palgrave Pivot, Cham 2018) 7

<sup>358</sup> Dehousse R., 'The Unmaking of a Constitution: Lessons from the European Referenda'. (2006) 13(2) Constellations 151

<sup>359</sup> Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 OJ C 53/01; Communication from the Commission to the Council and the European Parliament of 10 May 2005, 'The Hague Programme: ten priorities for the next five years'. The Partnership for European renewal in the field of Freedom, Security and Justice COM(2005) 184 final – [2005] OJ C 236 ; see also Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4<sup>th</sup> ed, 2016) section 6.2

<sup>360</sup> The ten priorities were: 1) Fundamental rights and citizenship, (2) The fight against terrorism, (3) Migration management, (4) Internal borders, external borders and visas, (5) A common asylum area, (6) Integration: the positive impact of migration on our society and economy, (7) Privacy and security in sharing information, (8) The fight against organised crime, (9) Civil and criminal justice: an effective European area of justice for all, (10) Freedom, Security and Justice: sharing responsibility and solidarity, The Hague Programme, *ibid*

setting up of a common asylum procedure through harmonisation, sharing responsibility and solidarity, as well as enhancing cooperation in the area of justice, privacy, security and organised crime, was once more highlighted.<sup>361</sup> The Hague Programme identified a second phase for the development of the CEAS which involved reevaluation of the implementation of relevant legal instruments, the establishment of a common asylum process, a uniform status for asylum seekers and persons seeking subsidiary protection, and the requirement to fully apply the Geneva Convention on Refugees alongside other relevant conventions.<sup>362</sup> At the same time, the Council had called for better management of migration flows through partnerships with countries of origin and transit countries, enhancement of return and readmission policies, as well as 'harmonised solutions [...] on biometric identifiers and data',<sup>363</sup> much in line with the Tampere Programme.<sup>364</sup> The Hague Programme arguably retained the securitisation dimension as migration remained an issue of security and protection. It remained part of the common foreign and security policy, with emphasis on the defence of the external borders and the control of movement, instead of substantially addressing the causes of migration or providing a comprehensive framework for cooperation and harmonisation.<sup>365</sup> With the Hague Programme, it was becoming much clearer that while previously the AFSJ was mainly to be governed through intergovernmental cooperation, there was now a shift towards supranationalism. This shift reflected the EU's intentions to incorporate the AFSJ within the broader interests of the European polity. In the following chapter, I contextualise why the AFSJ is one of the main driving forces of the European project and one of the most significant objectives of the EU as it is the only one that directly involves the individual as a subject of the EU legal order.

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<sup>361</sup> Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, [2005] OJ C 236

<sup>362</sup> Council of the European Union, 13302/1/04 REV 1, LIMITE 370, Draft multiannual programme: "The Hague Programme; strengthening freedom, security and justice in the European Union" (15 October 2004) last accessed at <https://bit.ly/2KHQGil> on 19 August 2019 para 1.3

<sup>363</sup> *ibid* 1.6.3, 1.6.4, 1.7.2

<sup>364</sup> see Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations, COM(2004) 401 final

<sup>365</sup> see further Channe Lindstrøm, 'European Union Policy on Asylum and Immigration. Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?' 2005 39 (6) Social Policy & Administration 587

Before the entry into force of the Lisbon Treaty in 2009 (signed in 2007)<sup>366</sup>, the follow-up justice and home affairs programme was adopted for the period 2010-2014.<sup>367</sup> The new Stockholm Programme emphasised the need for ‘dynamic and comprehensive migration policy’ through strengthened dialogue and cooperation between the EU and third countries<sup>368</sup> and it further re-highlighted the importance for the development of the CEAS on the basis of 1951 Geneva Convention relating to the Status of Refugees and other relevant international treaties. Furthermore, the programme emphasised the importance of sharing responsibilities and solidarity among the Member States as well as the establishment of tools, such as the European Asylum Support Office (EASO), which would enable such cooperation.<sup>369</sup> The external dimension of asylum was to be in close collaboration with the United Nations High Commissioner for Refugees (UNHCR) and other relevant actors.<sup>370</sup> Nevertheless, the distinction between legal and illegal migration was reinforced,<sup>371</sup> without acknowledgement of the potential blurring between the two, particularly concerning persons seeking international protection or victims of international crime. Importantly, however, the Stockholm programme emphasised democratisation through the promotion of European citizenship and fundamental rights within the AFSJ as well as a recognition of the EU’s obligations under European and international human rights instruments.<sup>372</sup> The democratising dimension along with enhancing human rights law can be seen as a positive step towards remedying potential gaps in relation to migrants. More particularly, it was stated that ‘[a]ll actions taken in the future should be centred on the citizen of the Union and other persons for whom the Union has a responsibility’.<sup>373</sup> The aspect of responsibility is particularly central in the context of Chapter Three, where I argue for a social empathy approach in the context of the AFSJ. It will be seen in that chapter that the recognition of this responsibility is one of the two fundamental elements for a social empathy approach, it is, therefore, important to note that the EU has recognised this responsibility towards others. This recognition of responsibility also becomes clearer in Chapter Two, where I use Aristotle’s

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<sup>366</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1; Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (Henceforth TEU); Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (Henceforth TFEU)

<sup>367</sup> Stockholm Programme: An open and secure Europe serving and protecting citizens, [2010] OJ C 115/1

<sup>368</sup> *ibid* para 6.1

<sup>369</sup> *ibid* para 6.2

<sup>370</sup> *ibid* para 6.2.3

<sup>371</sup> *ibid* para 6

<sup>372</sup> *ibid* para 2.1

<sup>373</sup> *ibid* para 1.1; This point had been initially criticised during the Stockholm proposals and prior to the programme’s adoption for failing to cover all other persons despite citizenship status see Elspeth Guild & Sergio Carrera, ‘Towards the Next Phase of the EU’s Area of Freedom, Security and Justice: The European Commission’s Proposals for the Stockholm Programme’, Centre for European Policy Studies, Policy Brief: No 196/20 (20 August 2009)

concepts of actuality and potentiality to identify the EU's direction. In that chapter, it becomes clearer that responsibility towards others constitutes part of the EU's objectives.

### **1.6.1 Immigration and asylum: general provisions**

The provisions in the Stockholm Programme were reflected in the provisions set out in the Treaty of Lisbon. This treaty is an important shift towards democratisation, particularly with the depillarisation of JHA.<sup>374</sup> The Treaty of Lisbon focused more on cooperation and less on the distinctions between intergovernmental and supranational modes of governance. The aspect of cooperation is particularly evidenced through the reorganisation of competences into exclusive, shared and supporting.<sup>375</sup> This meant that the EU would share competence in the internal market, social policy, economic, social and territorial cohesion, as well as in matters relating to citizenship and migration in the AFSJ.<sup>376</sup> Cooperation in the AFSJ similarly designated that the restrictions previously found in the Treaty of Amsterdam, regarding the Court's jurisdiction on matters over asylum and immigration, would no longer apply. Thus, the Court's jurisdiction extended in all matters of the AFSJ, albeit with some exceptions in the areas of police, law enforcement, order, and internal security.<sup>377</sup> This expansion of jurisdiction is particularly relevant to the analysis of case law in Chapter Four as it focuses on case law in the area of asylum, which is one of the new areas in which the Court has jurisdiction.

Additionally, the qualified majority voting<sup>378</sup> and the ordinary legislative procedure<sup>379</sup> became the norm, attaching a more robust character to decision-making, including the removal of national vetoes over asylum and immigration decisions. This goes hand in hand with Article 67(2)TEU, which states that a 'common policy on asylum, immigration and external border control, based on solidarity between the Member States, which is fair towards third-country nationals' is to be adopted, as well as Article 78 (2) TFEU, which grants powers to the European institutions to adopt

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<sup>374</sup> For a more detailed analysis of the provisions of the Treaty of Lisbon and the Stockholm Programme in relation to the AFSJ see Theodora Kostakopoulou, 'An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm,' 2010 19 (2) European Security 151; For a review of the asylum policy in the Treaty of Lisbon and the Stockholm Programme see Christian Kaunert C. & Sarah Léonard, 'The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' 2012 31 (4) Refugee Survey Quarterly 1

<sup>375</sup> Articles 2,3,4,6 TFEU

<sup>376</sup> Article 4(2) TFEU

<sup>377</sup> Article 276 TFEU

<sup>378</sup> Article 238 TFEU

<sup>379</sup> Article 294 TFEU

measures for asylum, immigration and border control purposes. A uniform approach is advocated towards encompassing a uniform status of asylum and subsidiary protection, common procedures for granting and withdrawing protection status, criteria for determining the Member-State responsible for dealing with an application, and common standards on reception conditions, among others.<sup>380</sup> Although progress seems to have been made regarding immigration and asylum policies, at the same time, the Treaty of Lisbon does not greatly depart from the security rationale, while it also enhances the EU's polity-building capacities.<sup>381</sup> The externalisation of the AFSJ's aims, as now being entangled with the objectives of the Common Foreign and Security Policy (CFSP) and Common European Security and Defence Policy (CSDP),<sup>382</sup> following the 9/11, serve as an evidence of this,<sup>383</sup> as does the adoption of the European Agenda on Migration<sup>384</sup> and the European Agenda on Security,<sup>385</sup> post-Lisbon.

At the same time, the Treaty of Lisbon amended its provisions relating to the values of the Union under Article 2 TEU which now states that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [...].'<sup>386</sup> The prevention and sanction mechanism provided for in Article 7 TEU further aims to safeguard these core values of the Union in the presence of 'a clear risk of a serious breach' (Article 7(1) TEU) and 'serious and persistent breach' (Article 7(2) TEU). However, the most significant developments concerning human rights in the Treaty of Lisbon, involve the recognition of the Charter as having the same legal value as the treaties and the accession of the EU to the ECHR (Article 6 TEU). The Charter is particularly

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<sup>380</sup> Article 78 TFEU

<sup>381</sup> It is interesting to note for example that the tasks under Common Security and Defence Policy have been expanded (Article 43 TEU) and a mutual defence clause has been introduced to strengthen solidarity between Member States when dealing with external threats (Article 42 (7) TEU). This shows a more enhanced involvement of the EU in matters previously dealt with through intergovernmentalism. Another example involves the role of the High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU), which, although existed since the Treaty of Amsterdam, was extended by the Treaty of Lisbon to include functions of Council Presidency in issues of foreign affairs and Commissioner responsibilities for external relations attaching more significance to EU's personality at the international stage.

<sup>382</sup> *ibid*

<sup>383</sup> Jörg Monar, 'The EU's Externalisation of Internal Security Objectives: Perspectives after Lisbon and Stockholm', 2010 45 (2) *The International Spectator: Italian Journal of International Affairs*, 23

<sup>384</sup> Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, [2015] COM(2015) 240 final

<sup>385</sup> Communication from the Commission to the European Parliament, the European Council and the Council, delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, [2016] COM(2016) 230 final

<sup>386</sup> Article 21 TEU also states in relation to the external action of the Union that actions shall be guided by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

relevant for the protection of citizens' rights and freedoms but also rights of non-citizens within the context of EU law.<sup>387</sup> Similarly, accession of the EU to the ECHR would formally guarantee the commitment of the EU to protecting and respecting fundamental rights but, as of the moment of writing, the Court of Justice has rejected a draft agreement on the accession of the EU to the ECHR as incompatible with EU law,<sup>388</sup> which means that currently, individuals cannot challenge EU laws or practices at the ECtHR. Nevertheless, as will be examined below regarding the post-Lisbon case law, the Court of Justice is now more eager to refer to the Charter and the ECHR in its case law and to use fundamental-human rights as part of balancing various interests at play. The relevance of the Charter is revisited in Chapter Four in the context of case law within the field of asylum which, as we will see in that chapter, plays an important, although not fully developed, role in the balancing of personal rights and freedoms against public interests.

### **1.6.2 Citizenship and democracy**

In the Treaty of Lisbon existing provisions on citizenship were supplemented with a slight shift towards enhancing participatory democracy through the Citizens Initiative,<sup>389</sup> and further developing representative democracy with decisions to be taken as openly and as closely as possible to the citizens.<sup>390</sup> Voting is still applicable only to municipal and European elections and does not extend to national elections, reflecting a reluctance to truly expand citizenship.<sup>391</sup>

This mechanism of the Citizens Initiative aims to bring citizens closer to the decision-making process by giving them the opportunity to invite the Commission to submit a legislative proposal after gathering no less than one million signatures from a significant number of Member States.<sup>392</sup> While the introduction of this initiative is welcome, as it has great potential to improve legitimacy and democracy in the EU, at the same time its symbolic dimension must not be ruled out. The Citizens' Initiative does not have a binding effect and there are no guarantees that the

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<sup>387</sup> For example, provisions relating to the right to seek asylum according to the Geneva Convention (Article 18), the prohibition of collective expulsions and non-refoulement (Article 19) the right to fair trial (Article 47(2)) the right to respect for family and personal life (Article 7), the prohibition of torture and degrading treatment (Article 4), as well as the rights of children (Article 24) of the Charter

<sup>388</sup> Opinion 2/13 (n.125)

<sup>389</sup> Article 11 TEU and Article 24 TFEU

<sup>390</sup> Article 10 TEU and Article 11 TEU

<sup>391</sup> Reaction to this limitation can be observed through the Citizens Initiative entitled Let me Vote, Commission Registration Number: ECI (2012) 000006 and academic debate about the future of European citizenship at Rainer Bauböck (ed), 'Debating European Citizenship 2019', IMISCOE (Springer, Cham 2019)

<sup>392</sup> Article 11 TEU and Article 24 TFEU

Commission will approve an initiative or that it will lead to a legislative proposal.<sup>393</sup> The Citizen's Initiative is nevertheless an important democratic tool for the citizens, and this can have a substantial impact on migration and citizenship. For example, the provisions on the free movement of persons (Articles 45-55TFEU), justice, freedom, and security (Articles 67-89TFEU), non-discrimination and citizenship (Articles 18-25TFEU), are all policy areas in which the Commission has the right to propose legislation and, therefore, areas in which the Citizen's Initiative can be used. Importantly, the initiative has been taken up on several occasions since 2015 in areas concerning migration, democracy, and the rule of law. For example, an initiative titled *Wake up Europe! Taking action to safeguard the European democratic project*, was introduced to support European values (Article 2TEU) and to urge the EU to protect democracy in light of the Hungarian government's xenophobic and anti-immigration measures. The petition was eventually withdrawn by the organisers who concluded that the Citizen's Initiative was not the most appropriate tool to use in this complex matter.<sup>394</sup>

It is important to mention that the European Parliament has adopted a resolution concerning the situation in Hungary. More specifically the resolution concerned the rule of law, democracy and fundamental rights and it stated that there is 'a clear risk of a serious breach of the values referred to in Article 2 of the TEU'.<sup>395</sup> The European Parliament requested from the Council to assess whether Hungary is posing a systemic threat to the EU's founding values, as this breach triggers Article 7(1) TEU.<sup>396</sup> However, up until the moment of writing the Council has failed to respond.<sup>397</sup> We can see the potential of the Citizens' Initiative in this context in raising awareness about important issues in the EU and complementing the work of the European Parliament. However, the complexity and sensitivity in this area are evident by the lack of action against Hungary. This indicates that it is not enough to have appropriate tools but what is also needed is the political will to utilise them. It is therefore questionable what kind of gravity and impact the Citizens' Initiative can have in such politicised issues like migration and citizenship.

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<sup>393</sup> The Citizen's Initiative has been successful only on four occasions including the subjects of water and sanitation as a human right, the ban of the destruction of the human embryo in the areas of research, development aid and public health, animal protection and particularly experiments on animals, and the most recent initiative on the ban of the use of toxic pesticides (more details on the initiatives and the Commission's follow up can be found at the Citizen's Initiative website at <https://bit.ly/2THFbLj> last accessed on 19 August 2019

<sup>394</sup> See official website of the initiative last accessed at <http://www.act4democracy.eu> on 19 August 2019

<sup>395</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))

<sup>396</sup> *ibid*

<sup>397</sup> Press Release, 'Council strongly criticised over failing to act to protect EU values in Hungary' (19-03-2019) last accessed at <https://bit.ly/2FuzV8r> on 19 August 2019

Nevertheless, there is a pending initiative including the subject of extremism<sup>398</sup> and an initiative for the support to local humanitarian groups and volunteers who assist refugees, which, however, has had insufficient support.<sup>399</sup> Another two initiatives concern European citizenship,<sup>400</sup> although one of them failed to fulfil the conditions.<sup>401</sup> This suggests that the Citizen's Initiative is gradually utilised by the civil society and steers dialogue and communication between citizens and the institutions, which is an important democratic aspect. Even in cases where an initiative does not succeed, its potential contribution to raising awareness over specific issues should not be ignored.<sup>402</sup>

Further, the Treaty of Lisbon enhances the role of national parliaments<sup>403</sup> and introduces the early warning mechanism as a safeguard to the principle of subsidiarity. The latter aims to protect the division of competences by limiting EU's actions in areas where it does not enjoy competence and ensures that it only acts as far as the objectives cannot be sufficiently achieved by the Member States.<sup>404</sup> However, Article 7(3) of Protocol No 2<sup>405</sup> states that the Commission may decide to maintain, amend, or withdraw proposals prepared by national parliaments in case a proposal does not comply with the principle of subsidiarity for a legislative act. As with the Citizens' Initiative, there is no guarantee for the protection of this mechanism. Nevertheless, reflecting on the governance tensions that characterised the developmental history of the EU, it is a welcome development that cooperation, consultation and increased shared competences gradually become the norm and shift away from dichotomising notions of supranational and intergovernmental governance models.<sup>406</sup>

Developments in the AFSJ, including the refugee crisis and the economic crisis, have confirmed the sensitivity of such salient issues. The politicisation of this area can also explain the 'stone by stone' approach followed by the Court of Justice,<sup>407</sup> and the less vigorous application of human

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<sup>398</sup> Stop Extremism, Commission Registration Number ECI(2017)000007

<sup>399</sup> We are a welcoming Europe: Let us help, Commission Registration Number ECI(2018)000001

<sup>400</sup> Permanent European Citizenship ECI(2018)000003 & Retaining European Citizenship ECI(2017)000005

<sup>401</sup> ECI(2017)000005 *ibid*

<sup>402</sup> An earlier example of a citizens initiative that triggered an interesting debate on European citizenship has been the *Let me Vote* initiative ECI (2012)000006 which, although withdrawn, has inspired academic debate on the future and meaning of European citizenship. See Bauböck, *Debating European Citizenship*, (n.391) part 1

<sup>403</sup> Article 12 TEU

<sup>404</sup> Article 5 TEU

<sup>405</sup> Protocol (No 2) on the application of the principles of subsidiarity and proportionality, TFEU

<sup>406</sup> See also Roger Goebel, 'Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon', 2013 20 *Columbia Journal of European Law* 77; Ingolf E.A. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' 2009 15 (3) *Columbia Journal of European Law* 349

<sup>407</sup> Koen Lenaerts, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach' (n.343)

rights in the context of citizenship and rights of TCNs explored in the subsequent section. The European Agenda on Migration and the subsequent Agenda on Security, adopted in April and May 2015 respectively, operate as clear evidence of the complexities of the AFSJ during a time when migration and security aspects have been particularly salient, highlighting the urgent need to balance fundamental rights and aspects of security as ‘complementary policy objectives’.<sup>408</sup> The clear need for the effective implementation of existing legislative measures and the emphasis on intergovernmental and supranational cooperation are also evidenced by the new strategic guidelines for the operation of the AFSJ adopted in June 2014 by the European Council after the end of the Stockholm Programme.<sup>409</sup> Instead of setting new objectives, the new strategic guidelines highlight the need for proper implementation of the existing framework. The absence of new measures further indicates that the problem is not only legal but also social. That is why there is a need to reconceptualise the AFSJ in order to understand its social and psychological underpinnings as it clearly involves affective aspects that connect to people’s identities.

We have seen that in the context of securitisation, different emotions like fear and insecurity can be mobilised, and we have also seen how the gradual development of the legal subject of the EU required some form of shared identity through special rights, passports, cultural and other symbols. The AFSJ cannot, therefore, simply be understood as a legal and a geographical area but as an area which reflects the ‘human face’<sup>410</sup> of the European polity and in which individual persons look for work, raise their families and seek to achieve their own potentials. This approach further suggests that implementation and utilisation of existing legal and policy tools are not a panacea to the problems and challenges that arise within the AFSJ. However, these must also be supplemented by a shift in perception and framing of the AFSJ involving consideration and recognition of the different affective aspects involved within this area. This reconceptualisation is further developed in Chapter Two, where I show how the AFSJ functions as a space where communication and interaction take place, building on the developmental history explored in the present chapter. This is also supplemented by Chapter Three, where I argue that this reconceptualisation can take place through a social empathy lens.

In the remainder of this chapter, I will review some of the prominent cases delivered by the Court of Justice following the entry into force of the Lisbon Treaty. I focus mainly on cases concerning the rights of TCNs, which are associated with EU citizenship, as well as citizenship rights of non-

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<sup>408</sup> Agenda on Security (n.385) 3

<sup>409</sup> European Council, Conclusions, 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014; Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010

<sup>410</sup> Term borrowed from Ferreira and Kostakopoulou (n.31)

economically active EU citizens. This analysis allows us to see the current state of EU citizenship, its substantive rights, who may benefit from the citizenship provisions and under what circumstances. Reviewing the case law is important to understand how free movement operates as power in the AFSJ and to provide the groundwork for Chapter Two. The latter builds on the dialectical relationship between the legal structures of the AFSJ with the individuals as subjects of the European polity. The analysis of case law, therefore allows us to see the development of the subject of EU law and to try to understand the inclusive and securitisation narratives of the European polity. The analysis that follows is further supplemented in Chapter Four, where I examine the Court's case-law in the context of asylum. However, Chapter Four is also developed as an exercise that tests the theoretical framework developed in Chapter Three and, therefore, serves a dual purpose.

### **1.6.3 The legal subject in the post-Lisbon case law**

Following the Treaty of Lisbon, the Court continued to deliver judgments in the field of citizenship and the associated rights of TCN family members, only now the Charter enjoyed a more elevated status the same as the treaties. The Court's approach has not always been easy to decipher or predict in some of the cases. However, it has maintained its focus on the free movement as a fundamental right of EU citizens (as opposed to the fundamental rights under the Charter). Simultaneously, the Court preserved its stance on the margin of appreciation for the Member States in protecting their interests. In the cases below, we can witness the centrality of the free movement as the central substantive aspect of citizenship, albeit for the exceptional cases that may rely upon the ruling in *Zambrano*.<sup>411</sup> The notion of power is still reflected in the interpretation of free movement, as well as citizenship, in similar ways as before. However it becomes clearer in the post-Lisbon case law that there is a distinction between the different sources of rights, i.e. Article 20TFEU on EU citizenship and Article 21TFEU on free movement; as we will see below, Article 20TFEU is currently potentially relevant only when Article 21TFEU does not apply. Therefore, we see further distinctions, such as economically and non-economically active citizens, distinctions between primary and secondary carers in cases of children, as well as dependent and non-dependent children or adults.

Distinctions based on economic activity, primary or secondary care within family law as well as other distinctions, fall within Foucault's system of differentiations, which as we explained earlier,

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<sup>411</sup> Case C-34/09 *Zambrano* (n.172)

are determined, among others, by law. Foucault's second point of analysing power, namely, the types of objectives, continue to be reflected through an instrumentalist approach as we see the emphasis on free movement which is part of the internal market, however, considerations for fundamental rights, especially family rights, now become more relevant. This reflects the objective to elevate fundamental rights and strengthen, gradually, the Charter of Fundamental Rights. In relation to Foucault's third point, which helps examine power, i.e. the means through which power relations come into existence, we will see, for example, that the requirement for sufficient resources determines access to the enjoyment of rights as do other requirements such as that of dependency. A more direct application of the requirements of Directive 2004/38, which is the main directive connected to Article 21TFEU, as well as categories and requirements provided by EU law and developed by the Court, indicate how power relations come into being within this area and how they are institutionalised through law, which is the fourth relevant point in relation to Foucault's notion of power.

#### **1.6.3.1 No movement, no dependency, no residence for TCN family members**

The *Iida*<sup>412</sup> case involved a Japanese father of a child who was a Union citizen and who no longer stayed in the host state but had moved with her mother. The Court, unsurprisingly, was unable to find a connection between the applicant, who sought to renew his residence permit in the host state, and Union law, consequently finding that his case fell outside the scope the treaty.<sup>413</sup> However, on a question concerning the right to family life (Article 7) and the rights of the child (Article 24) under the Charter, the Court merely said that as the matters fell outside the scope of EU law, Article 51(2) of the Charter stated that the field of application of EU law could not be extended beyond the treaties and, therefore, the Court lacked the power to examine fundamental rights questions in this case.<sup>414</sup> The Court's rationale was that as Mr Iida was not dependant on the child, he fell outside the meaning of Article 2(2) of Directive 2004/38 for family members. Additionally, Mr Iida's daughter was not prevented from enjoying the genuine enjoyment of her free movement rights. This is consistent with *Zambrano*,<sup>415</sup> *Chen*<sup>416</sup> and *Dereci*,<sup>417</sup> however, what may seem problematic is the lack of consideration of fundamental-human rights based on the Charter/ECHR. The absence of fundamental-human rights

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<sup>412</sup> Case C-40/11 *Iida* (n.172)

<sup>413</sup> *ibid* para 77

<sup>414</sup> *ibid* paras 78-81

<sup>415</sup> Case C-34/09 *Zambrano* (n.172)

<sup>416</sup> Case C-200/02 *Chen* (n.321)

<sup>417</sup> Case C-256/11 *Dereci* (n.172)

considerations also came in contrast to AG Trstenjak's separate opinion.<sup>418</sup> The AG had considered the possibility that denying the right of residence to the child's father, may restrict the child's right to freedom of movement. The AG stated that this denial 'must be regarded as amounting to a disproportionate interference with fundamental rights', which was a matter for the referring court to decide.<sup>419</sup> The AG referred to the principle of proportionality and the need to assess whether this interference would be disproportionate with the child's fundamental right of free movement.<sup>420</sup> The Court, in this case, failed to express how proportionality was applied as proposed by the AG, which would necessitate consideration of the fundamental rights under the Charter, even if the outcome would remain the same.

In *Ymeraga*,<sup>421</sup> the Court concluded that no right of residence could extend to TCN family members of a Union citizen, as the latter had not exercised his freedom of movement and could still enjoy his citizenship rights.<sup>422</sup> In *Ymeraga*, therefore, the Court found no connection to Union law and consequently no applicability of the Charter.<sup>423</sup> In this case, however, it may be useful to note that the Union citizen, as earlier in *McCarthy*,<sup>424</sup> was an adult and this differed from cases involving dependent minors or children in education, examined in the subsequent section. *Iida*,<sup>425</sup> as we saw, was different in its facts; it involved the rights of the TCN family member, rather than the rights of the child, the latter of whom was still able to exercise her free movement with her primary carer.

### 1.6.3.2 Children in education, dependency, and enjoyment of citizenship rights

The Court seems to be more consistent in scenarios involving the residence of children who are enrolled in education in a host state and the residence of their primary carers, irrespective of nationality. In *Teixeira*<sup>426</sup> the Court ruled that:

The children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant

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<sup>418</sup> Case C-40/11 (n.172) EU:C:2012:296 Opinion by AG Trstenjak paras 80-88, 92

<sup>419</sup> *ibid* para 88

<sup>420</sup> *ibid* paras 85,88

<sup>421</sup> Case C-87/12 *Ymeraga* (n. 172)

<sup>422</sup> *ibid* paras 30-33

<sup>423</sup> *ibid* para 43

<sup>424</sup> Case C-434/09 *McCarthy* (n.172)

<sup>425</sup> Case C-40/11 *Iida* (172)

<sup>426</sup> Case C-480/08, *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*, EU:C:2010:83, [2010] ECR I-01107

worker in that Member State are entitled to reside there in order to attend general educational courses there.<sup>427</sup>

This was regardless of the fact that one of the parents was a Union citizen and that the other parent was a TCN. The right of residence in these situations is not subject to the conditions of sufficient resources and comprehensive sickness insurance.<sup>428</sup> In *Teixeira*<sup>429</sup> and *Ibrahim*<sup>430</sup> the Court relied upon Article 12 of Regulation No 1612/68 on the freedom of movement for workers within the Community,<sup>431</sup> as the Union citizen in question was previously a worker, to argue that children enjoyed a right to education that was not conditional on sufficient resources and sickness insurance.<sup>432</sup> While there was no reference to proportionality in either case, albeit a minor point in AG Mazák's opinion in *Ibrahim*,<sup>433</sup> both the advocates general and the Court seemed to balance the rights and needs of citizens and those of the state in order to reach their decisions. More specifically, the balancing concerned the right of children to education against the right of the state to refuse residence based on failure to fulfil the conditions of sufficient resources and comprehensive insurance. In both cases, reference to Article 8 ECHR was made to state that Regulation 1612/68 must be read in light of that provision.<sup>434</sup> Proportionality in citizenship cases seems to play a marginal role, if at all, yet as we will see in Chapter Four, the Court may be applying proportionality as a balancing practice rather than as a procedural principle that is clearly defined. In *Zambrano*, AG Sharpston had also examined the aspect of proportionality but the Court did not refer to that principle in its judgment.<sup>435</sup> This is also evident in Chapter Four, where we will see that proportionality is more likely to be expressed in the context of the advocates' general opinions rather than in the main judgment.

In *O and S*<sup>436</sup> the Court, echoing *Zambrano*, reiterated that in the cases of children who are Union citizens, to deny a residence permit to TCN family members should not be permitted if this would interfere with the enjoyment of European citizenship rights.<sup>437</sup> However, the Court reasoned that as there was no relationship of dependency between the step-parent in question and the Union

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<sup>427</sup> *ibid* para 29

<sup>428</sup> *ibid* paras 59,61

<sup>429</sup> Case C-480/08 *Teixeira* (n.426)

<sup>430</sup> Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80, [2010] ECR I-01065

<sup>431</sup> Amended by Regulation No 2434/92

<sup>432</sup> Case C-310/08 *Ibrahim* (n.430) paras 35-55; C-480/08 *Teixeira* (n.426) paras 48-51

<sup>433</sup> Case C-310/08 *Ibrahim* EU:C:2009:641, Opinion of AG Mazák para 14

<sup>434</sup> Case C-480/08 *Teixeira* (n.426) para 39; Case C-480/08, *Teixeira* EU:C:2009:642 Opinion of AG Kokott, para 60; Case C-310/08 *Ibrahim* (n.430) para 31; *Ibrahim* EU:C:2009:641, Opinion of AG Mazák FN 34 of para 35

<sup>435</sup> Case C-34/09 *Zambrano* (n.172)

<sup>436</sup> Cases C-356/11 and C-357/11, *O and S* (n.172)

<sup>437</sup> *ibid* para 58

citizen, the substance of the citizenship rights of Union citizens could still be enjoyed,<sup>438</sup> unlike the case in *Zambrano*. However, the Court noted that Directive 2003/86 could apply in principle and allow the applicant to join their spouses and children subject to compliance with the conditions laid down in that Directive, particularly Article 7(1)(c) which refers to sufficient resources of the sponsors to maintain themselves and the members of their family.<sup>439</sup> The Court stated that these must be exercised in light of Articles 7 (private and family life) and 24 (the rights of the child) of the Charter. However, it was left to the national authorities to ‘make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned’.<sup>440</sup> In the judgment, there is no reference to proportionality, although the Court may be said to engage in such a balancing practice as was in *Teixeira*<sup>441</sup> and *Ibrahim*.<sup>442</sup> On the one hand, a margin of appreciation for Member States is permitted while, on the other hand, the Court obliges the Member States to balance public interests against the objectives laid down in Directive 2003/86 concerning family reunification.<sup>443</sup> However, there is a discussion on the principle of proportionality in the AG Bot’s opinion<sup>444</sup> with direct reference to its use by the ECtHR. In his opinion, AG Bot relies upon the importance of the rights of the child and the child’s best interests when balancing public interests and personal rights such as the right to family life (Article 8 ECHR)<sup>445</sup> and concludes that:

‘[i]n that context, the national court must carry out an in-depth examination of the family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature.’<sup>446</sup>

In *Alarape*,<sup>447</sup> the TCN parent-carer of a child, who had attained the age of majority, was permitted to continue residing in the host Member State. This approach was based on the child’s personal circumstances, who continued to need the care and presence of her parent to complete

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<sup>438</sup> *ibid* para 56

<sup>439</sup> *ibid* paras 71-73

<sup>440</sup> *ibid* para 80-81

<sup>441</sup> Case C-480/08 *Teixeira* (n.426)

<sup>442</sup> Case C-310/08 *Ibrahim* (n.430)

<sup>443</sup> Joined Cases C-356/11 and C-357/11, O,S (n.422) paras 78,81

<sup>444</sup> Joined Cases C-356/11 and C-357/11, O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, EU:C:2012:595, Opinion of AG Bot

<sup>445</sup> *ibid* paras 70-79

<sup>446</sup> *ibid* para 90

<sup>447</sup> Case C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, EU:C:2013:290

her education.<sup>448</sup> However, regarding permanent residence both in *Alarape*<sup>449</sup> and *Ziolkowski*,<sup>450</sup> the Court had underlined that the conditions laid down in Article 7 of the Citizens Directive must be fulfilled regardless of the national rules.<sup>451</sup>

The complexity of the residence rights connected to citizenship can be further observed in the subsequent case of *Alokpa*.<sup>452</sup> In *Alokpa*, the Court reiterated that a TCN family member of Union citizens, the latter of whom had not exercised their freedom to move (Article 21TFEU), may exceptionally derive a right of residence. The exception was allowed if denying a residence permit would result in a practical obligation of the Union citizens to leave EU territory and be denied of the genuine enjoyment of their citizenship rights under Article 20TFEU.<sup>453</sup> The Court reasoned, based on the facts of this case, that the children would not be obliged to leave the EU territory altogether (as was the case in *Zambrano*), as they could still go to France. However, it was left to the referring court to decide based on the specific facts and to establish whether the conditions under Article 7 of Directive 2004/38 were satisfied.<sup>454</sup> Although the AG stated that the Member States must take into account the individual situation of the Union citizens and ‘the future potential resources stemming from an offer of employment<sup>455</sup> [made to the TCN family member]’, this was not relied upon by the Court. The personal circumstances in *Alokpa*, i.e. whether the family would have to move outside the Union as they had no ties to France or whether Ms Alokpa would, soon, have sufficient resources, are assumptions rather than fact and could be used by the Court either way. Consideration of the personal circumstances, in this case, could have led, for example, to a more favourable decision on residence but, as it were, it led to a more restrictive approach because of how the personal circumstances were interpreted. Theoretically, however, if Ms Alokpa were to be forced to leave EU territory, this would trigger residence under Article 20TFEU,<sup>456</sup> however the Court’s reasoning seems to be unsound as it assumes that it is logical or even natural for families to move to another Member-State, as it had done in the case of *McCarthy*.<sup>457</sup>

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<sup>448</sup> *ibid* para 31

<sup>449</sup> *ibid* para 35

<sup>450</sup> Joined cases C-424/10 and C-425/10, Tomasz Ziolkowski (C-424/10) and Barbara Szeja and Others (C-425/10) v Land Berlin, EU:C:2011:866, [2011] I-14035

<sup>451</sup> *ibid* para 30

<sup>452</sup> C-86/12, *Alokpa* (n.336)

<sup>453</sup> *ibid* paras 32-33

<sup>454</sup> *ibid* para 35

<sup>455</sup> C-86/12, *Alokpa* (n.336), EU:C:2013:197, Opinion of AG Mengozzi, para 59

<sup>456</sup> see further Isabella Reynoso, ‘The impact of *Alokpa* and *Moudoulou* on EU citizenship and fundamental rights’ Case Comment, 2015, 3(1) UK Law Student Review 58; Hester Kroeze, ‘The substance of rights: new pieces of the Ruiz Zambrano puzzle’ 2019 44 (2) European Law Review 238

<sup>457</sup> See also Dimitry Kochenov & Richard Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ 2012 37 European Law Review 369

In the case of *O and S*<sup>458</sup> the Court had identified a possible different legal basis under the Family Reunification Directive,<sup>459</sup> which is what had triggered consideration for the Charter, unlike in the case of *Alokpa*, where the Court does not refer to fundamental rights under the Charter. In fact, in *Alokpa* AG Mengozzi considered that if Articles 24, 7, and 33 of the Charter were to be invoked, this would imply that the conditions laid down by the Citizens Directive were not satisfied and would disregard the limits of Article 21TFEU.<sup>460</sup> The outcome of the case in *Alokpa* also differed from *Chen*,<sup>461</sup> which involved the carer of a Union citizen who was child and who had sufficient resources thus more clearly satisfied the requirements of Article 7 Directive 2004/38.<sup>462</sup> It also departs from *Zambrano*,<sup>463</sup> as the Court blurs the lines as to what is to be considered as limitations to the enjoyment of the substance of rights under EU law, since clearly the children in *Alokpa* could be forced to live in a country where they had no established bonds or any sense of belonging.<sup>464</sup> The Court, however, takes the view that only an obligation to leave EU territory as a whole would constitute such deprivation of the substance of citizenship rights established by the *Zambrano* ruling.

To overlook the principle of proportionality in *Alokpa*, as well as a reference to the Charter, is significant because it departs from the earlier approach in *Brey*,<sup>465</sup> examined in the subsequent section. Although it may appear unclear as to when and how personal circumstances are to be considered and how proportionality is implemented, some light may be shed once we consider that the Court distinguishes between two sets of rights. On the one hand, the Court recognises residence rights that are triggered by the freedom of movement under Article 21TFEU, for which Directive 2004/38 applies and sets out conditions for residence. On the other hand, the Court applies the *Zambrano* ruling concerning residence rights under Article 20TFEU that may be exceptionally invoked by EU citizens where a cross-border activity is absent. In the case of Article 21TFEU and the Directive 2004/38, the Court more eagerly applies the Charter because sufficient connection is established with EU law and the Citizens Directive itself requires compliance with the Charter.<sup>466</sup> On the other hand, residence rights under Article 20TFEU are less clear as there is

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<sup>458</sup> Joined Cases C-356/11 and C-357/11, *O and S* (n.172)

<sup>459</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12

<sup>460</sup> Case C-86/12, *Alokpa* (n.336), EU:C:2013:197, Opinion of aG Mengozzi, paras 35-36

<sup>461</sup> Case C-200/02, *Chen* (n.321)

<sup>462</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77

<sup>463</sup> Case C-34/09 *Zambrano* (n.372)

<sup>464</sup> The children in *Alokpa* were born and raised up to that point in Luxembourg but their nationality was French.

<sup>465</sup> Case C-140/12 *Brey* (n.173)

<sup>466</sup> Recital 31 Directive 2004/38 (n.462)

no secondary legislation attached to that provision. The Court is, consequently, developing the conditions for what constitutes the 'substance' of citizenship rights.<sup>467</sup> The application of the Charter in the last set of cases is, therefore, trickier as the Court must establish sufficient connection to EU law in order to apply the Charter even in cases concerning families and children especially if we consider that family law is outside the specific competence of EU law. Going back to earlier case law, even as early as the SEA in cases like *Morson and Jhanjan*,<sup>468</sup> we can still detect a similar approach about the cross-border element and the scope of EU law. This is also evident in the cases below, which reflect a weakness regarding the substance of EU citizenship and what can trigger the application of EU law.

### 1.6.3.3 Non-economically active EU citizens

The interpretation of the conditions of the Citizens Directive is particularly important in cases of EU citizens exercising their free movement rights in another Member-State when they are not economically self-sufficient. The case of *Brey*<sup>469</sup> involved the granting of a compensatory supplement to nationals of another Member-State residing in Austria during their retirement. The issue was whether such a special non-contributory benefit was to be regarded as social assistance within the meaning of Directive 2004/38 which would imply that they did not satisfy the condition of sufficient resources and, therefore, the conditions for legal residence.<sup>470</sup> The Court in *Brey* adopted an individual circumstances approach to decide the case this time alongside the principle of proportionality. Primarily the Court stated that the fact that an economically inactive national of another Member-State could be eligible to receive a benefit as the one in the proceedings 'could be an indication that the national does not have sufficient resources'.<sup>471</sup> However, the Court continued to say that the national authorities 'cannot draw such conclusions without first carrying out an overall assessment of the specific burden [...] by reference to the personal circumstances characterising the individual situation of the person concerned.'<sup>472</sup> More specifically the Court, having reiterated that the right to freedom of movement is a fundamental principle of EU law, it stated that the conditions under Article 7(1)(b) Directive 2004/38 should be

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<sup>467</sup> see further Kroeze, The substance of rights (n.456)

<sup>468</sup> n.211

<sup>469</sup> Case C-140/12, *Brey* (n.173)

<sup>470</sup> *ibid* para 30

<sup>471</sup> *ibid* para 63

<sup>472</sup> *ibid* para 64

interpreted 'narrowly [...] and in compliance with the limits imposed by the law and the principle of proportionality'.<sup>473</sup>

The Member States' margin of appreciation in balancing public interests and the rights and freedoms of Union citizens must not be exercised, according to the Court, in a manner which would undermine the objective of Directive 2004/38, which is to 'facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely [in the EU]'.<sup>474</sup> While it was left to the referring Court to decide whether granting the benefit in question would constitute an unreasonable burden on the social assistance system of Austria, the Court said that national legislation, which automatically excludes granting such a benefit to an economically inactive national of another Member-State because he no longer fulfils the conditions for legal residence, is precluded.<sup>475</sup> The Court's approach and the requirement to consider the personal circumstances as part of balancing the interests involved is not applied consistently in subsequent case law and it is restricted to the application of Article 21TFEU rather than also apply in the context of Article 20TFEU. Even in *Brey*, the exclusion of automatic rejection of non-contributory benefits as disqualifying the citizen from legal residence, although important theoretically, in practice it is difficult to implement as the subjective nature of personal circumstances of each individual can complicate rather than clarify the application of proportionality. On the one hand, the Court recognises that eligibility to receive such benefits could in fact indicate that the national has not sufficient resources but, at the same time, the Court says that the personal circumstances must be taken into consideration and not be automatically assumed that granting the benefit constitutes an unreasonable burden.<sup>476</sup>

In the view of this author, although the aspect of personal circumstances, as part of applying the principle of proportionality, aims to balance public and personal rights and to establish a healthy relationship between state and individual, a most welcome effort, at the same time it can be difficult to establish when such balance is achieved and what circumstances would qualify in each case. In *Aloka*, for example, who was a TCN family member of Union citizens, the personal circumstances did not function in favour of her application for residence, although it is arguable that they should have. In Chapter Four of this thesis, we see that in the context of asylum and pre-removal detention, the personal circumstances can work more favourably than in cases that arise

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<sup>473</sup> *ibid* para 70

<sup>474</sup> *ibid* para 71

<sup>475</sup> *ibid* para 79-80

<sup>476</sup> The Court provides some guidelines as to what personal circumstances are to be considered such as the amount of the income and how often it will be provided, the possession of a certificate of residence and the period for which the benefit is applied for. *ibid* para 78

in the context of citizenship. The reason may be that in cases of asylum and detention, individuals may be considered to be in more vulnerable situations with not many other options available but most importantly those cases, as we will see in Chapter Four, are more likely to fall within the scope of the Charter. This reflects the significance of the Charter's applications and its potential impact on personal rights and freedoms. The development of the element of individual circumstances is also significant in the context of Chapter Three, where I develop the social empathy approach in the framework of the AFSJ. However, for the present chapter, it suffices to observe that the Court gradually builds its own case law on a 'stone by stone approach'<sup>477</sup> and that, as we will see towards the end of this chapter, the gradual development of family-related rights points toward a promising, although not a, yet, developed direction that considers individual circumstances in a positive way for individuals. The reluctance observed by the Court in cases concerning EU citizenship is also most likely because these cases are very closely connected to national laws on citizenship and naturalisation procedures which are matters for national law. This is particularly reflected in cases of non-economically active citizens, as in the following case of *Dano*,<sup>478</sup> which indicates that the individual circumstances are not always relevant or may function against the applicant. This case is also a clear example of the distinction between the different claims for residence under Articles 20TFEU and 21TFEU.

The case in *Dano* involved an economically inactive Romanian national residing in Germany, who could not rely upon the principles of equal treatment and non-discrimination on the grounds that she did not have sufficient resources not to become a burden on the social assistance system and failed, therefore, to fulfil the residence conditions under Article 21TFEU.<sup>479</sup> The Court in *Dano* does not touch upon the aspect of certain degree of integration into the host state and the existence of a real link between the applicant and the host state.<sup>480</sup> Instead, it follows a strict application of the requirements of Article 7 Citizens Directive because the rights are considered to be triggered by Article 21TFEU rather than Article 20TFEU.<sup>481</sup> Consequently, although legal residence had been previously consistently highlighted by the Court (see for example *Trojani*,<sup>482</sup>

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<sup>477</sup> Lenaert, 'EU citizenship and the European Court of Justice's "stone-by-stone"' approach (n.343)

<sup>478</sup> Case C-333/13, *Dano* (n.173)

<sup>479</sup> *ibid* paras 75,81

<sup>480</sup> This was the approach of the Court in earlier citizenship cases such as Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169, [2005] ECR I-02119 para 57; Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630, [2008] ECR I-08507, para 54

<sup>481</sup> Case C-333/13, *Dano* (n.173) paras 71-83

<sup>482</sup> Case C-456/02, *Trojani* (n.318)

*Martinez Sala*,<sup>483</sup> *Grzelczyk*),<sup>484</sup> it has also been more flexible in adopting an individual assessment approach<sup>485</sup> and using the principle of proportionality.<sup>486</sup> In *Dano*, however, there is no mention of any proportionality considerations in the judgement and no individual assessment seems to have taken place.<sup>487</sup> Article 20 TFEU merits no consideration in this case because clearly the *Zambrano* exceptionality is not applicable, and the Court finds no other legal basis for the case which explains the absence of fundamental rights considerations.<sup>488</sup> *Dano* primarily functions as reassurance to Member States' fears of "benefit tourism" but abandons consideration of the individual or even a thorough application of the principle of proportionality, even if the result of the case would be the same. This leaves economically inactive citizens within a grey legal area whereby they enjoy the same status as other EU citizens but not the same protection.<sup>489</sup> Peers further points out, that the Court had also failed to consider issues concerning expulsion, which is very restricted in the treaty, as well as the denial of the right to re-enter, which is not permitted under the Citizens Directive.<sup>490</sup> The economic instrumentalist discourse is clearly exemplified by the approach in *Dano* as priority is undoubtedly given to the economic aspects of citizenship and no other considerations seem to be relevant in the absence of the economic criteria. This is not to suggest that the outcome in *Dano* should have been necessarily different, considering that the right balance must be struck between personal rights and freedoms with the broader public interest. However, the prioritisation of the economic aspects over EU citizenship in the Court's reasoning does indicate an instrumentalist view of EU citizenship as merely facilitating the wider economic-orientated aims of the EU.

In the subsequent case of *Alimanovic*,<sup>491</sup> the Court confirmed its *Dano* ruling about access to benefits in a host state, but this time concerning former workers.<sup>492</sup> The Court ruled that the Citizens Directive no longer covered the applicants because as former workers they retained their 'worker status' for at least 6 months after which the Member-State could terminate their status

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<sup>483</sup> Case C-85/96, *Martínez Sala* (n.317)

<sup>484</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, [2001] ECR I-06193

<sup>485</sup> Case C-140/12 *Brey* (n.173) para 64

<sup>486</sup> Case C-413/99, *Baumbast* (n.320) para 91; Case C-200/02, *Chen* (n.321) para 32; Case C-140/12 *Brey* (n.173) para 70

<sup>487</sup> See further Rui Lanceliro, 'Dano and Alimanovic: the recent evolution of CJEU case law on EU citizenship and cross-border access to social benefits', 2017 3(1) UNIO - EU Law Journal 63

<sup>488</sup> see Case C-333/13, *Dano*, EU:C:2014:341, Opinion of AG Wathelet, paras 141-151

<sup>489</sup> see further Nic Shiubhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' 2015 52 (4) Common Market Law Review 889

<sup>490</sup> Steve Peers, 'Benefit Tourism by EU citizens: the CJEU just says No' (EU Law Analysis 11 November 2014) last accessed at <<https://bit.ly/2OMMjqS>> 7 Aug 2019

<sup>491</sup> Case C-67/14, *Alimanovic* (n.173)

<sup>492</sup> Case C-67/14 *Alimanovic* *ibid*, para 49; See also Steve Peers, 'Case Comment: Case C-67/14', 2016 30 (1) Journal of Immigration, Asylum & Nationality Law 54

and place them outside the scope of the directive.<sup>493</sup> The Court stated that Union citizens could claim equal treatment with nationals *only if* they fulfil the residence criteria and conditions set out in the Citizens Directive.<sup>494</sup> It went a step further departing from its previous decision in *Brey*,<sup>495</sup> on the aspect of individual assessment, stating that ‘no such individual assessment is necessary’.<sup>496</sup> This approach was based on the idea that even if a single individual claim may not constitute such an unreasonable burden, ‘the accumulation of all the individual claims which would be submitted to it would be bound to do so’.<sup>497</sup> This was confirmed in *García-Nieto*,<sup>498</sup> where the Court reasoned that applying the Citizens Directive in this way provided ‘a significant level of legal certainty and transparency’ while ‘enabling those concerned without any ambiguity, what their rights and obligations are’ and simultaneously ‘complying with the principle of proportionality’.<sup>499</sup> This conclusion, however, was contrary to the opinion of AG Wathelet who had ruled out the automatic exclusion from non-contributory cash benefits and the absence of an individual assessment.<sup>500</sup>

In the *Dano* line of cases, we see that EU citizens who have exercised their freedom to move under Article 21TFEU are rather strictly scrutinised on the basis of their economic activity and although they technically enjoy the status of EU citizenship it is not clear what this leaves them with if they are found in vulnerable economic situations. As it currently stands, the distinction between Article 20TFEU and Article 21TFEU is problematic because there is no clear understanding as to what the substance of EU citizenship is, nor is it clear when sufficient connection with EU law can be established. The assumption that the EU citizens could still go back to their Member-State or that they still have the option of moving to another Member-State, consequently placing them outside the scope of EU citizenship and the substantive rights it presumably entails, seems problematic.<sup>501</sup>

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<sup>493</sup> Case C-67/14, *Alimanovic* (n.173) para 53

<sup>494</sup> My emphasis; *ibid* para 49

<sup>495</sup> Case C-140/12 *Brey* (n.173)

<sup>496</sup> Case C-67/14, *Alimanovic* (n.173) para 59

<sup>497</sup> *ibid* para 62

<sup>498</sup> Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, EU:C:2016:114

<sup>499</sup> *ibid* para 49; also Case C-67/14, *Alimanovic* (n.173) para 61

<sup>500</sup> Case C-67/14, *Alimanovic* (n.173) EU:C:2015:210, Opinion of AG Wathelet, para 126(2)

The AG further opined that the children of a worker or former worker could claim a right of residence on the basis of Article 10 Regulation No 492/2011 (on freedom of movement for workers) without fulfilling the conditions of sufficient resources and comprehensive sickness insurance paras 119-120

<sup>501</sup> see also Kochenov & Plender (n.457)

#### 1.6.3.4 Family reunification and substance of citizenship rights

In light of subsequent case law (*Rendon Marin*,<sup>502</sup> *CS*,<sup>503</sup> *KA*,<sup>504</sup> and *Chavez Vilchez*<sup>505</sup>) the Court further makes more evident the distinction between the rights of residence that are directly linked to the Citizen's Directive triggered by Article 21TFEU as was the line of cases following *Dano*, and the scope of Article 20TFEU within the context of family reunification and the application of the principle of the enjoyment of the substance of rights under *Zambrano*. In these subsequent rulings, the Court provides guidelines as to the substantive rights entailed in EU citizenship and builds on the aspect of dependency which, as it followed from the reasoning in *O, S*,<sup>506</sup> plays a determinant role in considerations for the child's best interests when considering residence rights under Article 20TFEU.

In *Rendon Marin*<sup>507</sup> and *CS*<sup>508</sup> the Court, in contrast to *O and S*, stated that Article 20TFEU has to take into consideration the child's best interests (Article 24(2) Charter)<sup>509</sup> which is an important step for the interpretation of Article 20TFEU. However, the difference between *O and S* and the other two cases is that in *O and S* the TCN stepfather of the children who were EU citizens was not the primary carer as the TCN parents in *Rendon Marin* and *CS*. Following the *Zambrano* principle, the Court in *Rendon Marin* and *CS* considered that the children in both cases would most likely have to leave the EU territory as a whole if their TCN parents were refused the right of residence. This would deprive the children of the genuine enjoyment of the substance of their citizenship rights within the scope of Article 20TFEU and would, consequently, trigger the application of the Charter, as there was sufficient connection to EU law. The Court reasoned that in *Rendon Marin* and *CS* the element of dependency was present, which entailed the requirement to consider the child's best interests. This was contrary to the reasoning in *O and S* where the Court ruled out the existence of dependency, which implied that the situation fell outside the scope of Article 20TFEU and the Charter was, therefore, not applicable. The relationship of dependency in interpreting Article 20TFEU was further elaborated in *Chavez-Vilchez*<sup>510</sup> and *K.A.*<sup>511</sup> which are important steps towards a more encompassing approach towards family rights in the context of EU law although still fall within the problematic framework of what constitutes substantive rights in the context of

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<sup>502</sup> Case C-165/14, *Rendón Marín* (n.172)

<sup>503</sup> Case C-304/14, *Secretary of State for the Home Department v CS*, EU:C:2016:674

<sup>504</sup> Case C-82/16, *K.A.* (n.172)

<sup>505</sup> C-133/15, *Chavez-Vilchez* (n.172)

<sup>506</sup> Joined Cases C-356/11 and C-357/11, *O and S* (n.172)

<sup>507</sup> Case C-165/14 *Rendón Marín* (n.172)

<sup>508</sup> Case C-304/14 *CS* (n.172)

<sup>509</sup> para 81

<sup>510</sup> Case C-133/15, *Chavez-Vilchez* (n.172)

<sup>511</sup> Case C-82/16, *K.A.* (n.172)

EU citizens. The Court, unlike its more simplistic and stricter approach in earlier case law (*Dereci, O and S*), in answering the national Court's question in *K.A.* it stated that:

The fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.<sup>512</sup>

In *K.A.*, the Court found incompatible with Article 20TFEU the national practice that failed to examine residence application for family reunification purposes merely on the basis that the TCN family member was subject of an entry ban without considering the aspect of dependency between the EU citizen and the TCN family member.<sup>513</sup> The Court reiterated its position in *Chavez-Vilchez* but further clarified that in relation to a Union citizen, who is an adult, the relationship of dependency that would justify granting derivative residence rights to the TCN under Article 20TFEU 'is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible'.<sup>514</sup>

Unlike these cases which were connected to Article 20TFEU, *Diallo*,<sup>515</sup> which is one of the recent cases concerning rights of EU citizens and their TCN family members, was linked to Article 21TFEU and the provisions under Directive 2004/38 echoing the Court's earlier approach in *Iida*. The questions referred to the Court were procedural concerning time-frames for residence permits of family members of Union citizens and is important in terms of clarity concerning the procedures that Member States need to observe when making decisions on authorising residence cards. The point, however, I wish to underline from this case is connected to the consideration of personal circumstances. The Court stated that the automatic issuance of residence cards without examining whether the applicant fulfils the criteria for residence, would be contrary to the

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<sup>512</sup> *ibid* para 72

<sup>513</sup> para 62

<sup>514</sup> Case C-82/16, *K.A* (n.172) paras 72-76

<sup>515</sup> Case C-246/17, *Ibrahima Diallo v État belge*, ECLI:EU:C:2018:570

objectives of the Citizens Directive and found, relying on the previous case of *Iida*,<sup>516</sup> that the applicant in question could not be brought within the meaning of Article 2(2)(d) of the Citizens Directive and Article 4(2)(a) of Directive 2003/86 as a direct dependent relative in the ascending line.<sup>517</sup> As was the case in *Iida*, since the TCN father of the Union citizen cannot prove the element of dependency, he falls outside the scope of the Directive 2004/38 and no further links are made to Union citizenship or fundamental rights under the Charter, including family rights and the rights of the child. The main focus of the Court is clearly stated to be the effectiveness of EU law.<sup>518</sup> The interpretation of personal circumstances is of marginal consideration in the context of this and is not developed by the Court as the questions referred to it were not whether the TCN should be considered within the context of Directive 2004/38. However, in answering the procedural questions about timeframes and referring to the need to consider the individual situation of applicants, the Court referred to the aspect of dependency within the meaning of that directive and provided, as it did with previous relevant case law, a rather limited interpretation of dependency. This approach suggests that implicitly, the Court makes claims about family life, suggesting for example as in the case in *O and S* that parents who are secondary carers may not be considered parents at all for the purposes of the directive which significantly reduces their role to that of financial or material providers without consideration for the psychological impact on both the children and the parents or the preservation of family unity.<sup>519</sup>

Contrary to the approach in *Diallo*, in the recent case of *Banger*<sup>520</sup> the Court relied upon Article 21TFEU to establish that even though residence rights for TCN family members cannot be derived from Directive 2004/38 in the case of a returning EU citizen to their Member-State of nationality, such a right could be accorded in certain situations under Article 21TFEU. The Court reasoned that a Union citizen who returns to their Member-State 'should not be subject of less favourable treatment'.<sup>521</sup> In *Banger* the Court clearly shows the prioritisation of the freedom of movement which raises questions about the substantive rights of EU citizenship since those who exercise the freedom to move within the Union find themselves, although not always *vis Dano*, in a more favourable situation. The approach in *Banger* is, nevertheless, positive for Union citizens as the Court refers to family life that has been created with a TCN partner in a host Member-State, which in the absence of a right of residence granted, (in this case to the unregistered TCN partner

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<sup>516</sup> Case C-40/11 *Iida* (n.172) para 54

<sup>517</sup> Case C-246/17, *Ibrahima Diallo v État belge*, EU:C:2018:499, para 52

<sup>518</sup> *ibid* para 60

<sup>519</sup> see also Steve Peers, Tamara Harvey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights: A commentary* (Hart Publishing, 2014) 221

<sup>520</sup> Case C-89/17, *Secretary of State for the Home Department v Rozanne Banger*, EU:C:2018:570

<sup>521</sup> *ibid* para 32

of EU citizen) risks creating uncertainty and discouragement to the exercise of the freedom to move.<sup>522</sup> This approach, although positive, may introduce more questions than it answers in relation to the substance of citizenship rights. We see in Banger that freedom of movement is vital for citizenship, but it still remains unclear what the substantive rights of EU citizenship are other than movement.

## 1.7 Concluding Remarks

This varied interpretation of case law can be confusing and far from being clear or predictable. Spaventa has identified four phases to explain the Court's interpretation during the development of citizenship.<sup>523</sup> She identifies first and foremost the market citizen phase, which was before the institutionalisation of citizenship, and it applied to Community workers, as was explored in this chapter concerning the pre-Maastricht framework.<sup>524</sup> The second phase is identified as the constituent phase that came with the entry into force of the Treaty of Maastricht and mainly focused on expanding economic rights and strengthening the individual citizen; indicative cases include *Martinez Sala*, *Grzelcyck*, *Baumbast*, and *Bidder*.<sup>525</sup> The third phase, is the consolidation phase where the Court's interpretation became codified in Directive 2004/38 and the rights of EU citizens became, supposedly, more predictable (albeit for the exceptional cases that arose within the context of *Zambrano*).<sup>526</sup> The final phase, is what Spaventa characterises as the reactionary phase.<sup>527</sup> In this phase, the Court tends to favour certain privileged groups of citizens, i.e. those who are wealthy and those who are mobile, leading the Court to depart from earlier approaches to citizenship as holding a fundamental status for Union citizens; this is reflected, according to Spaventa, in cases like *McCarthy*, *Dereci*, and *Alokpa*.<sup>528</sup> Following the analysis in the preceding section of this chapter, we can also identify the *Dano* line of cases as part of this reactionary phase where the Court seeks to put Member States' concerns to rest about welfare tourism and, consequently, interprets the Citizens Directive rather sternly without reference to the fundamental status of EU citizenship. Spaventa rightly points out that this phase must be understood within the wider context of the debt crisis and the varied reactions towards the global

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<sup>522</sup> *ibid* para 28

<sup>523</sup> Eleanor Spaventa, 'Earned Citizenship - Understanding Union citizenship through its scope', in Dimity Kochenov (ed), *EU citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 204

<sup>524</sup> *ibid* 206

<sup>525</sup> *ibid* 207

<sup>526</sup> *ibid* 208

<sup>527</sup> *ibid* 208

<sup>528</sup> *ibid* 213-221

migration crisis.<sup>529</sup> However, as she also notes, thinking back on the developmental history of citizenship and the EU in general, it can be recalled that during the crisis in the 1970s the Court had taken a completely different approach. It had focused on enhancing the role of the citizens and bringing them closer to, rather than driving them away from, the legal framework.<sup>530</sup> It is, therefore, important to reflect upon why this may be different now? Although this is not a question that can be answered in the context of the present thesis, posing questions like these which concern the present and future of the EU polity, confirm that we need to reconceptualise matters that fall within the AFSJ.

It may be the case that with its most recent case law on family reunification in internal situations, the Court is embarking upon its fifth phase in its citizenship case law where it may further clarify the substance of rights under Article 20TFEU and to be more active in incorporating the Charter. However, the fact remains that the Charter only becomes relevant once a connection is established with EU law which the Court typically finds under Article 21TFEU and the exercise of free movement, or under exceptional and not very clear circumstances under *Zambrano*. Uncertainties about the scope of EU law and the struggle for individuals to claim rights within the citizenship framework is not, as I argue further in Chapter Two, sufficient for a European citizenship that claims to have a fundamental status and substantial rights and whose priority is, or should be, the individual. The decoupling of free movement (Article 21TFEU) and citizenship (Article 20TFEU) provisions together with the Court's case-law establish more dichotomies and more discriminatory traits. At the same time, very selectively and exceptionally can EU citizens and their TCN family members be brought within the scope of EU law. This depicts the EU's weak human dimension and it, therefore, necessitates reflection and re-evaluation of the constitutional and other socio-political structures that guide practices in this area.

O'Brien has sharply criticised the Court's approach in the line of cases of *Dano* and has argued that there is a 'moral vacuum within the theory of free movement at EU level as notions of equal treatment become mutable and pragmatic, not fundamental and principled.'<sup>531</sup> This, she explains, renders the 'personhood' of EU citizens directly linked and only recognised through work and economic activity.<sup>532</sup> The author of the current thesis agrees with this statement to a great extent, particularly within the context of the different legal bases that rights are claimed within the citizenship framework. The problematic aspect of uncertainty as to the substance of citizenship

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<sup>529</sup> *ibid* 209

<sup>530</sup> *ibid* 224-225

<sup>531</sup> Charlotte O'Brien, 'Civis Capitalist Sum: Class as the new guiding principle of EU free movement rights', 2016 53 (4) Common Market Law Review 937

<sup>532</sup> *ibid* 940

can be largely blamed for this unease. We have seen, however, that steps have been taken to incorporate the rights of the child and family as part of the substance of citizenship in the context of Article 20 TFEU and we have seen more engagement with the Charter. Although this is currently limited to cases involving children who may be obliged to leave EU territory in the absence of residence permit for their TCN family member, and in even more rare cases (following *K.A.*) of adults where separation by the EU citizen from the TCN family member is not possible, it remains to be seen how future case-law will be interpreted. *Banger*, however, gives us a clue that the free movement provision will be prioritised where there is cross-border activity and with no need even to mention the substance of citizenship rights.

Considering the reasoning in *O and S* about step-fathers and the relationship of dependency, even in the light of new guidelines in *Chavez-Vilchez* and *K.A.*, questions are raised about how far the Member States implementing the Court's guidelines are willing to go to balance different interests including the best interests of the child. In relation to that, Kroeze has rightly underlined that 'it is self-evident that maintaining the family together is almost always in the interest of the child and the family'.<sup>533</sup> The Court gradually steps into areas of family law, and its guidelines paint acceptable images of family structures. Parents are assessed as to whether they fit that picture before being considered for a residence permit, while it is possible that if the EU citizen parent is 'able and willing to assume sole responsibility' of the child, then the TCN parent may well be deported.

The substance of citizenship rights merits further elaboration if not by the Court then by future treaty revisions so as to avoid situations like in *Alokpa* or *O and S* as well as to address gaps created by cases like *Dano*, which raise even further questions about deportation and re-entry. While the Court's approach is to typically leave room for the Member States' to establish, for example, whether the conditions for sufficient resources are satisfied (*Alokpa*) or whether the genuine enjoyment of the substance of citizenship rights will be denied (*Zambrano*), the current author submits that it is within the Court's mandate to interpret fundamental rights not limited to free movement. The Court is also responsible for those rights protected by the Charter, and it should take up this opportunity more vigorously even by way of *obiter dictum*. Additionally, as the EU and the Court of Justice delve into the area of family law, most notably through the Family Reunification Directive and the Citizens Directive, a reflective reconsideration is needed concerning ideas constructed around concepts of family, including different types of family, gender and gender roles as well as the aspect dependency. This reflective approach should

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<sup>533</sup> Kroeze, The substance of rights (n.456)

facilitate a more human-centred approach of EU law that fully respects the human dignity of all persons within its territory.

The individual, as the legal subject of EU law, particularly in the context of citizenship, is therefore expected one way or another to fit a specific profile. Consequently, what the judicial interpretation of EU citizenship suggests is that the 'Other' in the context of Europe's socio-political identity is not necessarily only the securitised migrant discussed earlier in this chapter but also the undeserving citizen who is most commonly the non-economically active one, has not exercised their freedom of movement, and is unable or has no intention (for whatever reason) to work. Consequently, the question that remains is what does European citizenship and fundamental rights in the EU offer to those who may find themselves in vulnerable situations (such as those living in poverty including large numbers of children across Europe), those living alternative lifestyles (such as, but not limited to, those in the Roma community),<sup>534</sup> or those living under precarious legal status (such as asylum seekers, migrants in irregular situations, and stateless persons).<sup>535</sup>

While earlier in this chapter I have referred to the notion of gated Community used by Van Houtum and Pijpers to describe the practice of selective migration,<sup>536</sup> the metaphor of the revolving doors developed by Acosta and Mertire now seems to describe more accurately the welcoming and simultaneously hostile and securitisation regime of citizenship and immigration. The revolving doors metaphor, shows that it is now more about a flexible way of controlling access and exit and a continuous process of possibilities, rather than automatic and more permanent exclusion or inclusion.<sup>537</sup> The legal subject in the EU began, as shown in this chapter, as a Community worker within a market-based logic in a pre-Maastricht era who gradually evolved into a socio-political subject whose freedom to move within the Community was seen as fundamental to the European project and was even extended to TCN family members. In the post-Lisbon era, and with the elevation of the Charter, the legal subject is carefully selected and screened before being allowed to enjoy EU (derived) rights. The subject's worthiness (in this case the European citizen and the eligible TCN) is critically assessed based primarily on the subject's intention to work or to make (more) money and to avoid situations of vulnerability which could

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<sup>534</sup> see for example Owen Parker, 'Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance' 2012 50 (3) *Journal of Common Market Studies* 475; Carrera & Atger, *L'affaire de Roms* (n.316); Nuno Ferreira & Dora Kostakopoulou, 'The Roma and European Union citizenship: In search of a humane answer from the EU', 206-234 in Ferreira & Kostakopoulou, *The human face of the European Union* (n.31)

<sup>535</sup> Dallal Stevens, 'The humanness of EU asylum law and policy', 235, and Julia Bradshaw, 'Stateless in Europe: The unbearable lightness of being an unpreson in the EU', 260, both in Ferreira & Kostakopoulou, *The human face of the European Union* (n.31)

<sup>536</sup> n.295

<sup>537</sup> Acosta & Mertire, *Trapped in the Lobby* (n.355)

lead to reliance (even temporarily) on the social security system of a Member-State other than her own. In other words, in the context of citizenship the subject (the EU citizen or the TCN family member) must earn this right, as Spaventa shows, ‘through wealth, health and good behaviour’.<sup>538</sup>

Even though identifying these securitisation and instrumentalist discourses of citizenship, and earlier of migration, paints a rather bleak picture for the individual in the EU, we should not undermine the positive steps taken by the Court and the gradual development of rights within the short history of the EU. The recognition and elevation of certain fundamental rights, such as the rights of the child and family life as part of the substance of citizenship rights, and the extension of residence and employment rights to TCN family members are significant steps. Some of the positive and more inclusive aspects within the Court’s case law are further explored in Chapter Four, with particular focus on asylum and detention cases. Identifying these discourses enable us to understand some of the weaknesses of the citizenship and migration regime which will be further conceptualised in the context of Chapter Two, which explores why and how we may refocus on the more positive elements of citizenship and migration in the context of the AFSJ. Chapter Two, therefore, turns towards the more normative aspect of the subject and explores the significance of the individual for the European project.

As the cases explored in this section have indicated the regimes of inclusion and securitisation of citizenship they have shown, through this dynamic, the significance of movement in the context of citizenship as being embedded within a relationship of power. The subjects of these cases are all free and acting subjects, to use Foucault’s terminology,<sup>539</sup> and they are all subjects who one way or another have moved to or within the EU territory to work, to be with families, to improve their economic and social conditions, or simply to retire. Free movement, therefore, does not denounce their freedom; on the contrary it operates upon this freedom. It bears upon their actions ‘it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely’.<sup>540</sup> Within this relationship of power the law, as we saw, is a pivotal instrument that brings this power into being, it functions as a system of differentiations and states how and why things should happen, it institutionalises power structures,<sup>541</sup> and, eventually normalises society through actions, practices and ideas which are considered normal.

<sup>542</sup> The way power functions within the AFSJ is, consequently, inextricably connected to

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<sup>538</sup> Spaventa, *Earned Citizenship* (n.523) 221

<sup>539</sup> Foucault, *Why Study Power*, (n. 15) 788-789

<sup>540</sup> *ibid* 789

<sup>541</sup> *ibid* 792

<sup>542</sup> Foucault, *History of Sexuality* (n.22) 144

individuals and their identities and, as we will see in Chapter Two, to their autonomy. It is because it develops within a relationship of power, that the broader area of the AFSJ must be reconceptualised as it is not merely a collection of impersonal laws and rules, but it is a very personal framework that directs the actions of individuals in the societies in which they live. This point is captured by Foucault's fifth and last point relevant to the analysis of power which he calls the 'degree of rationali[s]ation' to explain that the exercise of power is not a clear-cut structure but that it involves different processes, 'it is elaborated, transformed, organi[s]ed'.<sup>543</sup> The analysis of the developmental history in Chapter One has shown the different ways in which aspects of citizenship and migration are organised within the legal context of the EU and has shown the structured and structuring aspect of movement in terms of categorising individuals and allowing or denying access to rights and freedoms within the EU legal order. It has further shown through case law how the lives of people are affected by the legal structures and interpretation of laws. Chapter Two builds and expands upon these observations by taking a step back to examine mechanisms by which this form of power influences the practices of individuals, how they internalise the various forms of power and how this power affects the lives of people in different ways.

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<sup>543</sup> Foucault, *Why Study Power*, (n. 17) 792



## Chapter 2 Theoretical dimension: A Union in motion

### 2.1 Introduction

Chapter One identified two main themes that underlined the development of the legal subject of the AFSJ. The first concerned the historical connection of citizenship, free movement, and fundamental rights to economic and market-orientated interests of the European polity as well as the increasing relevance of issues of internal security which now constitute a substantive interest of the EU. The second theme involved a more normative picture of the European polity and a vision of unity characterised by democracy, respect for human rights, and close connection between citizens and the EU. The entanglement of these two themes revealed an securitised and inclusive dimension of the AFSJ, which was explained using Foucault's notion of power. By engaging with the work of Foucault, I argued that the AFSJ operates as a dual framework within a relationship of power: a politico-legal framework and a socio-psychological. The latter framework contributes to the construction of meaning of social realities and can create norms and perceptions about Self and Other. This dialectical relationship is the subject of the present Chapter, structured around three interlocking questions. Firstly, what is the significance of the subject in the European project? Secondly, and partly to provide an approach to the former question, what is the purpose of the European polity? Finally, how can we assess whether the EU is fulfilling its purpose?

To approach these questions, the chapter borrows elements from Aristotle's theory of motion, which is a theory concerned with any form of change in the natural world. The theory of motion is a useful metaphor that can be applied to the European polity and provide some clarity while simultaneously avoiding deterministic assumptions about its present and future development. A vital element of Aristotle's theory is that of *entelecheia*, which is used to describe the actualisation of a potentiality. This approach requires that we ask more complex questions about the context in which the AFSJ has developed and whether we can and indeed should be concerned about the construction of identities and the more personal and human dimension of the subject within the legal structures. The chapter identifies the potentialities of the European polity based on its current constitutional framework and argues that as the AFSJ is central to the very existence of the EU and the actualisation of its potentialities, the subject, qua human being, is a vital component for the functioning of this area.

Secondly, in order to examine the AFSJ as part of the EU's actualisation process, it is crucial to take a step back and identify some tools through which to explore the process of actualisation. To do this, I bridge Aristotle with Bourdieu in order to construct a new theoretical apparatus that combines the interplay between structure and agency recognised by both scholars. The complementarity of Bourdieu's practical theory of habitus and its related conceptual tools add explanatory value to the process of actualisation. At the same time, Aristotle's theory provides us with a theoretical exercise that allows us to ask more normative questions about the EU's future. In engaging with Bourdieu's conceptual tools, the chapter shows the underlying mechanisms of the 'revolving doors' policy of the EU and therefore, the inclusivist and securitisation discourses.<sup>544</sup> For example, by applying Bourdieu's notions of capital and fields, we can see how it is that some people can access EU rights and freedoms while others cannot. Simultaneously, Bourdieu's conceptual tools allow us to break down how perceptions and meanings give rise to certain practices and norms. The construction of meaning and knowledge in the space of the AFSJ is, therefore, inextricably connected to identities. For example, how the Self is constructed within, and interacts with, its social environment. This connection justifies the bridging of Bourdieu with certain aspects of social psychology explored in this chapter.

The chapter finally explores how the subject internalises practices that take place within the AFSJ, and how the latter, as a space of communication and interaction, influences the construction of identities. For these purposes, we will look at the approach of Moscovici, alongside relevant aspects of the work of Mead and Castoriadis. This section aims to supplement the discussion on the dialectical relationship between agency and structure within the AFSJ, and to examine the implications of communication in the social space on the construction of identities and the process of internalising norms, ideas and beliefs. This analysis underlines the significance of approaching the EU through a human-centred approach that prioritises the wellbeing of individuals which is simultaneously connected to the wellbeing of societies by understanding some of the underlying processes of how structures are internalised by individuals. The connection to social psychology reflects the affective dimension of the AFSJ and the European polity more generally as it shows us how reason, through law, is entwined with emotions and embodied experiences.

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<sup>544</sup> Acosta & Mertire, *Trapped in the Lobby* (n.355)

## 2.2 Approaching the EU's *entelecheia*

Chapter One has already illustrated how the free movement has acted as the basis for the establishment of European citizenship, gradually expanding the legal subject beyond the confines of the legal status of citizenship. Mobility has been the initial trigger of European integration through the free movement of workers. It has gradually developed within an area of freedom, security, and justice with rules and mechanisms of security while managing the movement of the broader population that find themselves connected to this area. Mobility has, consequently, been a fundamental force for the development of the European polity; it has triggered economic, political and social changes in the construction of the EU through “enabling” or “constraining” access. Understanding mobility in this way further allows us to parallelise the free movement with Aristotle’s theory on motion (*kinesis*), which is based on the process of change. We may understand the European polity as an entity in motion bound by its own potentiality, which is comprised of living subjects with their individual potentialities that they seek to actualise, including, for example, economic, social, political, psychological and physical wellbeing.<sup>545</sup>

In Aristotle’s theory, motion (*kinesis*) is understood as the actuality (*entelecheia (+energeia)*) of a potentiality (*dynamis*). Although this may be confused as teleological, Aristotle did not see actuality as the result of a potentiality but rather as already an intrinsic component of it. The term *entelecheia* translates to “completeness”, however, Aristotle incorporated within this term the notion of *energeia* that denotes a sense of being active or being in motion. *Entelecheia* and *energeia* are consequently intertwined and understood as actuality, usually without being distinguished or separated (actuality=*entelecheia(+energeia)*) to explain the process of a “substance” moving closer to its completed form. Aristotle explains ‘[...] the end is the actuality and it is for the sake of this actuality-end that the potentiality is brought in’.<sup>546</sup> Similarly, for Aristotle, it was impossible for potentiality to exist without already having a conception of the actuality. For example, ‘[...] the very name, actuality, has an account based on the active function, which is extended to the entelechy’.<sup>547</sup> Aristotle further explained that ‘[e]very potentiality is simultaneously the potentiality of the negation of what it is the potentiality of[.] [...] [A]nything that does have a potential for being might not be actualised.’<sup>548</sup> In this sense, the term potentiality (*dynamis*) can be understood as the capacity of something or someone to achieve a

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<sup>545</sup> Amartya Sen and Martha Nussbaum have talked about this in terms of capabilities which is strongly connected to Aristotle’s idea of human flourishing. Martha Nussbaum & Amrtya Sen (eds), *The quality of life* (Oxford University Press, 2004)

<sup>546</sup> Aristotle, Lawson-Tancred H. (tr), *Metaphysics* (Penguin Books 1998), Chapter Theta 8

<sup>547</sup> *ibid*

<sup>548</sup> *ibid*

more completed state.<sup>549</sup> The question raised is this: how can this be applied to the European polity, and what can we learn about the AFSJ using this metaphor?

Viewing the EU as an entity in motion allows us to ask questions concerning its future. From its inception, the European polity involved not only merging markets and economies but also people, often framed within the more general terms of “European unity” or “an ever-closer union”.<sup>550</sup> Such a union of people, states, and markets, I argue, is the EU’s actuality. In the current state of the EU’s constitutional framework, which is the Treaty of Lisbon, this is envisaged in Article 1TEU which pronounces ‘a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’

In Aristotle’s terms, ‘it is for the sake of this actuality-end that the potentiality is brought in.’<sup>551</sup> In other words, these ideas of unity have functioned as the driving force of the evolution of the European polity. If the actuality for the builder is inherent in his capacity to build,<sup>552</sup> then what is the analogous capacity for the EU to become such a union? The Treaties, as well as the Court of Justice’s jurisprudence, have consistently referred to the constitutional traditions of the Member States and the common values shared between them. We have, for example, seen in Chapter One that the human rights discourse has been triggered by the Member States’ reactions to the case law of the Court of Justice and we have seen a judicial dialogue between national constitutional courts and the Court of Justice. These common values and traditions shared between Member States and utilised by the Court, function as the foundation of the European polity. More particularly Article 2TEU states:

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

What this tells us is that the potentiality of the EU to become ‘an ever closer union’ is inherent in its capacity to become one based on values which are already part of its foundations. The reactive approach to the development of fundamental-human rights at the EU level, as we saw earlier in

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<sup>549</sup> *ibid*

<sup>550</sup> This is evidenced from early on in documents such as The Tindemans Report (n.164) and the preamble to the treaties

<sup>551</sup> Aristotle, *Metaphysics*, (n.546)

<sup>552</sup> *ibid*

Chapter One, should be understood within this context. In other words, the conception of this actuality, i.e. becoming such a union, is inherent in the potentiality to become such a union. Having established that it is indeed possible to talk about the actuality and potentiality of the European polity we may now ask what is the force (*energeia*) or active elements that take the EU closer to (but not necessarily at) its completed form? To understand this, we must look at how the EU conceives such a union. We gain an idea as to who is intended to benefit from this union in Article 1TEU which places the 'people of Europe' and the 'citizen' at the centre of decision making, but what are the processes through which such union is to be achieved for the benefit of these people? Article 3TEU, which is the legal provision that establishes the practical aims of the EU, may be used as the answer to this question. Article 3TEU states:

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice [...] with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market [...]
4. The Union shall establish an economic and monetary union [...]
5. In its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

The AFSJ constitutes only one of several mechanisms for achieving this union. Therefore, this allows us to explore this area as part of the EU's actualisation process with reference to the foundational values of the EU, i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values may ultimately be understood as part of the EU's capacity to become an ever-closer union (*entelecheia*) which along with the active practices of the AFSJ (*energeia*), and in combination with the other practical goals, the EU is becoming one such union.

In attempting to describe and capture the nature of this evolving entity, terms such as ‘superstate’,<sup>553</sup> ‘superpower’<sup>554</sup>, ‘cosmopolitan empire’,<sup>555</sup> ‘network polity’,<sup>556</sup> and ‘economic and political partnership’,<sup>557</sup> have been used, among others. These are useful when trying to conceptualise and analyse what kind of “beast” the EU is, but in this thesis the focus is shifted from the characterisation or categorisation of the EU as one specific kind of polity, to its constitutional basis as it currently stands. What I mean by this is that the EU may be all of these things and none of these things. Its multilevel policy structure and its *sui generis* nature can be praised and strictly scrutinised at the same time depending on how one perceives this complex polity, so if we want to see ‘what’s wrong with the European Union and how to fix it’<sup>558</sup> we must first look at what it is trying to do.

Conceptualising the EU through actuality and potentiality, the development of the European polity can be explored from a non-deterministic perspective thus allowing room for change. From this approach we can see that both the legal and biopolitical frameworks fall within the process of the EU actualising its potentiality and becoming an ‘ever closer union among the peoples of Europe’. The legal framework seeks to protect the territory of the EU while the biopolitical aspect centres on security mechanisms for the control and management of populations. An important question that follows regards the balance between the active elements (*Energeia*), particularly in relation to the AFSJ, and the foundational values of the Union (Article 2 TEU) centring on the individual person who is intrinsic to the establishment of this union. For example, while security goes hand in hand with freedom and justice, the securitisation aspect attached to migration may challenge the practical implementation and interpretation of the values of the Union, in terms of human rights, human dignity, and equality, among others. With reference to Foucault’s governmentality and more specifically his notion of biopower, a tendency towards treating migration in terms of security or treating EU citizenship on the basis of economic instrumentalism may not be inconsistent with EU’s market and security-orientated aims. However, departing from the foundational values of the Union in migration and citizenship practices, will challenge EU’s actualisation of becoming an ever closer union in cases where Member-State or EU interests dominate over personal rights and freedoms. An emphasis on the common market with disregard

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<sup>553</sup> Morgan Glyn, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press, 2009)

<sup>554</sup> Robert J. Guttman (ed), *Europe in the New Century: Visions of an Emerging Superpower* (Lynne Rienner Publishers, 2001)

<sup>555</sup> Ulrich Beck & Edgar Grande, *Cosmopolitan Europe* (Polity, 2007)

<sup>556</sup> Barrie Axford & Richard Huggins, ‘Towards a post-national polity: the emergence of the Network Society in Europe’ 2000 48 (S1) *The Sociological Review*, 173

<sup>557</sup> Official website of the EU: The EU in brief last accessed at <https://bit.ly/1SD392r> on 19 August 2019

<sup>558</sup> Phrase borrowed from Simon Hix’s book entitled *What’s wrong with the European Union and how to fix it* (Polity Press, 2008)

for the wellbeing of the people in Europe or a narrow interpretation of security with disregard for human rights law undoubtedly results in systemic imbalances. As a result, in the absence of a balance between the various interests of the EU and a departure from its founding values and principles, will risk reducing the role of subjects qua individuals and potentially alienate them which would be inconsistent with the overall European project.

Recognising the role of the legal subject as both a prerequisite for and as a potentiality within the existence of the EU demonstrates the need to reflect upon the relationship between law and identity. It is within these politico-legal structures, which make up the constitutional corpus of the EU, that the legal subjects develop both as holders of rights and as individuals who try to actualise their own potentialities.

The remainder of this chapter conceptualises the processes through which the habitus is formed and developed in order to explain the EU's process of actualisation and its underlying mechanisms using Bourdieu's sociological tools. The primary purpose of this chapter is to lay down a theoretical and normative framework for understanding aspects of the AFSJ by recognising the dynamic relationship between structure and agency but also the power relations that influence practice and construction of knowledge in the social space. Before moving on to the next section, some important clarifications in respect to applying Aristotle's theory of motion to the EU are stipulated.

Firstly, I want to clearly restate that I am not suggesting at any point in this thesis that there are no links between migration and security. To do so would be absurd. However, it is wrong to presuppose such a link and in so doing institutionalise and normalise it by framing the phenomenon of migration as a threat. This is particularly true given that transnational crime that may often be connected to migration falls within the area of criminal law and can be dealt with through the criminal justice system.<sup>559</sup> Avoiding this presumption requires reflecting upon our understanding of security itself, rather than conflating it with securitisation. Security is, as Gibbs explained, a constitutional public good, and it is to be enjoyed by everyone irrespective of citizenship status.<sup>560</sup>

Secondly, talking about the actualisation of the EU's potentiality to become some form of "union" or "unity" of people based on its foundational values and principles should not be understood in deterministic or exclusivist terms, but rather as a process in the context of a globalised and

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<sup>559</sup> see also Didier Bigo, *Security and Immigration: Towards a Critique of the Governmentality of Unease*, 2002 27 (1) *Alteratives* 63

<sup>560</sup> Alun Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Ashgate, 2011)

diverse world. The meaning of this 'union' may change as the potentialities of the EU similarly change. This chapter argues that Aristotle's ideas of actuality and potentiality are useful theoretical tools which can also be flexible. Their use can therefore enrich our efforts to understand what the European polity is, what we could expect from it and what is or should be the role of individuals within it. As Aristotle said, 'anything that does have a potential for being may not be actualised'. This does not, however, mean that it loses its capacity to become such a union. Moreover, the chapter does not aim to suggest that the EU should become one form of polity over another. Instead, it explores the EU's evolution on the basis of its constitutional framework and with reference to the intentions that have been expressed throughout its historical development. It is with these points in mind that it is possible to transfer elements of Aristotle's theory of motion to the European polity.

Although this should be clear from the context of this thesis, it should nevertheless be highlighted that using Aristotle's theory on motion as a metaphor to understand what kind of Union the EU is or should be, must be interpreted in an inclusive way consistent with the polity's foundational values thus rejecting any ethnocentric superiority perceptions. It is the contention in this thesis that the EU must be understood in its broader context of the global community with a focus on the wellbeing of all people and with respect towards the cultural richness and diversity of our world.

Further, discussion of the EU's potentiality being actualised, in some form of European unity based on common values and the peoples of Europe as compass, can slip into determinism. This chapter makes a conscious effort to avoid discussing a *telos* for the EU. Instead, it will explore an ongoing process during which the polity strives to uphold a level of protection, freedom, and justice on the basis of the polity's values and the rights and freedoms enshrined within its constitutional framework. During this process, the people in turn strive to actualise their own potentialities, whether these are smaller scale, such as economic, political and social wellbeing, or a state of happiness as Aristotle's ultimate good (*ypertaton agathon*).<sup>561</sup>

### 2.3 Bridging Bourdieu with Aristotle

In the previous section, we explored Aristotle's concept of actuality and potentiality as a useful theoretical tool that allows us to understand the development of the AFSJ within the context of the evolution of the EU. The AFSJ was thus identified as one of the practices (active elements)

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<sup>561</sup> Aristotle believed, for example, that the 'end-goal' for a person's life was the acquisition of the ultimate good (*ypertaton agathon*), which for him was a state of happiness (*eudaimonia*) Aristotle, Hugh Tredennick (ed) *The Nicomachean Ethics* (Penguin Classics, 2004)

which can drive the European polity closer to actualising its potentiality, and it was explained that this could and should be done with the foundational values of the EU in mind. The question that arises at this point is how to practically explore the process of actualising the EU's potentiality with reference to one of its driving mechanisms, i.e. the AFSJ. In other words, how can we gain a better understanding of this power which is dispersed, as we saw in Chapter One, in the social structures and can be both forbidding and simplifying? As the application of Aristotle's theory of motion has provided us with the normative framework with which to explore the AFSJ, we can now turn to the more practical aspects of the actualisation process and identify some elements that may help us explore whether the European polity is moving closer to its actualisation and to what extent. I have already indicated that the securitisation of certain aspects of migration (i.e. those not connected to economic interests) indicates a problematic aspect of this process. It affects the 'space' in which identities form and in which construction of meaning takes place. At the same time, a potentially problematic element was identified in relation to the interpretation of the substance of citizenship rights and the scope of Article 20 TFEU as interpreted by the Court. In relation to the latter, it was explained that an exclusionary aspect is entailed in relation to some individuals, such as non-economically active citizens or those who have not engaged in cross-border activity, as well as TCN family members who may not be able to establish a relationship of dependency as this is understood by the courts. In engaging with Bourdieu's work on the aspect of habitus, this section aims to add an explanatory value to Aristotle's more normative framework in understanding the AFSJ and the construction of the subject.

Bourdieu's sociological contribution is devoted to understanding the interplay between individual agents and the social structures that can explain issues of domination and hierarchy in society. Through the lens of power, he approaches this relationship between agency and structure and develops some conceptual tools to explain the dynamics of power. Unlike Foucault, who explores power in terms of its historical evolution, Bourdieu approaches power as operating in fields through the habitus providing a complex network that helps us understand the dominant and dominated positions of agents. This ultimately enables us to understand how meaning is socially constructed in a given social space. The interplay between agency and structure is central to Bourdieu's sociological approach, as it is for Aristotle's philosophy in general. For example, what Aristotle considered as a person's ultimate potentiality in life was the acquisition of a state of happiness (*eudaimonia*). Achieving this was possible only through the cultivation of certain virtues and ultimately through the development of certain habits which become internalised. Aristotle was, therefore, focused on active and disciplined actions of individuals, such as the display of moral virtues (i.e. justice, courage), which can be cultivated through habituation in order to

actualise their potentiality.<sup>562</sup> As this set of virtues and their internalisation are embodied, this suggests that account must be taken of the emotional and socio-psychological characteristics and elements of human beings which is an important foundation for the argument of a social empathy approach developed in Chapter Three.

Aristotle, however, did not seem to pay much attention to unconscious processes and ‘unprincipled virtues’,<sup>563</sup> which may also influence the actualisation of potentialities.<sup>564</sup> Bourdieu, on the other hand, focuses on the habitus as ‘structured structures predisposed to function as structuring structures’<sup>565</sup> which may be taken as not allowing enough room for individual participation, reflexivity and free will in the construction of the social space.<sup>566</sup> The common denominator in both approaches, apart from the dialectical relationship between structure and agency,<sup>567</sup> is the practical effect of habit in the construction of society. For both scholars, *habit* ultimately acts to develop identities and determine the role of individual social agents through conscious or unconscious processes.<sup>568</sup> This allows us to explore the process of actualization of the EU’s potentiality with reference to the ‘habits’ that may have developed within the AFSJ, in the form of norms, dispositions and other practices which may be the result of social, legal, and political structures with the capacity to influence the construction of identities. As was saw in Chapter One, Foucault calls this process ‘normalisation’ whereby a ‘norm’ is established and accepted as both normal and normative. The population is then eventually organised and governed according to this ‘norm’. Bourdieu’s notion of habitus allows us to explore some of the more unconscious processes helping us to understand the underlying dynamics of the AFSJ and to strengthen our appreciation of how perceptions of migration may be constructed. Alongside Aristotle’s more conscious processes, this theoretical framework suggests that it is possible to cultivate more reflexivity in the construction, deconstruction and reconstruction of the habitus, which is taken up towards the end of this chapter.

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<sup>562</sup> *ibid*

<sup>563</sup> Used by Andrew Sayer, ‘Reflexivity and the habitus’, in Margaret S. Archer (ed), *Conversations about Reflexivity (Ontological Explorations)* (Routledge, 2010)

<sup>564</sup> Whether this is applied to things, persons, or, in the current case, to the EU as an institution.

<sup>565</sup> Bourdieu P., *The logic of Practice* (Polity Press 1990)

<sup>566</sup> A similar argument is made by Andrew Sayer, ‘Reflexivity and the habitus’ in Archer M.S. (ed), *Conversations about Reflexivity* (Routledge, 2013)

<sup>567</sup> The relationship between structure and agency is revisited at a later point in this chapter with reference to Moscovici, Mead and Castoriadis.

<sup>568</sup> Aristotle tends to emphasise the conscious aspect of an individual’s contribution to social structures through, for example, the cultivation of virtues while Bourdieu tends to focus on the more unconscious aspects such as through dispositions and doxa (explored further in this section).

## 2.4 Exploring Bourdieu's sociological tools and their application to free movement.

As introduced in the previous section, Bourdieu was interested in understanding society and its relationship to individuals in terms of power. The dimension of power can be explained, according to the French sociologist, culturally and symbolically. In other words, it can be created and recreated through social norms and dispositions developed through interaction between agents (subjectivism) and society's structure (objectivism). Bourdieu developed several key concepts in order to explain the processes by which power in society operates and is then interpreted as social practice, involving direct and indirect mechanisms that can be used to understand this interplay between social agents and structures.

The key idea is embodied in the concept of the habitus which is used to represent the 'matrix of perceptions, appreciations, and actions' and which is, in turn, responsible for 'the achievement of infinitely diversified tasks'.<sup>569</sup> The term habitus derives from Aristotle's ethics, and it is the translated version of *hexis*. Aristotle elaborated on the concept in the context of moral virtue (*arête*), which was understood as an acquired disposition, or habituation.<sup>570</sup> While Aristotle focused primarily on this idea of moral virtue as a means towards happiness, Bourdieu has revived the notion of habitus and expanded it beyond the discipline of ethics and morality to his theory of social practice. Although Aristotle's thought was similarly rooted in practical thinking, like Bourdieu's, the latter departs from what may be confused as teleological elements in Aristotelian philosophy and instead focuses on a more practical application of habitus that can be adjusted in various contexts. Consequently, for Bourdieu, social norms, dispositions, and perceptions, which are acquired by social agents, form the habitus that is constituted both by conscious and unconscious processes and are then reflected in social practice. Just like moral virtue is a *hexis* for Aristotle, perceptions, attitudes and norms, constitute Bourdieu's habitus. Drawing from that, social attitudes like racism and discrimination, or even solidarity and support, as well as norms relating to our perceptions on migration and security, but also our ideas and inclinations pertaining to notions of belonging and identification, can also form part of the habitus.

Bourdieu characterised the habitus as 'history turned into nature'<sup>571</sup> in order to explain the eventual normalisation of norms, dispositions, actions, and perceptions as taken for granted phenomena in every-day life. Through the habitus, Bourdieu attempts to explain the interplay

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<sup>569</sup> Pierre Bourdieu, Nice R. (tr), *Outline of a theory of practice* (Cambridge University Press 1977) 83

<sup>570</sup> Aristotle, *Nicomachean*, (n.561)

<sup>571</sup> Bourdieu, *Outline of a Theory of Practice*, (n.569)78

between conscious and unconscious forces underlying the development of practices in social space: 'It is just as true and just as untrue to say that collective actions produce the event or that they are its product'.<sup>572</sup> There is an inevitable loop, an antinomy, relating to agency and practice and which one comes first; this is also reflected in the philosophy of Aristotle who understood that society precedes the individual whom he saw as a social animal. This is also part of his logic in suggesting that actuality is always present in the potentiality. Embracing this 'antinomy' allows us to acknowledge the premise that, society and the individual are intertwined and inseparable constituents that each, acts as a prerequisite for the existence and development of the other. This approach accepts both the social constructivist premise of knowledge being socially constructed and through interaction as well as the post-structuralist premise of relational and co-dependent relations between structures, identities, and meanings.<sup>573</sup> This can also be applied, by the same logic, to individual and collective identities from a micro-level (family, village, town) to a macro level (nation, federation, EU, world). To elaborate on this, an important requirement to "unlocking" the full potential of individuals within society is to recognise that the individual level (personal thoughts, feelings, attitudes and expressions of individuals) is always present at the collective level (social imaginaries, myths, traditions, prejudices and norms) and vice versa. Aristotle saw this relationship between the individual and the social and the reflection of one on the other. That is why his philosophical approach focuses so prominently on the advancement of intellectual and moral virtues,<sup>574</sup> as well as on the organisation of the city-state of his time.

Bourdieu shares a common understanding of this relationship between individual and social and that is also why he focuses on the complex inter-constitutive nature of social structure and social practice, which similarly influence the production and reproduction of identities. For example, the concept of habitus was developed in his ethnographic research in Algeria where he studied the Kabyle people and where he tried to deconstruct social practice in the Kabyle society by linking together the individual level of personal and family life with the management of society at large.<sup>575</sup> Bourdieu has similarly used the notion of habitus to examine differences in taste and consumption (e.g., *Distinction*)<sup>576</sup> as well as to analyse the reproduction of inequality in the French

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<sup>572</sup> *ibid* 83

<sup>573</sup> see n.3 and n.10

<sup>574</sup> Aristotle, *Nicomachean Ethics* (n.561): Intellectual virtues: wisdom and practical wisdom, and Moral virtues: justice, courage, liberality, temperance etc

<sup>575</sup> see Jane Goodman & Paul Silvertstein, 'Introduction: Bourdieu in Algeria', in Jane Goodman & Paul Silvertstein (eds), *Bourdieu in Algeria Colonial Politics, Ethnographic Practices, Theoretical Developments* (University of Nebraska Press, 2009)

<sup>576</sup> Pierre Bourdieu, Richard Nice (tr), *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1987)

Educational system (e.g. *Reproduction in Education, Society and Culture*),<sup>577</sup> thus engaging in empirical research that aimed to analyse the relationship between agency (individual) and structure (society) by revealing the complementary nature of the two.<sup>578</sup>

This necessitates a dialectical understanding of the AFSJ which should be understood, as already argued, not only within its legal boundaries but as a social practice that influences social life and the individual but also influenced by the latter. In other words, the significance of European citizenship is not simply expressed in the legal provisions of the Lisbon Treaty, but it also extends to the self-perception of the individuals affected, their identification with other people and even to their every-day choices and practices in terms of employment, studies, vacations, as well as the exchange of ideas, communication and feelings of belonging. Similarly, migration is not only about the legal status, boundaries, rights and freedoms provided within the legal framework of the AFSJ but it is also about the perception of what migration is and who is defined as a migrant, how and why migrants are welcome or excluded within society as well as how migrants themselves may influence the construction, reconstruction and deconstruction of the habitus.

This dialectical process can be understood through the second sociological tool which Bourdieu has developed in the context of the habitus; this is the notion of *bodily hexis*, which is what connects the habitus (the acquired dispositions) to the body. The habitus is, according to Bourdieu, anchored to the body through the *bodily hexis* and it is through this *bodily hexis* that we develop gestures and other forms of communication in the social space, such as our postures or expressions. It 'is political mythology reali[s]ed, embodied, turned into a permanent disposition, a durable manner of standing, speaking, and, thereby, of feeling and thinking'.<sup>579</sup> In fact, for Bourdieu, the body was treated as a form of memory platform<sup>580</sup> that connects individuals to each other and to the social world. The implications of the development of citizenship and migration within the AFSJ can similarly be articulated through the *bodily hexis*, which is not only a form of expressing the embodied dispositions and acquired norms but it is also a form of communication and self-understanding. This means that both positive and negative articulations are inscribed in the body through the habitus which may, for example, include notions of inclusion and exclusion,

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<sup>577</sup> Pierre Bourdieu & Jean-Claude Passeron, Richard Nice, (tr), *Reproduction in Education, Society and Culture* (Sage Publications, 2<sup>nd</sup> ed, 1990)

<sup>578</sup> The debate on agency and structure has been addressed by various other philosophers and sociologists, such as Marx and Hegel, who attach a more collectivist dimension to agency, as well as Norbert Elias and his theory of civilizing process, and Anthony Giddens with his structuration theory. However, the thesis focuses on Bourdieu's theoretical approach as the sociological tools he provides such as, for example, the different forms of capital, as well as his emphasis on culture, allow for greater discussion and exploration of notions of identity within the context of the EU.

<sup>579</sup> Bourdieu, *Outline of a Theory*, (n.569) 93-94

<sup>580</sup> Bourdieu, *Distinction* (n.576) 474

as well as frames of thought and categorisations of individuals, such as safe or dangerous, as we already explored with reference to Foucault's system of differentiation in Chapter One.<sup>581</sup>

Another related concept to *bodily hexis* and the habitus is the notion of *doxa*, which is also a concept that Bourdieu borrows from Aristotle, albeit within a more developed and generalised interpretation.<sup>582</sup> The Aristotelian notion of *doxa* was a concept used to distinguish the public/common view from scientific knowledge; it was the wisdom of everyday practice and conduct that differed from scientific and objective facts.<sup>583</sup> *Doxa* had been previously used by Plato, Aristotle's teacher and mentor, as denoting a more negative meaning along the lines of false belief based on non-rational perception.<sup>584</sup> Within this background, Bourdieu expanded the notion of *doxa* and used it to describe the things that are taken for granted and appear as natural in the social world. This is because they are accepted and recognised through a system of classifications that provides legitimacy through misrecognition. Through this misrecognition, power is produced and reproduced in the social structure and becomes the mode of legitimation of practices.<sup>585</sup> When, for example, there is strong public opinion that is not necessarily based on any scientific or objective proof, and may very well be untrue, we have *doxa* based on Bourdieu's interpretation. *Doxa*, in other words, is based on the reproduction of misrecognition, which is developed by agents themselves through a non-reflexive and unconscious process causing presuppositions, beliefs, and norms, which appear to be true and are accepted as such. *Doxa* is produced and reproduced within the legal and political structures themselves, and therefore, misrecognition becomes institutionalised and normalised reflecting Foucault's understanding of power. It is within the reproduction of misrecognition that perceptions about Self and Other become entangled and establish acceptable norms. The securitisation aspect of free movement (as opposed to the idea of security as a public good)<sup>586</sup> serves as an evidence of this point as it functions on a basis where for some people it becomes easier to enter the EU territory and to access rights and freedoms from the EU legal order (for example highly skilled migrants)<sup>587</sup> while for others, as the "migration crisis" has shown, it becomes more difficult and constrained. Similarly, in relation to the European citizenship, the worthiness of the subject in terms of

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<sup>581</sup> Foucault, *Why Study Power*, (n.17) 792

<sup>582</sup> see further Crossley N., 'Pierre Bourdieu's Habitus' in Sparrow T. & Hutchinson (eds), *A History of Habit: From Aristotle to Bourdieu* (Lexington Books 2013) 272

<sup>583</sup> Crossley N., *Key Concepts in Critical Social Theory* (SAGE Key Concepts series 2004) 67

<sup>584</sup> Crombie I.M., *An Examination of Plato's Doctrines: II. Plato on Knowledge and Reality*, Vol. 7 (Routledge 1963), Chapter 1 (II) *Doxa* and *Epistêmê*, 33-41

<sup>585</sup> Bourdieu, *Outline of a Theory* (n.569) 164

<sup>586</sup> Gibbs, *Constitutional Life*, (n.560)

<sup>587</sup> see for example in relation to economic capital in section 2.5 of this chapter and the Blue Card Directive Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, [2009] 17

satisfying, primarily economic conditions and, subsequently, other conditions that are not explicit by the Court. The cases concerning the derivative rights of TCN family members/ carers of EU citizens, reflect that different people are either explicitly or implicitly expected to fulfil certain conditions or criteria, a practice which may not in itself be problematic until we consider the element of *symbolic power* alongside misrecognition.

The notion of *symbolic power* was built, but further developed by Bourdieu, on Marx's concept of ideology, and it can be used to understand positions of domination in society.<sup>588</sup> Marx's position was that the dominant class guides the dominant ideology and consequently expresses the ideas, perceptions, and systems of thought of the ruling class within society.<sup>589</sup> He considered that the ruling class, having the power to control the means of production, was automatically the one that also dominated ideology. Bourdieu elaborates on this idea and to show the recognised and legitimate power relations as perceived through social categories. This provides a shared common perception of the world fostered by the dominant agents who seek to re-assert their position of dominance in the social space. However, contrary to Marx's ideology, and as this was later developed by Althusser, Bourdieu postulates that the dominated agents reinforce this *symbolic power* by becoming, in a way, "accomplices", through unreflective acceptance of the principles created or promoted by the dominant agents.<sup>590</sup> For example, 'the doxic representation of the social world is embodied in the schemes incorporated in the habitus, and the dispositions of different social agents ensure that their actions are harmonised in such a way as to reproduce relations of domination automatically.'<sup>591</sup>

Consequently, the position of dominant agents in the social space gives them an advantage over the objectification of values and principles and, thereby, of their legitimation.<sup>592</sup> While the Marxian notion of ideology postulates that the ruling class which holds state power and therefore the power over, what Althusser calls, the Repressive State Apparatus (RSA), which functions predominantly by violence, it must also have power over the Ideological State Apparatus (ISA), which functions predominantly by ideology.<sup>593</sup> This situates economic class at the centre of

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<sup>588</sup> see further David Swartz, *Culture and Power: The Sociology of Pierre Bourdieu* (The University of Chicago Press, 1997) 89-91

<sup>589</sup> Karl Marx & Friedrich Engels, *The German Ideology* (Prometheus Books, 1998)

<sup>590</sup> Ciaran Cronin, 'Bourdieu And Foucault On Power and Modernity' (1996) 22 *Philosophy & Social Criticism* 65

<sup>591</sup> *ibid* 66

<sup>592</sup> Legitimation is used here in the sense of acceptance and validation of norms, principles, and beliefs, by the members of society

<sup>593</sup> Luis Althusser, Ben Brewster (tr.), 'Ideology and Ideological State Apparatuses: Notes towards an Investigation', in Luis Althusser, G.M. Goshgarian (tr.), *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso, 2014)

domination, but it fails to incorporate the various forms of capital, particularly cultural capital, which Bourdieu identifies. It also gives the appearance of a reduction in the possibility of agency since the ruling class, which ultimately owns the means of production, is responsible for both violence and ideology. On the contrary, Bourdieu's symbolic power accounts for both dominant and dominated agents' contribution to the construction of social reality either knowingly or mechanically.<sup>594</sup> *Misrecognition* of social reality is then primarily influenced by those agents who hold higher symbolic power, however, at the same time agents with less symbolic power contribute to *misrecognition* and to the reproduction of domination, albeit unreflectively.

Notions of European identity had been used early on as a mechanism of legitimation and as a tool for further integration in the context of the legal subject, through symbols like a common European passport or symbols like the European flag or the common currency, culminating in the (failed) Constitutional Treaty whose symbolic effect is still relevant. The idea of engineering, in a sense, a new group identity, became a common narrative in the European agenda, as we saw in Chapter One. The combination of these narratives with questions of identity and notions of belonging are inescapably connected to accessing EU citizenship through the Member States' national citizenships. The EU citizenship according to Article 20TFEU is additional to national citizenship and as such it can be problematic because national citizenships are regulated by differing policies and laws on integration and naturalisation, some of which tend to be restrictive and exclusivist,<sup>595</sup> potentially leading to disparities, discriminations and inequalities, as we will see below. The element of national citizenship, therefore, may function as a misrecognised element of European identity which regulates access to EU citizenship yet at the same time in light of other interests which are primarily economic, national citizenships may open up inviting individuals particularly with high economic capital.

The next section examines the notion of capital developed by Bourdieu, which explains how doxic perceptions may develop within the habitus and how different forms of capital regulate the positions of social agents in the social space.

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<sup>594</sup> see also Cronin (n.590)

<sup>595</sup> See further, Randall Hansen, 'A European Citizenship Or A Europe Of Citizens? Third Country Nationals In The EU', 1998 24 (4) *Journal of Ethnic and Migration Studies* 751; Dora Kostakopoulou, 'The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration', 185 in Hans Lindahl (ed), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart, 2009); Dora Kostakopoulou, 'The Anatomy Of Civic Integration' 2010 73 (6) *The Modern Law Review* 933; Dora Kostakopoulou, 'Liberalism And Societal Integration: In Defence Of Reciprocity And Constructive Pluralism' 2014 43 (2) *Netherlands Journal of Legal Philosophy* 127; Andreas Føllesdal, 'Third Country Nationals As European Citizens: The Case Defended' 2000 48 (S1) *The Sociological Review* 104

## 2.5 Capital, fields and power over mobility

As it was briefly mentioned earlier in this chapter, Bourdieu's notion of *capital* as an embodiment of power was not perceived merely in economic terms as was understood by Marx but was also interpreted in cultural, social, and symbolic terms. Bourdieu explained that cultural capital can be transformed into symbolic capital, which has the power of legitimation.<sup>596</sup> Bourdieu explained that symbolic capital is a 'transformed and disguised form of physical "economic" capital' and that its true effects are only produced when its true 'material' form is not revealed.<sup>597</sup> Given that cultural capital can be transformed into symbolic capital, we can see that European identity, through narratives of European citizenship and migration, adheres to both economic and cultural notions of capital. For example, through the introduction and development of the internal market, on the one hand, concentrating high economic capital, and the promotion of European culture through European citizenship and identity, on the other hand, concentrating high cultural capital.

A question that arises is where does the habitus operate, where all these practices, for the accumulation of capital and domination occur and essentially where does power function. As already introduced, the habitus is the system within which identities form and where norms, habits, and attitudes are produced and reproduced. Bourdieu established the metaphor of *fields* to explain the settings in which agents hold their positions in society. Swartz's definition of fields is particularly illuminating as it captures Bourdieu's complexity of the term quite accurately:

Fields denote arenas of production, circulation, and appropriation of goods, services, knowledge, or status, and the competitive positions held by actors in their struggle to accumulate and monopolize these different kinds of capital. Fields may be thought of as structured spaces that are organized around specific types of capital or combinations of capital.<sup>598</sup>

Consequently, it is within the *fields* that agents struggle to monopolise symbolic violence by achieving legitimation and it is through the acquisition of various forms of capital that the positions of social agents are held in the social space. Bourdieu identified the *field of power* as the principal field, which functions as a classifying principle of distinction and struggle throughout the various fields and is based on the distribution of the various forms of capital. Within this principal

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<sup>596</sup> Pierre Bourdieu, 'The Forms of Capital', in John Richardson, *Handbook of Theory and Research for the Sociology of Education* (Greenwood, 1986) 241-58

<sup>597</sup> Bourdieu, *Outline of a theory of practice*, (n.569)183

<sup>598</sup> Swartz, *Culture and Power*: (n.588)117

field, economic and cultural capital are in a constant competition with each other in terms of social hierarchy and power struggle, thereby, affecting the positions that agents hold within the field of power as well as within other fields. This struggle was illustrated in Chapter One through the paradigm of the 'revolving doors' policy,<sup>599</sup> which both allows and disallows access and gives rights as well as takes them away.

This chapter has used the element of change and movement with respect to the European polity to introduce Aristotle's theory of motion through the concepts of actuality and potentiality. The identification of fields in Bourdieu's theory of practice, however, give us an idea as to where this change takes place and how the interaction of different fields help shape the habitus which essentially incorporates the practices that enable or hinder the EU from actualising its potentialities. The AFSJ as explained is only one of various active mechanisms or fields, which have been identified as capable of leading the EU to ultimately becoming 'an ever closer union', but which is, however, the primary field in which the legal subject has developed and evolved.

With Bourdieu's understanding of capital and fields what could be said with reference to the EU is that social agents are able to 'move' from one field to another in the attempt to acquire more capital and more hierarchical positions in the social space as they become equipped with certain rights and freedoms or, reversely, are excluded from accessing such rights and freedoms affecting their position in the social space. As fields intersect and interact with one another, agents' positions fluctuate within them in an attempt to acquire different forms of capital. However, the possibility of moving around fields and struggling to acquire power within the social sphere tends, according to Bourdieu, to favour certain groups of agents who already occupy such hierarchical positions. This would place European citizens automatically in more privileged positions, as opposed to migrants primarily on the basis of their citizenship status. However, this would fail to account for the role of capital in all its forms. For example, Fligstein's work concluded that Europe has primarily been a class project that favours businesses, the educated, and the young,<sup>600</sup> while Risse, as well as Koopmans, concluded in their respective studies that the European communicative space is dominated by governments and executive actors.<sup>601</sup> These studies were set out to examine the existence of a European public sphere, or a European community, without, however, having as a focal point the relationship and interaction between citizenship and

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<sup>599</sup> Acosta & Mertire, n.355

<sup>600</sup> Neil Fligstein, *EUROCLASH: The EU, European identity, and the future of Europe* (Oxford University Press, 2008)

<sup>601</sup> Thomas Risse, *A Community of Europeans? Transnational identities and public spheres* (Cornell University Press, 2010); Ruud Koopmans, 'Who Inhabits The European Public Sphere? Winners And Losers, Supporters And Opponents In Europeanised Political Debates' 2007 46 (2) *European Journal of Political Research* 183

migration, they rather concentrated on European citizenship and forms of European identity in terms of feelings of belonging as a collective group. This raises questions on the issue of domination in the social space, especially when the subject of investigation is not only the European citizen but all individuals who derive rights and freedoms from the European legal order. The contribution of the aforementioned studies remains significant to this effect, as they all indicate a strong tendency of the EU towards technocracy and elitism, which distances the polity from the every-day person and from groups or individuals belonging to more vulnerable categories. Considering that these studies have been conducted more than a decade ago and prior to the economic and migration “crises” we can postulate that these findings would hold even truer today.

In Chapter One the analysis of the Court’s case law indicated, through the gradual interpretation of citizenship and free movement provisions that while the Court has slowly begun to incorporate fundamental rights under the Charter (as the latter only became binding with the entry into force of the Lisbon Treaty) it is only under specific, and not always clear, circumstances that the Charter becomes applicable in balancing different interests. Satisfying the financial criteria envisaged in Directive 2004/38 within the scope of Article 21 TFEU illustrates that certain rights and freedoms derived from EU law can only be accessed on the basis of financial capital.

In fact, the current regime of accessing EU citizenship by investment at the national level in some countries highlights this focus on high economic capital in relation to the subject in the AFSJ. For example, the legal framework governing Cypriot nationality and citizenship allows investors under fast-track procedures to become Cypriot citizens or gain a permanent residence permit, which further allows them access to European citizenship.<sup>602</sup> A similar policy is also found in relation to the Maltese citizenship, called the Individual Investor Programme (IIP) which has been approved by the European Commission.<sup>603</sup> The IPP allows access to the Maltese citizenship ‘by a certificate of naturalisation’ to individuals and their families who fulfil certain conditions.<sup>604</sup>

As a result of these citizenships by investment, a capital-based logic for the acquisition of citizenship is established where essentially the only connection required between the new citizen and the state is that of capital.<sup>605</sup> Shachar has called these transactions ‘unfettered cash-for-

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<sup>602</sup> see for example Council of Minister Decision, 19.03.2014, Scheme for Naturalisation of Investors in Cyprus by Exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013 accessed at <https://bit.ly/2zlrAgj> on 19 August 2019

<sup>603</sup> Individual Investor Programme website last accessed at <http://iip.gov.mt/> on 19 August 2019

<sup>604</sup> see eligibility criteria last access at <https://iip.gov.mt/individual-investor-program/> on 19 August 2019

<sup>605</sup> Ayelet Shachar, ‘Dangerous Liaisons: Money and Citizenship’, 7-15, in Rainer Bauböck, *Debating Transformations of National Citizenship*, IMISCOE Research Series (Springer, Cham, 2018)

passport programmes' that raise several important questions about justice and discrimination in relation to citizenship acquisition, as well as the perpetuation of inequalities already found within the citizenship framework, challenging any ideal of equal citizenship.<sup>606</sup> An approach to citizenship acquisition on the basis of economic capital further raises questions about political participation and feelings of belonging within the wider political community, which are aspects traditionally considered to be connected to the idea and practice of citizenship. In fact, we have already seen in Chapter One how several criticisms of European citizenship involved challenging its democratic legitimacy on exactly the same basis of lacking a *demos*, a community with shared feelings of belonging, and identification with the European polity. Evidently, with investment citizenships, similar questions may arise as no connection with the Member States is necessary.

However, the purpose of this point is not to suggest that these programs should necessarily be abandoned or seen exclusively as causing negative implications on the understanding, interpretation, and application of citizenship in today's global world.<sup>607</sup> It is aimed, however, to indicate the potential hypocrisy and double standards in suggesting that European citizenship is or should be based on ideas of nationality as a common cultural foundation for European citizenship or even that the only connection to the EU should be strictly based on national citizenship considering the differing laws and policies around citizenship in the Member States. This is particularly so when we take into account the struggle of other migrants to access national citizenships through naturalisation and integration procedures across the EU. This point is illustrated in Joppke's comparative study on civic integration policies in the Netherlands, Germany and France in which he identifies a restrictive, selective, and obligatory nature of civic integration including, for example, the imposition of penalties or rejection of residence permit if migrants fail to comply with integration requirements.<sup>608</sup> He most importantly emphasises, on the one hand, a liberalism acting on the basis of 'equality, individual rights and neutrality', while on the other hand he identifies 'a liberalism of power and disciplining' in the Foucauldian understanding of governmentality,<sup>609</sup> mentioned in Chapter One. Joppke explains that this approach to integration should not be understood as being rooted in racism or nationalism (although these should not be disregarded either) but rather on economic instrumentalism tied to the contemporary 'global competition state'.<sup>610</sup> Since part of the EU's actualisation of its potentialities involves an internal market and economic cohesion, economic instrumentalism may be considered as inherent in

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<sup>606</sup> Schacher *ibid* 9

<sup>607</sup> for example see Peter J. Spiro, 'Cash for passport and the end of citizenship', 17-19, in Bauböck *ibid*

<sup>608</sup> Christian Joppke, 'Beyond national models: Civic integration policies for immigrants in Western Europe', 2007 30 (1) *West European Politics* 1

<sup>609</sup> *ibid* 15-16

<sup>610</sup> *ibid* 16

many of its social policies. For example, as the labour market is central to the EU's aims, it directly affects social inclusion, including rights and freedoms to workers and residents but also access to its internal space. As it is primarily the Member States who control entry to the EU's territory, their practices and approaches to civic integration place a great deal of emphasis on this market-based logic. At the same time, the gradual involvement of the EU in relation to integration matters has increased through tools such as the Common Basic Principles for Immigrant Integration Policy in the EU as well as the Action Plan on the integration of third-country nationals which provide a more balanced framework for integration practices.<sup>611</sup> As it is not part of the aims of this thesis to go much deeper into integration policies in the EU, it suffices to say that within the context of the habitus, citizenship, which is tightly connected to integration processes, functions as a form of social capital that may rely upon other forms of capital or influence the acquisition of different capitals. Following a similar logic, Bauder, whose study concerned migrant and non-migrant workers, extended Bourdieu's notion of capital arguing that citizenship functions as a mechanism of distinction and a form of capital.<sup>612</sup> He explained that as a form of capital, citizenship has the capability of being transformed into other forms of capital acting as 'a strategy of accumulation' often resulting in the exclusion, subjugation, or marginalisation of migrants, whose access to citizenship is very limited.<sup>613</sup>

Bourdieu's interpretation of capital contributes, therefore, to unravelling the different faces of citizenship and identity. By taking a more critical outlook of how economic capital influences access to citizenship rights and freedoms, or in fact by viewing citizenship itself as one of the various forms of capital, the economic and market-orientated approach to European citizenship becomes evident while its more social aspect is challenged. An approach to EU citizenship that could potentially overcome this limitation<sup>614</sup> has been advocated by Kostakopoulou who has argued for residence or domicile-based EU citizenship which would have a more autonomous status and would allow the EU to co-determine loss or acquisition of EU citizenship.<sup>615</sup> This would

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<sup>611</sup> Council of the European Union, Press Release 14615/04 (Presse 321)( Brussels, 19 November 2004); Communication from the Commission to the European Parliamentthe Council, the European Economic and Social Committee and the Committee of the Regions, 'Action Plan on the integration of hird country nationals' COM(2016) 377 final (Brussels, 7.6.2016)

<sup>612</sup> Harald Bauder, 'Citizenship as Capital: The Distinction of Migrant Labor', 2008 33 (3) Alternatives 315  
<sup>613</sup> *ibid* 316

<sup>614</sup> However see criticism of this approach and general debate at Liav Orgad and Jules Lepoutre (eds., 2019) 'Should EU citizenship be disentangled from Member State nationality?', RSCAS 2019/24, Robert Schuman Centre for Advanced Studies, EUI, Florence.

<sup>615</sup> See earlier accounts of this position Dora Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) Journal of Political Philosophy 337 and more recently Dora Kostakopoulou, (2019) 'Who Should Be A Citizen of the Union?', in Liav Orgad and Jules Lepoutre (eds., 2019) Should EU citizenship be disentangled from Member State nationality?, RSCAS 2019/24, Robert Schuman Centre for Advanced Studies, EUI, Florence.

be particularly important, as Kostakopoulou explains, in cases of loss of national citizenship and statelessness cases, but also in addressing inequalities at the national level in relation to TCNs, who have been residing on EU territory yet cannot access national citizenship because of national policies which inevitably also affects children who have been born on EU territory but cannot have an EU passport.<sup>616</sup> Whether we accept or not, an autonomous EU citizenship as a solution to gaps and weaknesses in the area of citizenship, it is important to acknowledge that the EU's responsibilities towards the people on its territory have increased particularly since the Treaty of Amsterdam through the creation of an area of freedom, security and justice. Therefore, there is a need for increased cooperation particularly in the area of citizenship in order to overcome limitations at the national and EU levels in a way that it reduces domination of specific groups of people regarding access to rights and freedoms that should be enjoyed by everyone. In Kostakopoulou's proposal Member States still play a vital role in the field of citizenship however sharing this role with the EU would necessarily raise the standards regarding fair and equitable access to citizenship rights which as I see it should be a positive step regarding the role of the individual.

The following section builds upon the preceding analysis by linking Bourdieu's conceptual tools to social psychology in order to explore how the structures and mechanisms of the AFSJ, as explored thus far, relate more closely to subjects, qua individuals, with personal identities and how these structures and mechanisms become internalised in the form of meanings, norms, and habits. It, therefore, explores this dialectical relationship of structure and agency by incorporating elements from social psychology which is the branch of psychology that is concerned with the behaviour of individuals in their social contexts including their emotions, beliefs, and attitudes.<sup>617</sup>

## 2.6 Bridging Bourdieu with Social Psychology

As explored so far in this chapter, the underpinnings of Bourdieu's theory are based on the relationship, interaction, and interdependence between individual and society. The habitus is inscribed in the body, it turns into a 'durable manner of standing, speaking, and, thereby, of feeling and thinking'<sup>618</sup> and it becomes an integral part of individuals, their behaviour, attitude,

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<sup>616</sup> Kostakopoulou 'Who Should Be A Citizen of the Union?' *ibid*; see also as an example citizenship acquisition practices in Cyprus as reported by the non-governmental organisation Action for Equality, Support and Anti-Racism (KISA) '15 years in the country is not long enough, according to the CRMD, to become a citizen', 30 June 2015, last accessed at <https://bit.ly/2KNn9D6> on 18 August 2019; KISA, 'The feast continues, but this time it concerns citizenship', 23 December 2016 last accessed at <https://bit.ly/31OiK9W> on 18 August 2019

<sup>617</sup> Michael A. Hogg & Graham A. Vaghan, *Social Psychology* (Pearson, 8<sup>th</sup> ed, 2018) 4

<sup>618</sup> Bourdieu, *Outline of a Theory*, (n.569) 93-94

and perception of the social world influencing their skills, habits, and dispositions. This naturally extends Bourdieu's sociological approach to the branches of social psychology that similarly seek to make sense of the relationship between the individual and society through the study of the behaviour, thoughts and feelings of individuals in the social space.<sup>619</sup> The effects of Bourdieu's research on the construction of identities are axiomatic especially when taking into account the concept of fields in which individuals' positions are located based on the interaction of their habitus and their acquired capital. Converging Bourdieu's theoretical approach with social psychology allows us to consider more substantially the impact on the formation of identities within the AFSJ, which has been discussed so far as contributing to the structuring processes of the habitus in European societies. More specifically, as European citizenship and migration narratives develop within the AFSJ, not only are we aided through Bourdieu's approach to engage in a deconstructing exercise of such narratives but also to ask questions about how these may become internalised by social agents themselves who play a key role in producing, reproducing, or rejecting such narratives. The AFSJ in its geographical, conceptual and legal parameters acts as a component of social reality influencing the actions, habits and dispositions of individuals affected by it. As such, the fields of citizenship and migration are naturally implicated with emotion such as fear, empathy, compassion, obligation and any theoretical framework that seeks to understand processes within the AFSJ should be able to recognise this affective dimension.

A starting point which connects Bourdieu to social psychology comes from the theory of social representations established by social psychologist, Serge Moscovici.<sup>620</sup> Moscovici's interest was in understanding society's behaviour through the development of social representations which he defined as 'the elaborating of a social object by the community for the purpose of behaving and communicating.'<sup>621</sup> In his essay on social representations, Moscovici further explained:

Nobody's mind is free from the effects of the prior conditioning which is imposed by his representations, language and culture. We think by means of language; we organized our thoughts, in accordance with a system which is conditioned, both by our

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<sup>619</sup> Bourdieu himself has focused on the study of the interaction and relationship between societies and groups/individuals, for example his book on Algeria was based on his ethnographic research of the Kabyle people, an ethnic group of Kabylia in the North of Algeria, which was further developed in his later book *Outline of a Theory of Practice* (n.569), Pierre Bourdieu, *Algeria 1960* (Cambridge University Press, 1977); see also Hogg & Vaghan, *Social Psychology* (n.617)

<sup>620</sup> Rita de Cássia Pereira Lima & Pedro Humberto Faria Campos, 'Field and group: a conceptual approximation between Pierre Bourdieu and the social representation theory of Moscovici', 2015 41 (1) *Educação e Pesquisa* 63

<sup>621</sup> Serge Moscovici, 'Attitudes and Opinions', 1963 14 *Annual Review of Psychology* 231,251

representations and by our culture. We see only that which underlying conventions allow us to see, and we remain unaware of these conventions.<sup>622</sup>

Moscovici suggested that instead of denying these conventions and prejudices, we should try to understand and discover social representations and to accept them as part of our reality. His approach closely resembles Bourdieu's notions of habitus and fields as both scholars recognise, on the one hand, the role of social agents in the construction of reality but also the idea that the accepted social reality is imposed on individuals as an external force guiding their positions in the social space.<sup>623</sup> Both the habitus and social representations are present in all aspects of our social life, and this is what makes them applicable practical theories for the AFSJ.<sup>624</sup> On the one hand, we have Bourdieu's fields which are organised by the various forms of capital and the struggle for the acquisition of power by social agents, while on the other hand, we have what Moscovici calls, objects (these can be images that represent ideas or beings), which mobilise a group to familiarise with an unfamiliar object, to categorise something or someone for which or whom an image is created.<sup>625</sup> In both situations, social agents are producers of meaning; for Bourdieu, this is evident through the struggle of social agents to acquire power while for Moscovici this takes place through communication.

As Moscovici articulates:

Individuals and groups create representations in the course of communication and cooperation. Representations, obviously, are not created by individuals in isolation. Once created, however, they lead a life of their own, circulate, merge, attract and repel each other, and give birth to new representations, while old ones die out.<sup>626</sup>

From Bourdieu's perspective, we have doxic perceptions of the world, the taken-for-granted phenomena in social life, which gain legitimacy through misrecognition by social agents themselves and which are influenced by the positions of these agents in the various fields. As explained, these positions are influenced by power relations and acquisition of different forms of capital. Bourdieu's approach closely resembles Moscovici's who believes that social representations develop through communication and cooperation between groups and individuals, though not necessarily through their class or social/cultural status but rather through

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<sup>622</sup> Serge Moscovici, *The Phenomenon of Representations*, in Serge Moscovici, Gerard Duveen (ed) *Social Representations: Explorations in Social Psychology* (New York University Press, 2001) 23

<sup>623</sup> *ibid*

<sup>624</sup> *ibid* 26

<sup>625</sup> Moscovici calls these processes of anchoring and objectifying, see *ibid* 42 - 51

<sup>626</sup> *ibid* 27

confidence and intensity of belief in such representations.<sup>627</sup> Another difference, yet also a point of convergence between the approaches of Moscovici and Bourdieu, as far as how the social space is construed and perceived by individuals, is that Bourdieu's focus is not on identifying the underlying causes of *doxa* or **how** a social agent acquires capital. He, therefore, does not explain how this change takes place in the social space,<sup>628</sup> nor does he provide the tools by which to understand how individuals and groups internalise, norms, ideas and representations of social reality. Rather, he focuses on demonstrating the mutual constitutiveness of society and individual through the development of mechanisms which help us see the complicated relationship between structure and agency. This is not a limitation in Bourdieu's theory of practice but rather falls outside of his sociological and anthropological enquiry. However, this is, as the author of this thesis argues, the point which connects and extends Bourdieu's approach to the field of social psychology as it is not, as Moscovici explained, enough to suggest the existence of this dialectical relationship but we also need to understand how these representations occur by identifying their roots.<sup>629</sup> Moscovici explained the term social representations as being about 'the contents of everyday thinking and the stock of ideas that gives coherence to our religious beliefs, political ideas and the connections we create as spontaneously as we breathe'.<sup>630</sup> They allow us to classify people and objects, to explain and understand behaviours and to familiarise ourselves with the unfamiliar.<sup>631</sup> They are, in other words, a way of understanding and a form of communicating between social members within a given social environment.<sup>632</sup>

This theoretical background, which allows us to reconceptualise and reimagine the AFSJ as a communicative area, would be incomplete without an understanding of how the internalising process of the habitus takes place and why it is important to engage in this reflective exercise. In the remainder of this chapter I draw upon Mead's socio-psychological theory, especially his development of the "conversion of gestures", to show how internalisation takes place within this dialectical interaction. This is part of the author's effort to integrate different aspects of social psychology in the context of the AFSJ to show its different dimensions, gaps, and potentials and also to facilitate better understanding of the discourses of citizenship and migration that were explored in Chapter One.

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<sup>627</sup> Serge Moscovici, 'Notes towards a description of social representations', 1988 18 (3) *European Journal of Social Psychology*, 211, 230, 233

<sup>628</sup> See also Campos and Lima, *Field and group: a conceptual approximation* (n.620); emphasis added

<sup>629</sup> Moscovici, *The phenomenon of representations* (n.622) 27

<sup>630</sup> Moscovici, *Notes towards a description of social representations* (n.627) 214

<sup>631</sup> *ibid*; Moscovici *The phenomenon of representations*, (n.622) 37

<sup>632</sup> *ibid* (n.622) 32

The AFSJ is explored in this thesis as a space in which meaning is constructed. Communication and interaction occur through the AFSJ's political, legal, and social structures, and the different categorisations of the subject, either as an EU citizen, a TCN family member, an economically active or non-active person, among others, enable us to understand how personal rights and duties under the EU legal order are construed, as examined in the case law in Chapter One. These categorisations are not intrinsically positive or negative categories, but as they develop within the wider context of the AFSJ and within a relationship of power, the different representations of these categories influence how the people attached to these categories are perceived and received in the social space. The non-economically active citizen seeking entitlement to social assistance benefits, as in the case of *Dano*, is closely associated with benefit-tourism and, therefore, as someone who is perceived as not deserving a right of residence in a host state and who seeks to take advantage of the system. At the same time, an EU worker with equal rights to nationals in terms of employment may be perceived as draining the public wallet and taking jobs away from nationals.<sup>633</sup> Similarly, a refugee or an asylum seeker may be represented as a potential terrorist and a threat to the internal security or, depending on their country of origin, may be considered as undeserving of protection.<sup>634</sup> Public reactions and attitudes are, therefore, based on such representations which will trigger different behaviour and response and may give rise to compassion and solidarity or distrust and hostility.

Mead has provided a useful explanation as to how this communication functions at the individual-social level and how such representations become internalised and influence identities. He explained that the 'Self' is a 'social construct' that arises in 'social experience'<sup>635</sup> through 'communication of gestures', including language, that enables us to define ourselves as well as to define others; this eventually results in the construction and reconstruction of society within

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<sup>633</sup> see further Catherine Barnard & Amy Ludlow, "'Undeserving" EU migrants "milking Britain's benefits"? EU citizens before social security tribunals' 2019 Public Law, 260 last accessed at <https://doi.org/10.17863/CAM.39301> on 19 August 2019

<sup>634</sup> For a more detailed empirical analysis on the representation of migrants/refugees during the "migration crisis" see Overseas Development Institute (ODI), Helen Dempster & Karen Hargrave, 'Understanding public attitudes towards refugees and migrants', Working Paper 512, June 2017 last accessed at <https://bit.ly/2NqHykH> on 6 Sept 2018; Lilie Chouliaraki & Tijana Stolic, 'Rethinking media responsibility in the refugee "crisis": a visual typology of European news', 2017 39 (8) Media, Culture & Society 1162; Myria Georgiou & Rafal Zaborowski, 'Media coverage of the "refugee crisis": A cross-European perspective', Council of Europe report DG1(2017)03; Jill Walker Rettberg & Radhika Gajjala, 'Terrorists or cowards: negative portrayals of male Syrian refugees in social media', 2016 1 Feminist Media Studies 178; Esther Greussin & Hajo G. Boomgaarden, 'Shifting the refugee narrative? An automated frame analysis of Europe's 2015 refugee crisis', 2017 43 (11) Journal of Ethnic and Migration Studies 1749; Lin Prøitz, 'Visual social media and affectivity: the impact of the image of Alan Kurdi and young people's response to the refugee crisis in Oslo and Sheffield', 2018 21 (4) Information, Communication & Society 548

<sup>635</sup> George Herbert Mead, Morris C.W. (ed), *Mind, Self and Society: From the standpoint of a social behaviourist* (Chicago University Press, 1934) 140

which the 'Self' develops. To explain this process, Mead distinguished between the 'I' and the 'Me' as constitutive elements of the 'Self'. The 'Me', for Mead, is a conscious process of reflection while the 'I' is the unconscious and unpredictable response to that process.<sup>636</sup>

Mead's idea of 'conversation of gestures' is where communication occurs through the exchange of gestures and significant symbols<sup>637</sup> that give rise to the same responses between agents. In other words, it is through actions that we become aware of ourselves, and it is through communication that 'Mind', which is responsible for constructing the 'Social', arises. To simplify this, Mead explained:

In the conversation of gestures [...] the individual not only adjusts himself to the attitudes of others, but also changes the attitudes of the others. The reaction of the individual in this conversation of gestures is one that in some degree is continually modifying the social process itself.<sup>638</sup>

This means that when A communicates with B through an exchange of gestures, B's response is the interpretation of the gesture, which, in a way, produces the meaning of the gesture.<sup>639</sup> At the same time, once A externalises their gestures through social communication it helps their own self-understanding. Through this exchange of gestures 'Mind' arises in the social context and, thereby, the 'Self' develops.<sup>640</sup> This interplay between the conversation of gestures ('I' and 'Me') and the 'Self' signifies the dialectical relationship between personal and social identities combining conscious ('Me') and unconscious ('I') processes.

### **I + Me (conversation of gestures → (meaning) → Mind (social) → Self**

The conversation of gestures indicates how the discursive structures that guide practice in the AFSJ can influence not only meaning in the social space but also how they relate to personal identities and how these are socially constructed. In the context of the migration crisis the responses of the Member States to erect fences and close borders within a highly discriminatory and racist political background especially prominent within, but by no means limited to, the

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<sup>636</sup> *ibid* 175-176

<sup>637</sup> Significant symbols are internalised gestures which have the same meaning for all individuals in the same social group or given society *ibid* 47

<sup>638</sup> *ibid* 179

<sup>639</sup> *ibid* 80

<sup>640</sup> *ibid* 50

Visegrad group,<sup>641</sup> the politicisation of migration in the context of Brexit<sup>642</sup> and the EU's externalisation policies of its borders,<sup>643</sup> can be placed within the context of the conversation of gestures. For example, internalising hostile forms of communication (verbal as well as physical such as in the form of pushbacks, detentions, and poor conditions at reception)<sup>644</sup> shed light into how interaction and communication are structured within the AFSJ. Further, they raise questions about how individuals perceive others and themselves and about the responsibilities and duties we owe to each other. Even though this reaction does not suggest the absence of the more humanitarian and welcoming response, which is also an important dimension,<sup>645</sup> it does, nevertheless, suggest that the way migration is dealt with within the political arena problematises the approaches of the Member States and the EU and urges further reflection about how migration is perceived and dealt with. At the same time, the hostile dimension attached to migration necessitates its reconceptualisation and reframing in the political and social contexts.

Although this securitised and more hostile discourses of migration may be a self-sufficient reason to want to explore and reflect upon the processes of the dialectical relationship between structure and agency and, therefore, the communication of gestures within the AFSJ as identifying the roots of specific representations, there is one final point to make as concluding the theoretical framework that can help explain why reconceptualising the AFSJ is important. This final point goes back to the question of individuals, qua subjects, and their role in the European polity, which as I have argued in this chapter is central to the EU's actualisation of its potentialities. As I put forward in this chapter, the EU's actuality to 'become an ever closer union' rests upon the subject as the legitimising force of this aim as well as the receiver of rights and freedoms established under the treaties. With reference to Castoriadis' interpretation of autonomy, I explain why it is important to continually engage in the process of reflection and reflexivity and challenge the structures of the AFSJ, within which the subject develops. Ultimately, Castoriadis' approach to

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<sup>641</sup> see Ákos Bocskor, 'Anti-Immigration Discourses in Hungary during the "Crisis" Year: The Orbán Government's "National Consultation" Campaign of 2015', 2018 52 (3) *Sociology* 551; see also Satnam Virdee & Brendan McGeever, 'Racism, Crisis, Brexit', 2018 41 (10) *Ethnic and Racial Studies* 1802

<sup>642</sup> see for example Matthew Goodwin & Caitlin Milazzo, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit' 2017 19 (3) *The British Journal of Politics and International Relations* 450; Edgar Grande, Tobias Schwarzbözl, Matthias Fatke, 'Politicizing Immigration', 2018 *Journal of European Public Policy* 1; Philipp Lutz, 'Variation in policy success: radical right populism and migration policy', 2019 42 (3) *West European Politics* 517

<sup>643</sup> Vasilis Papageorgiou, 'Externalization of European Borders', 2018 KEDISA Research Paper No 23 last accessed at <https://bit.ly/2L7Bivp> on 19 August 2019

<sup>644</sup> for example see Burcu Togrul Koca, 'Bordering Practices Across Europe: The Rise of "Walls and "Fences"' 2019 16 (2) *Migration Letters*

<sup>645</sup> Chouliaraki and Georgiou refer to this entanglement between security and humanitarian practices as humanitarian securitization Lilie Chouliaraki & Myria Georgiou, 'Hospitality: The communicative architecture of humanitarian securitization at Europe's Borders' 2017 67 (2) *Journal of Communication* 159

autonomy answers the question: why should we understand social representations in the first place?

For Castoriadis, as with Mead, Moscovici, and Bourdieu, societies are perceived as being self-creative. In other words, the laws, institutions, traditions, and norms in society are created by and for individuals through their socio-historical contexts.<sup>646</sup> When individuals and societies continuously ask themselves, what is a good society, they are able to question the institutions, traditions, and norms which they themselves have established throughout history. This ability or process is what Castoriadis terms as *autonomy* (αυτονομία), which means giving laws to oneself.<sup>647</sup> On the other hand, *heteronomy* (ετερονομία) indicates that societies do not recognise their own self-construction but instead attribute this to external factors.<sup>648</sup> According to Castoriadis, heteronomy leads to the alienation of society from its own institutions, laws, customs, and ideas as it fails to recognise that it is itself that has been their source.<sup>649</sup> He explained that autonomy cannot be perceived and achieved individually but only as a collective project,<sup>650</sup> while his idea was that without autonomous societies individuals cannot be autonomous either, and vice versa. He referred to an internalised Other which represents the unconscious which is built on the desires, meanings, and expectations that individuals bring with them since before their birth.<sup>651</sup> This, I submit, may include social representations in the understanding of Moscovici as well as doxic perceptions in Bourdieu's approach. What Castoriadis suggests is not to eliminate these internalised, unreflective ideas, beliefs, desires, and meanings which constitute or contribute, according to Castoriadis, to an 'imaginary institution of society', presenting itself as 'more real than the real'.<sup>652</sup> Rather, in a similar line with Moscovici, through his idea of autonomy Castoriadis suggests that this imaginary must be reflected upon, contemplated and (re)examined within its own context.<sup>653</sup> It is a constant process that allows social subjects to reorganise this internal Other, this imaginary, which is an inexorable part of the social subjects themselves.<sup>654</sup>

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<sup>646</sup> Cornelius Castoriadis, *Η φαντασιακή θέσμιση της κοινωνίας [The imaginary Institution of Society]*, (Kedros, 1978) 150-163

<sup>647</sup> *ibid*

<sup>648</sup> *ibid* 150-163

<sup>649</sup> *ibid* 156-59

<sup>650</sup> *ibid* 159, translated from the Greek edition by the author of this thesis

<sup>651</sup> *ibid.* 150-151

<sup>652</sup> *ibid.* 152

<sup>653</sup> *ibid* 158

<sup>654</sup> *ibid* 157

## 2.7 Concluding Remarks

While Bourdieu focuses on the construction of social reality presenting the social space as a space for conflict among individuals and groups contributing to the construction of the habitus, through which identities develop, Moscovici suggests that we find and understand the underlying mechanisms of this conflict, by examining how social representations are created.<sup>655</sup> Mead casts light on how communication and interaction among social subjects occur in practice and how the internalisation of ideas, beliefs, norms and perceptions take place through this communication. Finally, Castoriadis' interpretation of autonomy helps to explain why it is crucial to explore these processes in the first place by expressing that in the absence of autonomy, individuals and societies become detached from the institutions and laws they have created for themselves. Using the conceptual tools provided by Bourdieu, I connected the AFSJ to the idea of the habitus. I explained how the concepts of capital, fields, and *doxa* may operate in the construction of the AFSJ in a way that influence identities and give rise to representations in Moscovici's understanding as they become internalised through Mead's conversation of gestures. These analytical tools were incorporated in the chapter as a means by which to explore the entanglement of the securitisation and inclusion narratives of the subject, examined in Chapter One, and their dialectical relationship in the context of the AFSJ. This analysis is situated within the wider purpose of the chapter, which has been to understand how to assess the European polity and locate the role of the individual within the European project. To that effect, using Aristotle's theory of motion as a metaphor, I suggested that the AFSJ constitutes one of the main active elements (*dynamis*) of the EU's actualisation of its potentialities, which ultimately aim to create 'an ever closer union among the peoples of Europe', placing, therefore, the individual at the centre of the European project. This suggests that any analysis of the AFSJ, within which the subject is defined and redefined, the elements of reflexivity and reflection must be embedded if we are to facilitate autonomy at the individual and collective levels in order to actualise personal and social potentialities. This must necessarily strive to improve the welfare of all people without prioritising nationalistic ideas of superiority which suggests that the idea of the Union must be open-ended (hence non-deterministic) and subject to continuous reflection as to who does and who should derive rights and freedoms based on the responsibilities of the EU towards EU citizens and other people residing in the EU. The following chapter builds upon this theoretical framework and puts forward an alternative approach for the reconceptualisation of the AFSJ, which

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<sup>655</sup> Campos and Lima (n.620)

recognises this dialectical relationship and does not disregard the affective dimension of its politico-legal structures.



## Chapter 3 A social empathy approach

### 3.1 Introduction

The previous chapter demonstrated that within the politico-legal structures of the AFSJ there is an affective dimension that is connected to the human element of the EU, in general, and the AFSJ, in particular. It was shown that within the habitus and through the conversation of gestures not only are representations about Self and Other created but different emotions, not limited to trust, fear, mistrust, compassion, solidarity, hostility, may be produced and reproduced. The AFSJ is, therefore, not only viewable as a legal and political framework in which the legal subject develops but also as a social-psychological space where meaning is produced and, as will be explored further, where a sense of responsibility towards each other develops. Understanding the historical development of the legal subject and recognising the dialectical relationship of the subject with the politico-legal structures is, therefore, a crucial deconstructive exercise in and of itself. Still, it does not help us approach the normative questions concerning EU's future. This chapter borrows Humberto Maturana's notions of languaging and emotioning to briefly describe the effects of internalising aspects within the habitus (norms, habits, representations, perceptions) explored in Chapter Two as groundwork for the central thesis of this chapter which is the incorporation of empathy within the context of analysis of the AFSJ.

Maturana is a pioneering biologist who developed what is known as cultural biology. His research, in a nutshell, maintains that human beings are, in their core, loving animals who cultivate aggression culturally.<sup>656</sup> However, our interests here lie not in the biological underpinnings of Maturana's theory nor whether humans are inclined towards love or aggression.<sup>657</sup> However, this chapter embraces his approach towards understanding human beings in terms of being living systems who self-generate their own structures through systemic conservation of networks of conversations, which are cultures. This approach is consistent with the theoretical framework developed in Chapter Two, but Maturana's conceptualisation captures the relationship between the politico-legal aspects of the AFSJ with the socio-psychological through his notion of braiding languaging and emotioning.

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<sup>656</sup> Humberto Maturana Romesin & Gerda Verden-Zöllner, Pille Bunnell (Edt.), *The Origin of Humanness in the Biology of Love* (Imprint Academic, 2008) 58

<sup>657</sup> Although several studies have made similar claims in relation to empathy. Two such examples are Marco Iacoboni, *Mirroring People: The Science of Empathy and how we Connect with Others*, (Picador, 2009) and Rifkin, *The empathic civilization* (n.26)

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For example, for Maturana 'cultures arise [...] in the conservation of some basic manner of living, defined and reali[s]ed in us human beings as a closed recursive network of conversation around which all else is open to change'.<sup>658</sup> This argument reflects what Mead captured in his concept of the conversation of gestures and the relational dynamic between structure and agency. For instance, Maturana explains that '[l]anguage is a manner of living in recurrent interactions in a flow of coordinations of coordinations of consensual behaviors.'<sup>659</sup> Consensual here does not mean consent but rather behaviour which takes place in agreement without stipulation,<sup>660</sup> reflecting the interactions and processes within the habitus closely. He refers to 'linguaging' to describe 'the recursive flow of consensual coordinations of behaviours' which he sees as being 'braid[ed] with emotioning'.<sup>661</sup> As Maturana explains 'our emotioning changes in the course of our linguaging, and our linguaging changes in the course of our emotioning.' He calls this relationship a 'conversation'<sup>662</sup> while he refers to emotioning to describe the active nature of emotions. As Maturana explains, when we are talking about an emotion, we are referring to a 'domain of relational behaviors'.<sup>663</sup> Through our interaction, talking, thinking, reflecting, and acting our emotions change guiding our practices and, consequently, our living. 'Indeed, as our emotions change, we become different beings in our emotioning and in our reasoning, and we live the flow of our emotioning most of the time without being aware of our changes'.<sup>664</sup>

What is also central to Maturana's approach, is his emphasis on reflection (he also calls this reflective awareness) as a way through which we can shift our emotioning.<sup>665</sup> For him, this is significant if we want to preserve those aspects of the human species that relate to love and cooperation. His whole theory builds around, what he terms as, the 'biology of love' which despite the biological framework within which it is developed, Maturana's definition is applicable and relevant regardless of whether we accept or reject the biological analysis of his research. For example, he defines the 'biology of love' as 'the manner of living with the other in the doings or behavio[u]rs through which the other arises as a legitimate other in coexistence with oneself' and central to this is mutual trust, collaboration and mutual respect.<sup>666</sup> This complements Castoriadis' notion of autonomy as it not only embraces the process of reflection and the recognition of the self-constitution of societies but further acknowledges the affective elements of the relationship

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<sup>658</sup> Maturana, *The Origins of Humannes* (n.656) 64

<sup>659</sup> *ibid* 31

<sup>660</sup> *ibid*

<sup>661</sup> *ibid*

<sup>662</sup> *ibid*

<sup>663</sup> *ibid* 35

<sup>664</sup> *ibid* 36

<sup>665</sup> *ibid* 36,74

<sup>666</sup> *ibid* 81

between politico-legal structures and the individual. Applying this in the context of the AFSJ cements the idea that in assessing the EU's actualisation process and exploring the normative aspects of the AFSJ, emotions must be taken more seriously. The inclusive and securitisation aspect of the freedom of movement and EU citizenship, as was examined in Chapter One, do not only involve access to rights and freedoms under the EU legal order but also make claims about the ideal subject, normalise modes of living and penetrate the personal realm of identities in terms of biopower as suggested in Chapter Two. This normalisation, as was explained, need not necessarily be intentional but can instead be understood in terms of letting things happen or regulating movement in the context of maintaining an 'optimal regularity' thus normalising acceptable modes of moving and living.<sup>667</sup> However, if legal and political structures dominate the European project, echoing Castoriadis, then there is a risk of alienating the subject from the law and institutions as well as from society.

Concepts such as autonomy, reflective awareness, and actualisation of potentialities can be explored from a wide array of perspectives even though they may initially be conceived as abstract. These could be explored from the perspective of democratic participation of social agents, the level of direct democracy, public debates and deliberation, as examined by various scholars who have studied the EU public sphere.<sup>668</sup> These concepts could be further explored based on the available opportunities for individuals to be part of the public sphere, to have a role in decision-making and to achieve their individual and collective goals. However, while all of these perspectives and approaches are significant when exploring a communicative space such as the AFSJ, they apply in specific situations or concern only specific groups (i.e. those who can vote or those who can access channels of deliberation in the first place).

The aim in this chapter is to explore a more encompassing conceptualisation of the AFSJ that combines the element of reflective awareness and reflexivity as critical underpinnings of understanding and analysing issues within the AFSJ but also the affective, human element that recognises the role of emotion. To that effect, the chapter examines the potential application of

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<sup>667</sup> Huysmans, *The Politics of Insecurity* (n.197) 100

<sup>668</sup> Examples include Michael Nentwich 1996 'Opportunity Structures for Citizens' Participation: The Case of the European Union', European Integration online Papers (EIoP) European Community Studies Association Austria (ECSA-A), vol. 0 (1), November last accessed at <https://bit.ly/2TMF29b> on 19 August 2019; Richard Bellamy, Dario Castiglione & Jo Shaw (eds), *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave Macmillan, 2006); Elizabeth Monaghan, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative', 2012 13 (3) *Perspectives on European Politics and Society* 285; Jon Erik Fossum & Philip Schlesinger (eds), *The European Union and the Public Sphere: A Communicative Space in the Making?* (Routledge, 2007); Ruud Koopmans & Paul Statham (eds), *The Making of a European Public Sphere: Media discourse and political contention* (Cambridge University Press, 2010); Beate Kohler-Koch & Christine Quittkat, *De-Mystification of Participatory Democracy: EU Governance and Civil Society* (Oxford University Press, 2013)

social empathy, which expands the notion of interpersonal empathy to include other-orientated perspective-taking and social responsibility in the wider social context, within the AFSJ as a social exercise and a social experiment. The chapter proceeds with a brief reference to the relationship between justice and emotion, then looks at some political and moral philosophical perspectives concerning the relationship between justice and empathy, and finally moves on to explain various disciplinary approaches to the notion of empathy and how social empathy may be applied within the context of the AFSJ.

### 3.2 Justice and emotion

We have so far explored the importance of institutional and legal structures as promoting, contributing to, and creating several social norms and practices which through habituation and reproduction become embedded in the social sphere and are internalised by individuals. This argument recognises and highlights the significant role of institutional structures in every-day living and the not always obvious ways in which such institutions can influence practice. In political philosophy, one of the most elaborate ways of approaching the importance of institutions has been delivered by John Rawls who has focused on how just institutions have a profound impact on societies and people in their collective and personal capacities. Rawls unequivocally saw institutions as manifestations of justice itself and considered their structure as being responsible for achieving equality at the social and economic level.<sup>669</sup> However, while Rawls' contribution in the area of justice is unquestionable, and his normative approach is inspiring, his theory of justice may be considered as too idealistic rather than pragmatic. Amartya Sen, for example, has dedicated his book, *The Idea of Justice*, to explaining that despite how just institutions may be and no matter how just and reasonable behaviours may be reflected in the institutions, there are behavioural aspects and other influences that may depart significantly from what the institutions advocate.<sup>670</sup> As he put it:

Indeed, we have good reasons for recogni[s]ing that the pursuit of justice is partly a matter of the gradual formation of behaviour patterns – there is no immediate jump from the acceptance of some principles of justice and a total redesign of everyone's actual behaviour in line with that political conception of justice.<sup>671</sup>

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<sup>669</sup> John Rawls, *A Theory of Justice* (Revised Edition) (Belknap Press/Harvard University Press, 1999)

<sup>670</sup> Amartya Sen, *The Idea Of Justice* (Penguin, 2010)

<sup>671</sup> *ibid* 68-69

What can this mean in the *AFSJ* and how does this significant observation lead us to a discussion about social empathy? In Chapter One, the discussion focused on the aspects of freedom and security by exploring the Court's interpretation of Article 21 TFEU and the conditions for residence laid down in Directive 2004/38 as well as Article 20 TFEU on the interpretation of the genuine enjoyment of substantive rights of citizenship as established through the *Zambrano* principle. The Court had balanced in that case the state's right to withhold residence or work permit from irregular migrants with that of the rights of the EU citizens who were children and who had not exercised their free movement. The result of this balancing act was the establishment of derivative rights for their TCN parents, a principle which as we saw has been limited and exceptional in nature, yet a balancing act nonetheless. In terms of the element of security, the developmental history analysed in Chapter One showed an increased securitisation aspect concerning migration and the biopolitical mechanisms of the apparatus of security which operates on the logic of normalising and regularising pointing at the same time to the techniques of power within the *AFSJ*. However, as these themes focus on the aspects of freedom and security, there is also the third principal constituent of the *AFSJ*, namely, the aspect of justice.

There are different ways of understanding and analysing justice (for example in terms of distribution, utility or reparation). However, for our current purposes we can adopt a broad understanding of justice as capable of being examined in two ways. The first, through the structure and organisation of institutions, which was an approach taken in Chapter One. Secondly, we can, as argued by Sen, examine justice through the lives that people actually live.<sup>672</sup> The idea of justice involves in its broad conceptualisation questions about the duties and responsibilities we owe to one another as well as questions concerning social and individual welfare within a social context. Therefore, justice also has to do with the actual every-day living in communities and spaces we share. To be able to discuss actual practices allows us to see the effect of institutional and legal frameworks but also their shortcomings.

Thus far we have referred to various institutions that are relevant to the functioning of the *AFSJ*, these include not only the major EU institutions such as the Commission, the Council, and the Court of Justice, but also all institutions, agencies, and committees that are organised within the EU constitutional order with an impact on the *AFSJ* (such as Europol, Frontex, EASO, FRA). Further, Chapter One examined much of the legal framework that establishes, regulates, or guides practices within the *AFSJ*. It was, for example, highlighted that there is a human rights framework that binds states and institutions, as well as specific legislation that deals with more specific issues that may arise in the *AFSJ* such as residence, integration, and family reunification among others. If

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<sup>672</sup> *ibid*

we were to follow Rawls' theory of justice, we would be inclined to place greater emphasis on perfecting these institutions in the hope that justice and equality could be achieved. This institutional focus, however, would only be partially true because, as was explored in Chapter Two, there are multiple social influences and many different factors that determine and continuously alter the habitus, including agents themselves. If we were, therefore, to apply Sen's logic, we would be inclined to say that even if the institutions within the AFSJ were "just" or even "perfect", this would not necessarily mean that the corresponding behaviours would be the same. Contemporary examples involving xenophobia, racism, and prejudice, which have been visible during the migration crisis, indicate that the legal framework itself and the organisation of appropriate institutions are not sufficient. Institutional change can achieve neither justice nor the creation of a community (or multiple communities) in which people's voices are adequately heard and within which people can actualise their own potentialities.<sup>673</sup> A Rawlsian approach would perhaps suggest gaps in the institutional structure and the legislation itself and this may indeed be partially correct in the context of the AFSJ if we consider failures and weaknesses of the CEAS.<sup>674</sup> However, the divergent approaches in relation to migration issues, the different responses of states, representatives and populations to welcoming, for example, refugees, or dealing with other substantial issues, such as relocation or accommodation, indicate another dimension. This dimension goes beyond legal rights, duties, and institutional structures to a more behavioural aspect that it is, arguably, directly connected with emotions. In considering the relevance of emotions alongside *law* and *reason*, we can approach Sen's idea of justice by making an effort to understand actual living. This effort necessitates an approach that accepts law (in its capacity to produce reason, structure, and categories) and emotion (such as compassion, empathy, anger, and fear) as complementary. Recognising this entanglement of law and emotion is particularly important for reflective awareness (which in turn leads to reflexivity), which has been identified in the previous chapter as an indispensable ingredient for societies that seek to attain autonomy at the social and individual levels and was situated in the context of the AFSJ as an active element of the EU's actualisation process.

The following section begins by examining the approach of certain political and moral philosophers, who have directly or indirectly recognised a role for emotions in the context of justice. The choice of scholars is deliberately limited and brief as the main purpose is to give indicative examples from various philosophical approaches throughout time. The section

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<sup>673</sup> see for example Leonie Ansems de Vries & Elspeth Guild, 'Seeking refuge in Europe: spaces of transit and the violence of migration management', 2019 45 (12) *Journal of Ethnic and Migration Studies* 2156

<sup>674</sup> Sandra Lavenex, "'Failing Forward'" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System', 2018 56 (5) *Journal of Common Market Studies* 1195; also de Vries & Guild *ibid*

subsequently examines the concept of empathy and its application in the context of the AFSJ as a process that encourages reflective awareness and reflexivity, including acknowledgement of the human aspect of the EU including the relevance of emotions.

### 3.3 Political and moral philosophical perspectives

In the context of justice, Sen has highlighted the significance of acknowledging emotion recognising that '[r]eason and emotion play complementary roles in human reflection'.<sup>675</sup> He further argued 'against the plausibility of seeing emotions or psychology or instincts as independent sources of valuation, without reasoned appraisal' arguing 'between reason and emotion'.<sup>676</sup> In approaching justice, therefore, it is valid to consider the relationship between law and emotion, both of which are integral to reflexivity and involve the lives of people as are actually lived. Sen expressed the following:

What we owe to each other' is an important subject for intelligent reflection. That reflection can take us beyond the pursuit of a very narrow view of self-interest, as we can even find that our own well-reflected goals demand that we cross the narrow boundaries of securitisationself-seeking altogether.<sup>677</sup>

Reflection, therefore, is intrinsic to justice, and it requires that we consider the duties we owe to one another and the ways we influence each others' lives. It is intrinsic to the processes of the habitus where domination, based on different forms of capital acquisition, can lead to disparities and gaps that may prevent individuals from actualising their potentialities.<sup>678</sup> The question that arises then is how to understand this reflexive process which is simultaneously connected to how we can live together? This is not a novel question, of course. Many philosophers, political scientists and great thinkers have approached this question, from Aristotle, to Immanuel Kant and Adam Smith, to 20<sup>th</sup> Century thinkers such as John Rawls, Jürgen Habermas, Amartya Sen and Martha Nussbaum, to name only a few. These thinkers did not recognise the role of emotions in the same way, if at all. However, they all recognised the need for a consensus in the social space where people can live together in harmony, and they all recognised the role of justice as part of this process, as well as the need to cultivate a particular attitude towards achieving that consensus.

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<sup>675</sup> Sen, *The Idea of Justice* (n.670) 39

<sup>676</sup> *ibid*, xvii

<sup>677</sup> *ibid*

<sup>678</sup> Amartya Sen has, along those lines, discussed about capabilities

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For example, even in Rawls' emphasis on just institutions, there is a recognition of a behavioural aspect concerning moral thinking. For instance, in establishing a sense of justice in the 'original position', Rawls recognises it is not enough for a person to be just, they must want to be so.<sup>679</sup> In order to avoid dominating one another, Rawls developed his idea of the original position under which individuals choose the fundamental principles by which their society will be structured. This choice is made behind the 'veil of ignorance' which prevents individuals from knowing their characteristics (such as race, gender and social status) on the basis that this will lead them to make impartial and rational choices. However, Rawls importantly recognises the relevance of feelings in developing the faculty of moral thinking and nods toward empathy when he explains his second stage of moral development. He says, 'acquiring a morality of association [...] rests upon the development of the intellectual skills required to regard things from a variety of points of view and to think of these together as aspects of one system of cooperation.'<sup>680</sup> He then goes on to explain:

We must not only learn that things look different to them, but that they have different wants and ends, and different plans and motives; and we must learn how to gather these facts from their speech, conduct, and countenance. Next, we need to identify the definitive features of these perspectives, what it is that others largely want and desire, what are their controlling beliefs and opinions.<sup>681</sup>

Rawls here makes an association with, what we now refer to as, other-orientated perspective-taking, which is one of the two significant elements of social empathy adopted in this thesis. Even in Kantian deontological moral philosophy, which inspired Rawls, there is a place for emotions despite often confused as to the contrary. Kant's 'categorical imperative' highlighted respect for the humanity in others and 'act[ing] only in accordance with that maxim through which [we] can at the same time will that it become a universal law'.<sup>682</sup> Even though Kant makes no specific reference to emotions, he talks about *affects*, *sympathy*, *moral feelings* and *passions* which can be regulated by imagination or reason. While he may appear to be suggesting that there is no place for emotions in morality and pure reason, his theory suggests that in moral judgment there is a level of emotional sensitivity required, as well as an understanding of the feelings of others.<sup>683</sup>

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<sup>679</sup> Rawls, *A Theory of Justice* (n.669) 413-415

<sup>680</sup> *ibid*, 410

<sup>681</sup> *ibid*

<sup>682</sup> Immanuel Kant (1785) *Grounding for the Metaphysics of Morals* (James W. Ellington tr., 2<sup>nd</sup> ed., Hackett, 1993) 30

<sup>683</sup> see further Nancy Sherman, 'The Place of Emotions in Kantian Morality', 11, in Alix Cohen, (edt) *Kant on Emotion and Value*, (Palgrave Macmillan, 2014); Maria Borges, 'What can Kant teach us about emotions?' 2004 101(3) *The Journal of Philosophy* 140

Aristotle, as we briefly saw in Chapter Two, was also preoccupied with philosophical and ethical questions about the good life which involved moral virtues one of which was the virtue of justice, which involved consideration for others as well as proportional (though not equal) distribution. In his *Nicomachean Ethics*, Aristotle discussed the various virtues that can lead a person to achieve his highest aim, which is, according to him, a eudaimonic life.<sup>684</sup> This idea of *eudaimonia* is closely connected to his idea of the common good in the city-state of his time and, therefore, with the idea of community. Aristotle considered the acquisition of moral virtues as involving emotional, social and rational skills, habits and reflection, indicating the importance of cultivating certain feelings, while he spoke of the golden mean which describes the middle ground for the balanced acquisition of moral virtues.<sup>685</sup>

Adam Smith, who was similarly concerned with morality and justice as prerequisites for well-functioning societies, emphasised social psychology and the role of emotions (rather than pure reason) in leading moral and just lives.<sup>686</sup> He considered that moral sentiments were intrinsic to our nature as social beings, what he referred to as sympathy. Still, he recognised that although we are naturally sympathetic to one another, there are other external factors causing corruption and immoral practices. Like Aristotle, Smith placed great emphasis on virtues, among which was justice. However, he identified justice as being the only virtue which can be enforced upon us so that it diminishes the harm we do to others.<sup>687</sup> In his *Theory of Moral Sentiments*, Smith highlighted the significance of what he called ‘mutual sympathy’ especially regarding ‘negative emotions’. He explained that ‘[t]o seem to not be affected by the joy of our companions is but want of politeness; but to not wear a serious countenance when they tell us their afflictions, is real and gross inhumanity’.<sup>688</sup> Moreover, Smith’s idea of sympathy describes, as was the case with Rawls, the other-orientated perspective-taking of social empathy discussed below in this chapter. More specifically, he described it as follows:

As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation. [...] [I]t is by the imagination only that we can form any conception of what are his sensations. Neither can that faculty help us to this any other way, than by representing to us what would be our own, if we were in his case. It is the

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<sup>684</sup> Aristotle, *Nicomachean Ethics* (n.561) Book II

<sup>685</sup> *ibid*

<sup>686</sup> Adam Smith, Sálvio M. Soares (ed) *The Theory of Moral Sentiments*, (1790) (6<sup>th</sup> ed, MetaLibri 2006)

<sup>687</sup> *ibid* 71

<sup>688</sup> *ibid* 10

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impressions of our own senses only, not those of his, which our imaginations copy. By the imagination, we place ourselves in his situation.<sup>689</sup>

This imagination corresponds, as will be seen further, to a process of reflection that encourages other-orientated perspective-taking. From a more contemporary perspective, Habermas established his theory of communicative action and placed great emphasis on deliberation and argumentative speech among individuals based on the interaction and coordination of their actions. At the same time he also recognised empathy as an essential ingredient for deliberative democracy. More particularly, he recognised empathy as ‘an emotional prerequisite for ideal role-taking, which requires everyone to take the perspective of all others’.<sup>690</sup> This highlights the cognitive ability to understand (but not necessarily feel) another person’s feelings, circumstances and ideas.

Martha Nussbaum discussed the role of political emotions in the political life and identified emotions rooted in love as necessary ingredients for sustaining societies that aspire to justice and the common good. She made specific reference to empathy and compassion and explained that ‘we may define empathy as the ability to imagine the situation of the other, taking the other’s perspective’.<sup>691</sup> She further elaborated that ‘empathy is not mere emotional contagion, for it requires entering into the predicament of another, and this, in turn, requires some type of distinction between self and other, and a type of imaginative displacement’.<sup>692</sup> This distinction between self and other, constitutes, as will be seen further, another vital element of empathy as embraced in this thesis.

This brief reference to the political and moral philosophers and thinkers indicates that we have good reasons to explore the relevance of emotions in social and communicative spaces. However, while they all point towards normative accounts of justice and contemplate on how to achieve just communities through a process of reflection and reflexivity, there are also more recent, often interdisciplinary, fields that deal with more specific questions about the place and role of emotions in the context of the law and society. For example, there has been an emerging interdisciplinary field that goes a step further from claiming the relevance of emotions in law and society to drawing direct connections in more practical every-day discourses aiming to show the urgency of recognising the role of emotions in the outcomes of law and legal reasoning.

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<sup>689</sup> *ibid* 4

<sup>690</sup> Jürgen Habermas, Ciaran Cronin (tr), *Justification and Application: Remarks on Discourse Ethics*, (Polity Press, 1993) 174

<sup>691</sup> Martha Nussbaum, *Political Emotions: Why Love Matters for Justice*, (Belknap Press/Harvard University Press, 2013) 145

<sup>692</sup> *ibid* 146

In his book *A Passion for Justice*, Robert Solomon has argued that ‘justice is a passion to be cultivated, not an abstract set of principles to be formulated, mastered and imposed upon society’.<sup>693</sup> Despite how we perceive the principles of justice, these are:

[U]tterly meaningless without that fundamental human sense of caring and the ability to understand and personally care about the well-being of other human beings and other creatures who may be very far away and personally quite unknown to us.<sup>694</sup>

In a similar line of thought, Susan Bandes’ *The Passions of Law* makes direct connections between emotions and legal practices.<sup>695</sup> Bandes’ book is the first collection of essays that brings together essential questions concerning justice, law, psychology, and philosophy and aims to reflect and discuss the role of emotions in the legal context from how judicial decisions are taken to emotions concerning lawyers and clients. As Bandes states in her introduction, ‘the law [...] is imbued with emotion’. Rather than questioning ‘*whether* emotion belongs in the law’ the essays focus on questions such as ‘how do we determine which emotions deserve the most weight in legal decision making? Moreover, which emotions belong in which legal contexts?’<sup>696</sup>

Even though the aim of this chapter is not to study specific emotions within the legal framework of the AFSJ, it is important to keep these studies in mind. They go a step further than suggesting the relevance of emotions by examining the actual role of emotions, such as disgust, compassion, and caring within the legal context.<sup>697</sup> This more pragmatic approach towards emotions is also the subject of a sub-disciplinary field of sociology that deals with the sociology of emotions or, what it is also called, the social construction of emotions. This area highlights the role of emotions in society as constituting more than physiological/biological phenomena and is consistent with Bourdieu’s habitus examined in the previous chapter. From this more sociological perspective, for example, Thoits and Hochschild consider emotions as being constructed socially, taking the form of norms or rules giving meaning to different situations and directing people as to how to feel in a given situation.<sup>698</sup> Candace Clark similarly argues, in relation to the expression of sympathy, that there are rules, beliefs, and other symbols within culture that direct when sympathy will be

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<sup>693</sup> Robert Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Rowman & Littlefield Publishers, 1995) 33

<sup>694</sup> *ibid*

<sup>695</sup> Susan Bandes (ed), *The Passions of Law* (New York University Press, 2000)

<sup>696</sup> *ibid* 7

<sup>697</sup> Bandes *ibid*, Solomon (n.693), Nussbaum (691)

<sup>698</sup> Peggy Thoits, ‘The Sociology of Emotions’, 1989 15 *Annual Review of Sociology* 317,319; Arlie Russel Hochschild, ‘Emotion work, feeling rules, and social structure’, 1979 85(3) *American Journal of Sociology* 551; Arlie Russel Hochschild, *The managed heart: Commercialization of human feeling* (University of California Press, 3<sup>rd</sup> ed, 2012)

expressed and under what circumstances,<sup>699</sup> while Kemper and Collins have explored the impact of resources, power, status and social class in the development and construction of emotions.<sup>700</sup>

This background is used to highlight the growing importance of emotions within politico-legal framework (without downplaying the role of emotions in the biological sense) and the impact on the socio-psychological structures, the dialectical relationship of which was examined in Chapter Two. What follows will not discuss any particular emotions in the context of the AFSJ, even though such studies would be incredibly illuminating and would contribute to further understanding of this area of EU law. One such study has been the *Politics of Compassion* by Ala Sirriyeh who explores compassion and empathy as emotions within immigration policies in Europe.<sup>701</sup> However, in the present thesis I embark on a more general theoretical approach and do not treat empathy as emotion. Instead, I explore the meaning of (social) empathy and how this can be considered as one of the most significant tools needed to encourage reflection that many philosophers, thinkers, political and social scientists have discussed throughout the years. My argument is that social empathy can be the 'golden rule' (to use an Aristotelian term) between emotion and reason as it is itself neither an emotion nor based on pure reason. It is, as will be explored below, a process which has the potential to be cultivated both at the personal as well the collective level. This theoretical approach is subsequently applied in a more empirical context in Chapter Four, which serve as an example of how a social empathy approach may be interpreted in the context of the AFSJ within an institutional framework, particularly through the case law of the Court of Justice.

### 3.4 Exploring empathy

Empathy, in its general everyday meaning, is captured in the phrase of *walking in someone else's shoes*. This simple phrase describes a matrix of emotions and cognitive processes, such as trying to understand the suffering of others from their own perspective, the ability to observe and identify their suffering and to feel as they feel. However, these processes do not sufficiently capture the broader scope of empathy whose practical and normative implications are studied

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<sup>699</sup> Candace Clark, *Misery loves company: Sympathy in everyday life* (The University of Chicago Press, 1997)

<sup>700</sup> Randall Collins, 'Stratification, emotional energy, and the transient emotions', 27-57 in Theodore D. Kemper (ed), *Research Agendas in the Sociology of Emotions* (State University of New York Press, 1990); Theodore D. Kemper & Randall Collins, 'Dimensions of microinteraction', 1990 96 (1) *American Journal of Sociology* 32

<sup>701</sup> Sirriyeh, *The Politics of Compassion* (n.33)

throughout various disciplinary fields including neuroscience,<sup>702</sup> social work,<sup>703</sup> philosophy and psychology.<sup>704</sup> Because of its general application and incorporation in different fields of study, to provide a precise definition or a comprehensive explanation as to the meaning and functions of empathy may not be possible or even desirable as it risks reducing empathy to a single derivative definition. However, the following section aims to explore and pin down the meaning of empathy as this can be applied in the context of the AFSJ. I will adopt the term *social empathy*, as elaborated by Segal and others, because it captures the social dimension of empathy as opposed to the merely interpersonal aspect.<sup>705</sup> I will, however, expand its application to apply not only in relation to individuals but to institutions in the sense that we can assess not only individuals' social empathy towards other individuals and social groups but the potential for social empathy to be assessed within institutions themselves. This approach allows empathy to be explored with reference to the wider social structures, including institutions and laws, while simultaneously incorporating the inter-personal aspect of empathy, which involves empathy between and towards individual social agents. Social empathy, as embraced in the current thesis goes beyond the interpersonal characteristics of individuals and the social skills that may be associated with developing empathy. It goes further to explore the application of social empathy in the context of the European polity and to ask whether a social empathy approach can be a valuable alternative or additional dimension through which to understand issues that arise within the AFSJ.

It is, however, important to first to understand what empathy entails as this has been explored in various disciplines. To that end, subsequent paragraphs commence with a brief reference to the neuroscientific explanation of what triggers empathy then moves on to empathy's more social dimensions considering studies in the field of social neuroscience, social psychology and social work. Approaching empathy from these fields allows us to see the scientific as well as social dimensions of empathy, therefore, acknowledging, in line with Chapter Two, the dialectical relationship between individual and their social environment but also capturing what Maturana called 'the braiding of languaging and emotioning'. Social work in particular, which is the field in

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<sup>702</sup> Jean Decety & William Ickes, *The social neuroscience of empathy* (MIT Press, 2009); Tania Singer & Claus Lamm, The social neuroscience of Empathy, 2009 1156 (1) *Annals of the New York Academy of Sciences* 81; Iacoboni, *Mirroring People* (n.657); Lian Rameson, Matthew Lieberman, 'Empathy: A Social Cognitive Neuroscience Approach', 2009 3 (1) *Social and Personality Psychology Compass* 94

<sup>703</sup> Elizabeth Segal, 'Social Empathy: A Model Built on Empathy, Contextual Understanding, and Social Responsibility that Promotes Social Justice', 2011 37 (3) *Journal of Social Service Research* 266; Elizabeth Segal, Karen Gerdes, Cynthia Lietz, Alex Wagaman, Jennifer Geiger, *Assessing Empathy* (Columbia University Press, 2017)

<sup>704</sup> Amy Coplan, 'Understanding Empathy: Its features and Effects', 3, in Amy Coplan & Peter Goldie (eds) *Empathy: Philosophical and Psychological Perspectives* (Oxford University Press, 2011); Martin Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge University Press, 2010)

<sup>705</sup> Segal, Social Empathy: A Model Built on Empathy, (n703); Segal et al., *Assessing Empathy* (n.703)

which social empathy developed, is concerned with the relationships between individuals, groups, and communities, and which brings about positive social change that contributes to enhancing the wellbeing of people. Social work is, therefore, a vital discipline to consider in understanding empathy and its practical processes and competencies in the social space and allows us to consider the relational dynamics between law and emotion, structure and agency, society and individual.

### 3.5 Interdisciplinary approaches to empathy and its definitions

In the field of neuroscience, the study of specific regions in the brain and particularly the discovery of specific cells in the brain called 'mirror neurons', have been used to explain the neuroscientific aspect of empathy.<sup>706</sup> This hypothesis, as Iacoboni explains, can be understood in the following way: 'our mirror neurons fire when we see others expressing their emotions as if we were making those facial expressions ourselves. Based on this firing, the neurons also send signals to emotional brain centres in the limbic system to make us feel what other people feel'.<sup>707</sup> In other words, when we observe someone, we activate the same actions and emotions in ourselves as if we were experiencing what the Other is experiencing.

A neuroscientific approach, therefore, suggests that empathy may express a close biological connection between human beings,<sup>708</sup> something similar to what Maturana developed in his concept of 'biology of love' where he argues that love has been part of our biological evolutionary roots at about 3 million years ago.<sup>709</sup> From Iacoboni's perspective, empathy is understood as an innate and automatic response, which is closely connected to the idea of imitation. For example, when we see someone feeling sad, the mirror neurons, at least hypothetically, are said to fire in us, i.e. the observer, causing us to express the same emotions as the person we observe.<sup>710</sup> This was captured by Adam Smith when he said '[h]ow selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.'<sup>711</sup> The discovery of mirror neurons may help to explain the underlying neurological processes of empathy and provide us with as to how we may feel for someone else; in fact, they may

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<sup>706</sup> Mirror neurons were first discovered in macaque monkeys by a team of neurophysiologists at the University of Parma and have since been researched in humans, see Rizzolatti G., Craighero L., 'The Mirror-Neuron System', 2004 27 Annual Review of Neuroscience 169

<sup>707</sup> Iacoboni, *Mirroring People* (n.657) 119

<sup>708</sup> *ibid*

<sup>709</sup> Maturana, *The origin of humanness in the Biology of Love* (n.656)

<sup>710</sup> Iacoboni, *Mirroring People* (n.657)

<sup>711</sup> Smith (n.686)

explain, from a biological perspective, some aspects of Bourdieu's bodily hexis and Mead's conversation of gestures. However, it does not adequately explain why empathy may be triggered and what other social and psychological aspects may influence our ability to show or feel empathy.

A more generalised approach within the field of social work is provided by Gerdes who has explained empathy as 'a capacity, a cognitive ability, a skill, a feeling, understanding, a disposition, a process'<sup>712</sup> that is used to explain 'the physiological experience of feeling what another person is feeling and the cognitive processing of the experience'.<sup>713</sup> It is further used to describe 'the ability to perceive and feel the world from the subjective experience of another person'.<sup>714</sup> From this approach, empathy is expressed based on both cognitive and emotional processes,<sup>715</sup> which suggests that there is much more to the triggering of neurons in the brain. The approach suggests that empathy can be taught, learned, acquired, and cultivated in a way that is consistent with the dimension of the social construction of emotions mentioned in the previous section. The notion of empathy can comfortably be situated in the context of the habitus as part of the conversation of gestures, as explained with reference to Bourdieu and Mead in the preceding chapter, or to what Maturana referred to as the 'braiding between languaging and emotioning'. This 'conversation' reflects the internalisation and inscription in the bodies and minds of social agents of the communication that arises (including norms, meanings, ideas, emotions) contributing to the construction of their identities, their everyday actions and interactions. Empathy can, therefore, be understood as reflecting a deeper form of communication but also learning process between social agents, which allows them to imagine and or feel what it is like to be in the position of another person. This interpretation is what Rawls possibly meant in the context of the development of moral thinking and the cultivation of the ability to take on different perspectives and understand different positions and feelings. It is also related to what Habermas referred to when he talked about empathy as an ideal role-taking within a deliberative democracy.

The underlying elements of empathy at the social-psychological level have been discussed by Batson, who refers to eight phenomena, or psychological states, that we may go through when experiencing empathy.<sup>716</sup> For example, empathy may involve: i) knowing another person's internal

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<sup>712</sup> Karen Gerdes, 'Empathy, Sympathy, and Pity: 21<sup>st</sup>-Century Definitions and Implications for Practice and Research, 2011 37 (3) *Journal of Social Service Research* 230, see Table 1

<sup>713</sup> Batson C. D. & Fultz J., 'Distress and empathy: Two qualitatively distinct, vicarious emotions with different motivational consequences' 1987 55(1) *Journal of Personality* 19  
Hoffman, 2000 quoted in Gerdes, *Empathy, Sympathy, and Pity*, ibid

<sup>714</sup> Misch & Pelouquin, 2005, p. 42 in Gerdes, *Empathy, Sympathy, and Pity* ibid

<sup>715</sup> Coplan, *Understanding Empathy* (n.704)

<sup>716</sup> Daniel Batson, 'These Things Called Empathy: Eight Related but Distinct Phenomena', in Decety & Ickes, *The Social Neuroscience of Empathy* (n.702)

state, thoughts and feelings, ii) matching the neural responses of another person, iii) feeling sympathy others by feeling as they feel, iv) projecting one's self into another's situation, v) imagining how another is thinking and feeling, vi) imagining how one would think and feel if he were in the other's place, vii) feeling distress at the suffering of another person, and, viii) feeling for another person who is suffering.<sup>717</sup>

All these psychological states are closely related to one another, but none could stand alone as a single comprehensive definition of empathy. For example, feeling for another person may involve trying to understand that person's internal state, but this does not mean, as Batson explains, that this other-orientated feeling is based on accurate facts. It may well be based on a wrong idea of what the other is feeling, which may consequently lead to the wrong actions that do not assist the person who is suffering. This insight suggests two important elements for empathy as embraced in this chapter; primarily that empathy is orientated towards another person and, secondly, that it involves a more active role as regards the alleviation of another persons' suffering. It is on this basis that empathy can be understood as a social practice, a collective process and effort that can be applied not only at the interpersonal level but also at the social and collective level including, as will be seen, the level of society and its institutions, laws, and bodies.

### **3.6 Two important elements of empathy**

#### **3.6.1 First element: other-orientated perspective-taking**

Concerning the other-orientated element of empathy, Batson explains that when feeling for someone else drives us to focus on our own emotions this actually impedes the other-orientated feeling which is an important component of empathy,<sup>718</sup> and, consequently, does not allow us to understand or feel the experiences of others from their own perspective and based on their own situation. This means that the affective processes are not necessarily sufficient in themselves to enable us to understand and experience another's feelings especially not in such a way as to place us in a position to act in a manner that alleviates the suffering of another person. From Batson's approach, to rely on the idea of empathy as merely an automatic and hard-wired response to other people's emotions, as suggested by Iacoboni, does not necessarily mean we are empathic towards them because we understand their pain. Instead, it suggests that we may be feeling for

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<sup>717</sup> *ibid*

<sup>718</sup> *ibid*, 10

them from a more egotistic point of view as the feelings that arise in us are self-orientated rather than other-orientated. This concept is labelled as personal distress, which can result in a failure to express empathic behaviour as there is no distinction between self and other, which can lead to confusion as to who is really feeling the particular emotion in the first place.<sup>719</sup>

Social neuroscientists have argued that empathy depends on the distinction between self and other, in other words being self-aware and in a position to identify whether our affective behaviour derives from us or is triggered by someone else.<sup>720</sup> From the social neuroscientific perspective, Singer and Lamm believe that if the trigger of empathy is internal, then this would more likely indicate personal suffering and not necessarily sharing another person's feelings.<sup>721</sup> While the two authors mentioned above similarly explain that in the field of neuroscience, empathy is understood as being automatically activated without necessarily involving any conscious awareness, at the same time they underline the flexibility of the human brain. They explain that 'top-down influences', such as 'attention, contextual appraisal, perspective-taking, and the relationship between empathiser and target', also play a significant role in triggering empathy.<sup>722</sup> What this means is that even though the empathic feeling towards another person may itself be automatic in the form of a reaction or response, this does not imply that empathy in its entirety is disconnected from conscious, reflexive elements, nor does it mean that it happens outside the social environment.

In fact, if empathy is understood in the terms explained by Batson, i.e. as 'a capacity, a cognitive ability, a skill, a feeling, understanding, a disposition, a process' the expression of empathy entails reflexivity at its core even if it is eventually triggered automatically. To exemplify this point, we may consider a situation where, for instance, someone is watching the news about capsized refugee boats and feels for the victims and expresses empathy towards them. This reaction may be an unconscious and automatic reaction to others' suffering, however, this reaction may be rooted in a multiplicity of other mental, emotional, and physiological aspects including a conscious effort to understand the perspective/situation of the person experiencing this calamity, or to link this feeling to one's own previous experiences.

For example, Lamm and Majdandžić agree with the idea that 'there are strong evolutionary roots and forces of automaticity in empathic responding' but these may be 'attributed to (early)

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<sup>719</sup> see for example Jean Decety, Claus Lamm, 'Empathy versus Personal distress: Recent Evidence from Social Neuroscience', in Decety & Ickes, *The Social Neuroscience of Empathy* (n.702), 203

<sup>720</sup> Singer & Lamm, 'The social neuroscience of empathy' (n.702) 83

<sup>721</sup> *ibid*

<sup>722</sup> *ibid*, 89

learning experiences, culture, and socialisation rather than hard-wiring mirroring'.<sup>723</sup> This idea is further supported by Engens and Singer, who suggest that different networks can invoke the generation of empathic responses or their alteration but also the intentional regulation of empathy.<sup>724</sup> They explain that empathic responses can be generated from direct perceptual exposure or from engaging in perspective-taking with the aim to understand the emotions of others. However, at the same time, different characteristics such as the gender or personality of the empathiser, the relationship between the empathiser and the target, as well as the perceived fairness of others, all affect empathic responses.<sup>725</sup>

This other-orientated element of empathy has similarly been highlighted by Coplan who emphasises the aspect of self-other differentiation, arguing that it is through this distinction that we can identify whether someone is likely to express empathic feelings that are other-orientated rather than self-orientated.<sup>726</sup> Coplan, who is more interested in the philosophical and psychological aspects of empathy, adopts a narrower definition of empathy and considers that not only is a reactive emotion insufficient to be considered as empathic (because it does not necessarily imply that the other's emotions have been identified accurately) but further that the perspective-taking involved should primarily be other-orientated. As she explains:

In other-orient[at]ed perspective-taking, a person represents the other's situation from the other person's point of view and thus attempts to simulate the target's individual's experiences as though she were the target individual. Thus I imagine that I am you in your situation, which is to say I attempt to simulate your experiences from your point of view.<sup>727</sup>

Contrary to the other-orientated perspective-taking, the self-orientated perspective-taking as Coplan explains 'is more likely to lead to personal distress' as identified above.<sup>728</sup> The reason for this is that trying to imagine what it is like to experience what another person is experiencing can lead to confusion about the source of these emotions, eventually causing the observer to focus on her own emotions rather than feeling empathic towards the pain or experiences of others.<sup>729</sup> Although Coplan's approach rejects the possibility of empathy being simultaneously automatic as well as intended, her explanation of self-other differentiation remains vital for the purposes of

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<sup>723</sup> Claus Lamm and Jaminka Majdandžić, 'The Role of shared neural activations, mirror neurons, and morality in empathy – A critical comment' 2015 90 *Neuroscience Research* 15, 20

<sup>724</sup> Haakon Engen and Tania Singer, 'Empathy Circuits', 2012 23 (2) *Current Opinion in Neurobiology* 275

<sup>725</sup> *ibid* 276-277

<sup>726</sup> Coplan, *Understanding Empathy* (n.704) 9

<sup>727</sup> *ibid*, 10

<sup>728</sup> *ibid*, 12

<sup>729</sup> *ibid*, 13

this chapter. For example, as Batson similarly explains, feeling the same as someone else feels may restrain feelings directed towards the Other, leading us to focus on our own emotions.<sup>730</sup> When, for instance, we try to imagine how we would feel being in the position of another person in distress, it is possible that 'self-orient[at]ed feelings of distress' may arise.<sup>731</sup>

So far, I have focused on the important aspect of empathy as orientated toward others rather than towards one's self, highlighting the significance of the distinction between self and other. I have explained that empathy is to be embraced as a social-psychological practice which may result in automatic responses as reactions towards the suffering of others but which, however, entail a process of perspective-taking from the position of the Other and, therefore, involves the process of reflective practice and reflexivity. Empathy was explained thus as communication which occurs as part of the conversation of gestures and which becomes internalised by social agents guiding their actions, thoughts, and the construction of knowledge within the social space. The internalisation of empathy in the social agents' bodies and minds as constituting part of the habitus suggests that empathy can be understood beyond our biological and evolutionary inclinations to respond empathically automatically,<sup>732</sup> but rather that empathy can be acquired, cultivated and learned as a disposition, habit or skill.<sup>733</sup> With that in mind, I suggest that empathy can be used to as an additional framework for the reconceptualisation of the AFSJ as a communicative space and as an active element of EU's actualization process. Incorporating a social empathy approach within the AFSJ encourages us to challenge attitudes that arise within this area based on reflective awareness.

As empathy involves a distinction between self and other, in the context of the AFSJ this would mean that questions of, for example, accessing citizenship rights including residence and work as well as reliance on social security systems, would require consideration of the situation of others in the host state similar, as the current author suggests, to what the Court of Justice has embraced in some (but by no means all) situations following an individual circumstances approach. However, this does not sufficiently capture empathy which involves, for the current purposes, a second significant element, namely, the effort to alleviate the other persons' suffering and the trigger of positive action towards that aim.

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<sup>730</sup> Batson in Decety and Ickes, (n.716) 10

<sup>731</sup> *ibid*, 10-11

<sup>732</sup> Iacoboni (n.657)

<sup>733</sup> Gerdes (n.712)

### 3.6.2 Second element: positive action and social responsibility

Lamm and Majdandžić explain that ‘empathy is sensitive to deeply-rooted parochialism and in-group bias/altruistic action towards those we perceive as closer or more similar to us’.<sup>734</sup> This suggests that although in many situations empathy denotes, and is connected to, positive emotions and actions such as altruism<sup>735</sup> and prosocial behaviour, including perspective-taking<sup>736</sup> and understanding others,<sup>737</sup> it may also indicate bias and prejudice towards those perceived as out-groups. Studies have shown, for example, that when measuring empathy towards racial groups other than one’s own, a reduction of empathic feelings is noticed.<sup>738</sup> Chiao and Mathur, however, found that racial bias in empathy stems from ‘culturally acquired prejudice’,<sup>739</sup> which means that changes in culture can influence how empathy is expressed and especially how people respond to the suffering of others, whether they are considered members of the in-group or an out-group. The self-other differentiation through a process of reflection is therefore not sufficient to constitute empathy but instead must be accompanied by a willingness to take positive steps to alleviate the other’s suffering and to address injustices by cultivating a sense of responsibility towards others.

This approach closely reflects Maturana’s argument that the systematic conservation of either aggression or love (the latter of which he defines as acceptance of the Other’s legitimacy in coexistence with one’s self)<sup>740</sup> takes place within culture which is, therefore, crucial for the evolution of the human being. For example, Maturana refers to cultures as ‘biological phenomena’ to illustrate his point of how cultures directly influence human beings while he explains that they take place ‘through the living of living system’ (i.e. the human) ‘in the relational dynamics of language’.<sup>741</sup> On that basis, I argue that it is not only desirable but also essential to cultivate a culture of empathy through reflexivity and reflective awareness that aim to address misconceptions, prejudices and stereotypes within the AFSJ but also to substantively address inequalities, discriminations, injustices, and suffering that take place within this area.

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<sup>734</sup> Lamm & Majdandžić (n.723) p.20

<sup>735</sup> Daniel Batson, ‘The Empathy-Altruism Hypothesis’, in Daniel Batson, *Altruism in Humans* (Oxford University Press, 2011)

<sup>736</sup> see for example Coplan, ‘Understanding Empathy’ (n.704)

<sup>737</sup> Batson, ‘These Things Called Empathy’ (n.702)

<sup>738</sup> Joan Chiao & Vani Mathur, ‘Intergroup Empathy: How Does Race Affect Empathic Neural Responses?’ 2010 20 (11) *Current Biology* 678; Alessio Avenanti, Angela Sirigu, Salvatore Aglioti, ‘Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain. 2010 20 (11) *Current Biology* 1018; Vani Mathur, Tokiko Harada, Trixie Lipke, Joan Chiao, ‘Neural basis of extraordinary empathy and altruistic motivation’, 2010 51 *NeuroImage* 1468

<sup>739</sup> Chiao & Mathur, ‘Intergroup Empathy’, *ibid*, 480

<sup>740</sup> These are only two emotions

<sup>741</sup> Maturana (n.656) 91

As these inequalities and biases are developed both culturally and structurally (as we saw in the previous two chapters), this suggests that empathy must be applied not only at the interpersonal level (i.e. with reference to individual persons) but also at the collective and social level. That is, not only through the living system (human being) but also through the social systems where networks of various relationships merge, interact and come to existence. The remainder of this chapter explores the concept of social empathy which has been developed within the field of social work but which, as will be argued, has broader implications and potentials and can be applied within the context of the AFSJ.

### 3.7 Social empathy

Social workers have suggested that empathy should be incorporated into social work with the aim to address social inequalities and promote social justice<sup>742</sup> but also to prepare social workers to be more effective in their work.<sup>743</sup> This suggestion has important implications for the study of citizenship and migration in the wider socio-legal framework in which empathy could be used in a similar way. This approach can have an impact on the professions involved in these fields including, for example, the role of politicians, legislators, judges, and civil servants who are implicated in policy setting, legislating, interpreting and applying laws all of which play a significant role in the construction and reconstruction of meaning in the social space. At the same time, elements of empathy could also be explored within the socio-legal framework itself, for example, through an examination of specific laws and policies. Segal has defined social empathy as follows:

Social empathy applies empathy to social systems to better understand the experiences of different people, communities, and cultures. Social empathy is the combination of: 1) experiencing empathy to its fullest extent, 2) gaining deep insight and knowledge about historical and socioeconomic contexts, particularly about inequality and disparity; and 3) embracing the importance of social responsibility.<sup>744</sup>

Furthermore, social empathy has also been explained as ‘the application of empathy on and by larger systems, such as organisations that are responsible for decisions and policies that impact

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<sup>742</sup> Segal, ‘Social Empathy: A Model Built on Empathy’ (n.703); Segal et al., *Assessing Empathy*, (n.703)

<sup>743</sup> Karen Gerdes & Elizabeth Segal, ‘Importance of Empathy for Social Work Practice: Integrating New Science’, 2011 56 (2) *Social Work* 141

<sup>744</sup> Segal, ‘Social Empathy’ (n.703), 267-268

large groups of people'.<sup>745</sup> Segal and others have suggested that by promoting interpersonal empathy through its various components, such as 'affective mentali[s]ing'<sup>746</sup>, 'self-other awareness', 'perspective-taking'<sup>747</sup> and 'emotion regulation',<sup>748</sup> it is possible to cultivate social empathy on a larger scale and between different social groups, thus improving their relationship and co-existence. For instance, they posit that encouraging empathy at the social level can lead to positive social behaviour, including altruism, morality and justice.<sup>749</sup> However, in addition to the interpersonal aspects of empathy, the preceding authors further establish that there are two additional components involved in a more socially-orientated understanding of empathy. The first is the component of 'contextual understanding of systemic barriers'. This involves understanding the historical circumstances that have contributed to the formation of identities of a particular group.<sup>750</sup> The second component is the 'macro self-other awareness/perspective-taking', which focuses on the external factors that influence the experiences of others.<sup>751</sup> Segal explains that to address structural inequalities, it is important 'to provide people with opportunities to gain deep contextual knowledge and have experiences that create empathic insights into the lives of people who are oppressed'.<sup>752</sup>

This deep contextual knowledge functions as a process of reflection and involves understanding social conditions, the differences between individuals and social groups, and understanding people's needs. Segal put forward the three basic components for developing a model based on social empathy, including embracing (individual) empathy as means towards the promotion of prosocial behaviour and eliminating unsubstantiated fears towards others. This embrace of empathy would provide a well-informed understanding of the history and context of the life experiences of people who may not identify with the prevailing culture, and encourage the element of social responsibility which can lead to positive actions.<sup>753</sup> She recognises that empathy alone may not necessarily result in positive behaviours and also that empathy may indeed be preferential towards in-group members. Thus, she argues, it is important that its potentially positive effects, such as prosocial behaviour and gaining a deep understanding of others' emotions and experiences, are enhanced by promoting a framework of deep contextual

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<sup>745</sup> Segal et al. , *Assessing Empathy* (n.703) 24

<sup>746</sup> This is defined as the "the state of imagining or thinking about an experience" and understanding or predicting others' emotions through non-verbal communication. Segal et al., *ibid* 15-16

<sup>747</sup> 'Self-other awareness' and 'perspective-taking' have already been explored above.

<sup>748</sup> This is defined as 'the ability to react to another's experiences and process what those reactions might mean without becoming overwhelmed', Segal et al., *ibid* 19

<sup>749</sup> *ibid* 56-60

<sup>750</sup> *ibid* 26

<sup>751</sup> *ibid* 27

<sup>752</sup> Segal, 'Social Empathy' (n.703), 268

<sup>753</sup> *ibid* 269-273

understanding and deep reflection over events and other social problems.<sup>754</sup> This point is consistent with Coplan's approach, which suggested that empathy is more genuine when it is based on other-orientated perspective-taking.<sup>755</sup> As explained, this avoids personal distress that may arise from the self-orientated perspective-taking which involves emotion regulation, which refers to the ability to control one's emotions and being in a position to distinguish and manage one's feelings from somebody else's.<sup>756</sup>

The two significant elements of empathy within the different disciplines are further enhanced by Segal's approach to a more specific type of empathy, namely social empathy. For the purposes of the current thesis the first element of empathy, regarding the other-orientated perspective-taking, requires a deeper understanding of the context and historical background to social issues faced by individuals and groups, while the second element concerning the active alleviation of others' suffering, involves the promotion of social responsibility in order to take steps to address potential inequalities and disparities that may arise in the social space.

Studying and exploring the hypothetical application of social empathy within the context of the EU and the AFSJ, allows us to address concerns about autonomy. As identified at the end of the previous chapter, autonomy is a crucial aspect for the meaningful development of the subject and the actualisation of the EU's potentialities ultimately creating an 'ever closer union' which is inclusive and responsive to all those who derive rights under its socio-legal order. The definition of autonomy used here is based on Castoriadis' conceptualisation which treats autonomy not as living independently from one another but rather as allowing the challenge of tradition, deconstruction of norms and practices and the reformulation of what is considered good in a given society. Castoriadis' conceptualisation, as was explained in Chapter Two, recognises that individuals exist in relation to others and in relation to the institutions they set in society, as such, individuals create their own laws and must, therefore, constantly deliberate about what constitutes a good society. At the same time, institutions which are set up in society play a significant role in facilitating deliberation and participation, which allows individuals to challenge their laws, norms, traditions, and practices. However, it can be recalled from Chapter One, through the analysis of Foucault's notion of power and the biopolitical aspect in relation to the development of the subject, that power relations can dominate individuals and can impose an identity upon them which can influence autonomy and the actualisation of their individual potentialities. Reference was made to the technological apparatuses that apply to whole

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<sup>754</sup> *ibid*

<sup>755</sup> Coplan, 'Understanding Empathy' (n.704) 4

<sup>756</sup> Segal et al., (n.703) 45

populations not necessarily in order to exclude certain groups or individuals in their own right but rather through the security apparatus which functions on the basis of calculating risks and balancing probabilities which are eventually normalised and embedded in the social sphere.

Any account of autonomy must, therefore, include the vulnerable element of the human person. This is particularly significant in the context of the AFSJ which is connected to many areas that regulate the lives of individuals either in the context of EU citizenship and regular migration or in the context of international protection. It is the argument in this thesis that a social empathy approach facilitates this recognition of vulnerability, which is elaborated in the subsequent section. It is, therefore, not enough to suggest that individuals and societies must cultivate self-reflection and deconstruct any doxic ideas and representations that may have been historically and traditionally established in a given society. It is also important to ask what does it practically and realistically take to achieve that? Incorporating the aspect of vulnerability in the context of the AFSJ and identifying its significance within the context of social empathy reflects a step towards strengthening the human face of the EU from a more human centred vantage point. Meanwhile, the social empathy approach in general, as explained in this chapter, is also based on a reflexive philosophy capable of embracing diversity in all its forms. Together, these are significant steps towards a 'democratic humanist philosophy' put forward by Ferreira and Kostakopoulou, which can function as 'the benchmark against which the adequacy and enforcement of EU law and policy across the board should be analysed – hence promoting a compassionate, empathic, inter-connected and caring "right way" of doing and living politics and norms'.<sup>757</sup> Additionally, a social empathy approach that further incorporates the aspect of vulnerability in an empowering way, is compatible with the politics of listening that treats listening as a social and political process. This argument has been explored by Bassel in *The Politics of Listening: Possibilities and Challenges for Democratic Life*, where she argues that for political equality to be achieved there is an urgent need for listening rather than only speaking.<sup>758</sup> She explains that for a politics of listening everyone must participate both as a listener and a speaker on an equal basis while listening may act as a form of recognition of otherwise excluded groups or individuals, who are not seen as legitimate political subjects.<sup>759</sup> Bassel argues that this form of listening as political and social process:

requires listening also for the past, to recognise rather than erase the historical roots of unequal social relations that condition the visible, present moment of conflict. This listening

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<sup>757</sup> Nuno Ferreira, Introduction, in Ferreira & Kostakopoulou, *The Human Face of the European Union*, (n.31)10

<sup>758</sup> Bassel, *The Politics of Listening* (n.32)

<sup>759</sup> *ibid* 6-10

recasts the story being told and who is able to tell it, and shifts roles of speaking and listening within new relations of interdependence and recognition. This is micropolitics, embedded in social and political processes that need to be understood within their cultural and historical contexts but also connect across and transcend them.

This form of listening reflects, and sits comfortably with, the way social empathy is understood in the present thesis as it not only requires recognition of the socio-political, cultural and historical context of inequalities, but also a recognition of the Other as a legitimate political agent which is the basis for a social empathy approach.

### **3.8 (Empowering) vulnerability as intrinsic to social empathy**

The preceding paragraphs explained that to be able to engage in self-reflection we must also be able to understand different perspectives and points of view to understand the impact of our actions, or inactions, on others. Similarly, to be critical about existing norms, traditions and ideas we must be able to understand their historical underpinnings and their specific contexts. A social empathy approach is crucial to that effect because primarily, as it involves interpersonal empathy, it recognises each person as an individual who may experience their own vulnerable situations without imposing any social norms as to what is accepted or not accepted. Secondly, it recognises that individuals exist in social contexts and therefore it encourages the development of institutions to be structured in ways that support and facilitate in-depth knowledge of the historical and socioeconomic contexts of various groups and individuals to avoid inequalities. In other words, the condition of vulnerability plays a crucial role in social empathy and the acknowledgement of which is particularly essential for reflexivity. In the context of the AFSJ, the aspect of vulnerability is particularly important in the balancing of various interests, as the analysis of citizenship and free movement case law in Chapter One suggests, especially in the context of family reunification and children's rights.

Vulnerability reflects in a more practical outlook the relationship between law and emotion and shows that the law and the institutions that are set up to implement it are not, and can hardly be, rid of emotions. Martha Fineman characterised vulnerability as 'universal and constant, inherent in the human condition' and she has argued that institutions and the state should be more involved in addressing vulnerability.<sup>760</sup> Because of that she rejects the idea of an autonomous and

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<sup>760</sup> Fineman, 'The vulnerable subject' (n.30) 1

independent subject. However, she does seem to be in line with Castoriadis' conceptualisation of autonomy which establishes that individuals can and do make laws, but also that institutions must reflect this freedom to question laws and traditions. Fineman puts it as follows:

While it may be beyond the will of the law to alter, existing inequalities certainly are not natural. Inequalities are produced and reproduced by society and its institutions. Because neither inequalities nor the systems that produce them are inevitable, they can also be objects of reform.<sup>761</sup>

Fineman's definition of vulnerability connects with social empathy and particularly to the second important element related to the alleviation of others' suffering through positive steps and social responsibility. Fineman explains that the word vulnerable has 'potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility'.<sup>762</sup> She not only recognises the role of institutions, the state and of society in general but also places upon them a responsibility to recognise and address this vulnerability. This recognition is particularly significant because Fineman identifies vulnerability as one substantial element of the human condition that triggers (or should trigger) a process of reflection which has been identified by many philosophical and political scholars throughout the years. More specifically, she identifies vulnerability 'as a heuristic device' that facilitates the 'examin[ation] [of] hidden assumptions and biases that shaped its original social and cultural meanings' while it is 'valuable in constructing critical perspective on political and societal institutions, including law'.<sup>763</sup> Fineman identifies vulnerability 'to range in magnitude and potential' based on the different positions of individuals 'within a web of economic and institutional relationships' and 'influenced by the quality and quantity of resources we possess or can command'.<sup>764</sup> This reflects Bourdieu's various fields and different forms of capital which were discussed in Chapter Two.

Fineman similarly recognises the dialectical relationship between individual agents and institutional structures and highlights their relationship by saying that we must recognise the universality but also particularity of human vulnerability and the unavoidability of it. Then, we can turn to society and its institutions which even though cannot eliminate vulnerability they can 'mediate, compensate, and lessen our vulnerability through programs, institutions, and

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<sup>761</sup> *ibid*

<sup>762</sup> *ibid* 8

<sup>763</sup> *ibid* 9

<sup>764</sup> *ibid* 10; see also p. 16 where she talks about systems of power and privilege that produce advantages and disadvantages and p.17 in Martha A. Fineman, 'Vulnerability and inevitable inequality', 2017 3 (4) *Oslo Law Review* 133, 2017

structures'.<sup>765</sup> Vulnerability understood through Fineman's approach should not be considered as a separate conceptualisation from social empathy but rather as its inherent characteristic. Social empathy involves an active process of cultivating interpersonal empathy, contextual knowledge and steps to eliminate injustice. This process requires that both at the individual and collective levels we adopt other-orientated perspective taking which encourages us to imagine and understand different kinds of vulnerability without, however, reducing individuals to their own vulnerabilities and stigmatising them by assigning an identity to them. Instead, through the lens of vulnerability, we can try to understand the existing circumstances knowing that these may be temporary. Accounting for the element of vulnerability emphasis should be placed on the empowering rather than limiting factors. It should be seen as something we all share as human beings yet as something that each one of may experience differently or collectively as social groups. Viewing vulnerability through the lens of empowerment rather than limitation, we build resilience but this is something we must recognise not only in ourselves at the level of the Self but also in others by giving them the space to be heard and have their needs truly understood and met.

Recognising vulnerability as a foundational aspect of social empathy, therefore, reflects the pragmatic approach to justice by Amartya Sen. By identifying vulnerability as an important element for the development and cultivation of reflexivity both at the individual and collective levels, the goal is not to have perfect institutions or perfect humans but to have institutions that reflect the human experience inherent to which is the element of vulnerability. Institutions would therefore allow for flexibility and freedom as well as strive towards the inclusion of voices that are otherwise marginalized. At the same time, as Fineman explained, we must recognise:

Of course, [that] societal institutions themselves are not foolproof shelters, even in the short term. Metaphorically, they too can be conceptuali[s]ed as vulnerable: They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudices.<sup>766</sup>

The question that arises at this point is how we can apply this within the AFSJ and what may be the implications for the formulation of citizenship and migration within an area where multiple categories and groups are produced and reproduced? Chapter Four explores the possibility of applying social empathy at the institutional level, reflecting the social component of social

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<sup>765</sup> Fineman, 'The vulnerable subject' (n.30) 10

<sup>766</sup> *ibid* 12

## Chapter 3

empathy, and more specifically looks into some of the case law of the Court of Justice particularly within the area of asylum.

## Chapter 4 Exploring social empathy elements in the Court's case law

### 4.1 Introduction

The previous chapter explored the notion of empathy and suggested that a social empathy approach may function as a reconceptualising lens for the AFSJ by placing the individual at the centre. Social empathy was identified as a valuable approach as it not only recognises the individuality of all social subjects, qua individuals, but also acknowledges the need to address vulnerability. The present chapter enquires whether we can talk about social empathy from an institutional perspective and engages, more specifically, with the case law of the Court of Justice.

In Chapter Three with reference to Fineman, vulnerability was identified as important for social empathy which requires the state and its institutions to address different forms of vulnerability. It was explained that in recognising the historical contexts in which inequalities arise in relation to groups and individuals, and in attempting to address social injustices, the state and its institutions have a responsibility not only to recognise these vulnerabilities but also to adopt relevant laws, policies and practices as a form of taking positive steps to address them. What this means is that the state and its institutions are required, primarily, to understand the needs of people and to listen to marginalised voices before being able to address potential inequalities and injustices that may be faced by different groups and individuals. A question that may legitimately be asked in the case of the EU is how can social empathy be applied at the EU level and how could institutions that are arguably distant from the EU citizens (and more so from migrants and others residing in the EU) be asked to deliver such a task. Considering the division of competences at the EU and national levels, the conflicting policies across the EU in salient areas such as migration, and the specific functions of the Court of Justice to ensure a harmonised application of EU law, social empathy may appear as a complex or even abstract notion to apply. Indeed, this may be the case. However, using a social empathy lens allows us to identify gaps in law and policy making and to see more clearly the 'human face of the EU'.

Different routes could be followed if we were to examine aspects of social empathy, such as with reference to the European Parliament and the European Commission, which represent two of the main institutions of the Union. The previous chapter already pointed out that by studying the

public sphere, we can gain valuable insights about democracy, participation, and deliberation.<sup>767</sup> Studying the public consultation and participation at the different stages in the law-making process and policy-setting would require an examination of the mechanisms and opportunities given to individuals, groups and their representatives to participate, to be heard and to engage in meaningful dialogue with various stake-holders and decision-makers.<sup>768</sup> In effect, this would reflect the possibilities given to provide contextual understanding of potential inequalities and injustices, which is a fundamental aspect of social empathy. If this examination were to take place it would further require an assessment in terms of effectiveness of such mechanisms and opportunities through the social and political impact they may have had. Examining democratic participation, could potentially provide a platform for also addressing the second important element of social empathy, which is connected to addressing inequalities and taking positive steps to provide solutions where these are needed. However, I have chosen a different path for the present purposes by enquiring whether, and if so how, social empathy can be understood in the context of the judiciary within the AFSJ. Two preliminary reasons for justifying this choice are explained below.

The first reason is connected to the expanded jurisdiction of the Court of Justice to give preliminary rulings in the AFSJ, which was examined in Chapter One. This means that the Court of Justice now has jurisdiction to give preliminary rulings in the areas of police and judicial cooperation in criminal matters and, most relevant to the current purposes, it can now receive requests from any national courts and tribunals in the area of free movement of persons including visas, asylum, and immigration. Additionally, the Treaty of Lisbon has elevated the legal status of the Charter and now constitutes part of the corpus of constitutional rules and principles that guide the Court in this area. For the purposes of this chapter, I consider the area of asylum and immigration as an area which often involves dealing with persons in vulnerable situations. Different categories of people within immigration and asylum are more likely to find themselves in vulnerable situations (either temporary or more long-term), such as persons seeking protection,<sup>769</sup> i.e. refugees and displaced persons, unaccompanied minors, irregular migrants, and persons detained for deportation purposes. These categories often involve persons in vulnerable

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<sup>767</sup> see n. 668

<sup>768</sup> An example of this may be the European Citizens' Consultations project which is the first pan-European project based on participation and deliberation on the future of the EU and includes EU citizens from all 28 Member States. See further, European Commission, Citizens' dialogues and citizens' consultations: Key conclusions, 20 April 2019 last accessed at <https://bit.ly/2VYmITQ> on 20 August 2019; Paul Butcher & Simona Proncuté, 'European Citizens' Consultations: Consultation begins at home', 2019 18 (1) European View 80

<sup>769</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011

situations, without however suggesting that vulnerability is present simply by reason of being an immigrant or a person seeking international protection. In these situations, the Court is often called upon to balance personal rights and freedoms protected in the Charter, such as the right to human dignity (Article 1), the right to liberty and security (Article 6), the right to seek asylum (Article 18), the right not to be subjected to torture, inhuman or degrading treatment (Article 19), as well as the rights of the child (Article 24), among others. Respect for these personal rights is divided by a very thin line by public and collective interests, as long as these are provided for by law (Article 52). The scope of these rights is not absolute, save for Article 19, and are subject to the principle of proportionality (Article 52). More specifically, the latter states that 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. With the expanded jurisdiction of the Court in the AFSJ the Charter becomes a binding instrument to be closely observed and applied by the Court. In examining the individual circumstances of the applicants, the Court must determine whether these personal rights are respected and whether any restrictions are justified. From this perspective, while considering social empathy from the level of the Parliament or the Commission would be a valuable enquiry, the Court of Justice plays a significant role in cases where constitutional and fundamental rights and freedoms may clash with one another. Consequently, in examining the Court's approach we can explore what happens when EU law is not properly implemented, it needs further clarification or when two constitutional rights or freedoms clash. It is the Court's task to interpret the law according to the will of the Commission and as approved by the Council and Parliament. This is linked to the second reason for choosing the Court of Justice as an example to enquire about social empathy.

As we saw above, it is one of the Court's tasks to interpret the law of the Union through the preliminary rulings procedure.<sup>770</sup> This includes situations where a personal right or freedom protected under the Charter may conflict with a public interest, which may be used to justify a derogation from the protection of the personal right or freedom in question. In Chapter One, it was noted with reference to earlier case law, that the Court was faced with the challenge to balance the four freedoms against national rules focusing mainly on the single market and the market-orientated aims of the EU. For example, we saw that during the 1960s and 1970s mobility, residence and their associated rights (such as those related to family members as well as the non-discrimination principle) were exclusively linked to the free movement of workers and on their

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<sup>770</sup> Article 267 TFEU states that:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

economic activity as in *Walrave* (1974)<sup>771</sup> and *Michel* (1973).<sup>772</sup> Even earlier cases, such as *Stork* (1959),<sup>773</sup> *Geitling* (1962),<sup>774</sup> and *Sgarlata* (1965)<sup>775</sup> remind us that fundamental rights were not part of Community law<sup>776</sup> and that these fell outside the considerations of the Court during adjudication. As this approach gradually changed leading to the development of fundamental rights as general principles of EU law<sup>777</sup> along with the elevation of the legal status of the Charter, it is no longer outside the jurisdiction of the Court to adjudicate in areas concerning fundamental rights, once a connection is found with EU law. In fact, as it is within the Court's duties to ensure the correct interpretation and application of EU law across the Member States, it falls upon the Court to find a balance between conflicting rights and freedoms. This requires a close examination of the purpose of the limiting law or practice at the national level, which means that the Court must consider the wider context of the conflicting laws or principles in question and reflect on the wider purposes that a directive is meant to serve before deciding whether the limiting law or practice is sufficiently justified.

These two reasons, namely, the expanded jurisdiction of the Court in the areas of asylum and immigration, which often involve persons in vulnerable situations, along with the increased legal status of fundamental-human rights as part of the general principles of EU law, allow us to examine the Court of Justice as an institution that resolves conflicts of constitutional significance but also as capable of reflecting aspects of the 'human face' of the EU in challenging situations.

In this chapter, I engage in an experimental exercise whereby cases of immigration and asylum are explored from the perspective of social empathy. In examining the cases in this chapter, the two important elements of social empathy, *viz.* contextual understanding through other-orientated perspective-taking and encouragement of social responsibility, are brought within the judicial context to understand whether these elements are relevant in the Court's reasoning. This

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<sup>771</sup> Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, EU:C:1974:140 [1974] ECR 1405

<sup>772</sup> Case 76/72 *Michel S. v Fonds natinel de reclassement social des handicapés*, EU:C:1973:46 [1973] ECR 457

<sup>773</sup> Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel*, EU:C:1959:4

<sup>774</sup> Case 13/60 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v High Authority* EU:C:1962:15

<sup>775</sup> Case 40/64 *Marcello Sgarlata and Others v Commission of the EEC* EU:C:1965:36

<sup>776</sup> see Chapter One

<sup>777</sup> *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; See further De Witte (n.101) and Mart Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community', 1990 12 (1) *Michigan Journal of International Law* 173; Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.); Case C-26-29 *Erich Stauder v City of Ulm – Sozialamt* ECR 419; Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECR 1125; Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, EU:C:1974:51 [1974] ECR 491; Case 136/79 *National Panasonic (UK) Limited v Commission of the European Communities*, EU:C:1980:169, [1980] ECR 02033

exercise further elucidates the close dialectical connection between the legal structures and their impact on actual lives which were explored in more depth in Chapter Two, while it further helps us understand the EU's actualisation process focusing on the individuals within the legal system.

## 4.2 Points of clarification

Before moving further, several important points need to be expressed. Primarily, as this chapter serves as an experimental enquiry into how we could incorporate social empathy in the context of the judiciary at the EU level, I have chosen to examine cases that directly involve questions of at least one fundamental right that potentially clashes with a public interest, i.e. the personal right to liberty vs. state's right to control entry to its territory, even if this derives from secondary law. This meant that cases that involved more procedural aspects, including questions concerning which Member-State is responsible for examining an application for international protection, conditions and qualifications for granting refugee or subsidiary protection status, conditions for withdrawing such status, and revocation of residence permits were generally excluded. The focus was maintained on cases that directly involved the treatment of migrants as these are more likely to involve questions of violations of personal rights and, consequently, are more closely connected to individuals that may be found in vulnerable situations. The underlying reason for the condition of vulnerability in this area of law may often be connected to the precarious status of individuals in question, the conflicting national policies and measures that may (or may not) be set in place affecting migrants' wellbeing, as well as the special or specific needs of migrants.<sup>778</sup> In effect, these cases reflect the relationship between the state and the migrant as a person with rights and freedoms under the EU legal order. Seeing how the Court approaches these cases, it is hoped to gain valuable insights as to whether social empathy elements may be relevant.

At the same time, it must be reminded that the EU asylum and migration law is an elaborated and complex area that involves border and security management through centralised databases and information systems such as the SIS-II, VIS, Eurodac and eu-Lisa, whereby personal data is collected, stored, and processed.<sup>779</sup> These raise important questions concerning transparency and accountability of how the data is processed and consequently involve questions of fundamental

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<sup>778</sup> See generally in the context of asylum in the EU, Asylum Information Database (AIDA), 'The concept of vulnerability in European asylum procedures', 2017, last accessed at <https://bit.ly/2f9gOmN> on 20 August 2019

<sup>779</sup> see further information on EU website at European Commission, SIS II – Second generation Schengen Information System <https://bit.ly/31SLoGS>, Visa Information System (VIS) <https://bit.ly/2z8PjTF>, Identification of applicants (EURODAC) <https://bit.ly/2jsCBVL>, and eu-LISA <https://bit.ly/31KAh2O>, last accessed on 20 August 2019

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rights and freedoms.<sup>780</sup> The area of immigration and asylum further involves the role of Frontex, which is authorised to cooperate with the national authorities as well as with third countries. It further involves Europol which is the law enforcement body of the EU authorised to exchange and share information between the national authorities for the prevention and combating of serious cross-border crime.<sup>781</sup> Immigration and asylum is, therefore, an area concerned with external border controls and irregular entries, including policies and laws concerning smuggling, externalisation of the EU's policies on migration but also matters concerning family reunification and social security, among others, for those who enjoy international protection status. At the same time, the erection of fences in various Member States as part of border management which is contrary to the Schengen Borders Code<sup>782</sup> and the general purpose of the CEAS reflect the complexities, challenges, and tensions between the Member States and the EU in managing the external frontiers and the impact these may have on individual lives. It is, therefore, essential to approach cases that arise in this area knowing that they are part of a wider context of political importance.

Secondly, in order to be able to examine cases with the social empathy elements in mind, it is important to identify tools that guide the Court in its reasoning and judgements. As we are concerned with cases where personal rights and freedoms may conflict with a public interest, we must identify the appropriate judicial tool that is typically used in situations of such conflict. The aspect of fundamental rights was mentioned earlier as having been incorporated in the general principles of EU law as well as having an elevated legal status equal to that of the treaties. These developments in the area of fundamental rights necessarily places a duty on the Court, and other institutions, to 'respect the[se] rights, observe the principles and promote the application [of the Charter]' <sup>783</sup> when implementing, or in this case interpreting, EU law, while at the same time paying 'due regard for the principle of subsidiarity'.<sup>784</sup> Fundamental rights, however relevant,

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<sup>780</sup> see for example concerns about the operation of these centralised databases Philip Hanke & Daniela Vitiello, *High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"*, in Elena Carpanelli & Nicole Lazzerini (eds), *Use and Misuse of New Technologies Contemporary Challenges in International and European Law*, (Springer, 2019) 3; EU Immigration and Asylum Law and Policy, Niovi Vavoula, 'Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals' Privacy?' (08 July 2019) last accessed at <https://bit.ly/2NIA6qW> on 20 August 2019; EU Immigration and Asylum Law and Policy Evelien Brouwer, 'Interoperability and Interstate Trust: a Perilous Combination for Fundamental Rights', (11 June 2019) last accessed at <https://bit.ly/2MpbY0B> on 20 August 2019

<sup>781</sup> Europol, official website: <https://www.europol.europa.eu/> last accessed on 20 August 2019

<sup>782</sup> For example, Article 14(2) of the Schengen Borders Code provides that there must be a 'substantiated decision' if entry is to be refused. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77/1

<sup>783</sup> Article 51 Charter on the field of application of the Charter

<sup>784</sup> *ibid*

cannot be the only mechanism used by the Court in deciding cases where there are conflicting rights.

In Chapter One, it was observed that the Court adopts a flexible approach through which it engages in a balancing exercise where various rights and interests are concerned. More specifically, it was with reference to the *Zambrano* principle and its subsequent interpretation in cases like *Rendon Marin, CS, Chavez Vilchez*, and *K.A.*,<sup>785</sup> where we gradually saw the Court referring to the Charter more frequently and using fundamental-human rights, such as family rights and the rights of the child, as part of a balancing exercise, while recognising Member States' margin of appreciation. Although the Court's interpretation is not without its limitations and challenges,<sup>786</sup> through a stone by stone approach<sup>787</sup> the Court has, arguably, been able (although not consistently) to provide a balance between the varied interests and rights without making claims about how each should be understood. Rather, by recognising their respective constitutional values the Court indicates how they may be balanced in specific situations.<sup>788</sup> This balancing exercise is connected to the principle of proportionality, which also constitutes one of the general principles of EU law. It is this principle, along with fundamental rights, that this chapter sets out to examine as an experimental exercise that seeks to shift our traditional analysis of case law and add a socio-psychological lens to our understanding of issues and cases that arise in the context of the AFSJ.

### 4.3 General Principles of law

General principles of law as a source of law, as Tridimas explains, 'usually connotes principles which are derived by the courts from specific rules or from the legal system as a whole and exist beyond written law. In that sense, the process of discovery of a general principle is *par excellence* a creative exercise [...]'.<sup>789</sup> Tridimas further explains that general principles 'do not set out legal consequences that follow automatically from them' rather, they function as arguments and as guides for the courts.<sup>790</sup> General principles function as reasons for specific rules and 'tell us something about the values which the courts believe underlie the legal system.'<sup>791</sup> The flexibility

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<sup>785</sup> n.172

<sup>786</sup> For example, the aspect of dependency was identified in chapter one as potentially constituting a problematic requirement depending on interpretation.

<sup>787</sup> Lenaerts, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach', (n.343)

<sup>788</sup> Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill/Nijhoff, 2015) 223

<sup>789</sup> Takis Tridimas, *The general principles of EU law* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 1-2

<sup>790</sup> *ibid* 2

<sup>791</sup> *ibid* 2

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of general principles can, therefore, be the subject of criticism as well as support, because the lack of clear rules as to how they should be applied allows them to be manipulated in different ways.<sup>792</sup> However, Harbo identifies an internal and external function concerning principles which are transferable to the principles of law. He explains that the internal dimension involves securing efficiency in the decision making, which could mean limiting the scope of arguments relied upon in a decision, the choice of which would necessarily have to be of a substantive nature.<sup>793</sup> On the other hand, the external function involves predictability and securing legitimacy for judicial decisions, which would mean legitimacy in a procedural rather than substantive sense. The procedural approach means that legitimacy, or legal certainty, for decisions made is based on structured and predictable reasoning that is objective and not arbitrary.<sup>794</sup> General principles of law can, therefore, be of substantive and procedural nature, the first of which implies that the application of the principle will be vital as to the outcome of the decision. In contrast, the second reflects how the reasoning of a decision is structured and organised.

Tridimas also identifies two types of general principles in the context of the EU, the first of which is of particular interest here.<sup>795</sup> These are principles which derive from the rule of law and include the protection of fundamental rights and proportionality, as well as equality, legal certainty, legitimate expectations, and rights of defence.<sup>796</sup> These principles refer to the relationship between individuals and public authorities but, as Tridimas explains, may be applied and relied upon by Member States and Community institutions.<sup>797</sup> The second set of general principles reflect the constitutional structure of the EU and concerns the relationship between the EU and its Member States, such as the principles of primacy and direct effect, division of competences, subsidiarity, and cooperation.<sup>798</sup> As the current thesis is more concerned with the relationship between the individual and the institutions or state authorities, it is the first category that is of particular concern. However, this does not mean that the close connection and, sometimes, the inseparability of these two categories is not recognised.<sup>799</sup> To illustrate the close connection between the two categories of principles we may consider that proportionality is concerned with the proper exercise of competences.<sup>800</sup> Similarly, human rights are both general principles of law (as they have gradually been established within the EU legal system) but have also been codified

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<sup>792</sup> see for example Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law', 2010 16 (2) *European Law Journal* 158

<sup>793</sup> *ibid* 265-266

<sup>794</sup> *ibid* 269-270

<sup>795</sup> Tridimas (n.789)

<sup>796</sup> *ibid* 4

<sup>797</sup> *ibid* 4

<sup>798</sup> *ibid* 4

<sup>799</sup> *ibid* 5

<sup>800</sup> Article 5 TEU and Protocol No. 2 On the application of the principles of subsidiarity and proportionality.

into primary law, yet they are still largely contested.<sup>801</sup> This shows that the general principles can hardly be autonomously understood and must always be explored in the context in which they arise. Simultaneously, this relationship between the different general principles, particularly with regards to proportionality and human rights, implies that they can function both on a substantive basis as well as procedurally.

#### 4.3.1 Proportionality and fundamental rights as general principles

The rule of law, from which proportionality derives,<sup>802</sup> and respect for human rights are defined as common values to the Member States (Article 2 TEU) which have been gradually developed by the Court of Justice drawing upon the legal traditions of the Member States.<sup>803</sup> Proportionality was also featured in the *Solange I* case as a requirement under the German Basic Law to protect individual rights and was examined in more detail by the Advocate General, who stated that ‘the individual should not have his freedom of action limited beyond the degree necessary for the general interest.’<sup>804</sup> While the proportionality principle has been utilised early on by the Court in diverse areas of Community and EU law,<sup>805</sup> its procedural nature is now enshrined in Protocol 2 TEU, which states that the Union’s competences are ‘governed by the principles of subsidiarity and proportionality’, and Article 5 TEU which states that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’ The procedural character of proportionality, as applied by the Court, consists of a tripartite test of suitability, necessity and, what is often referred to as, proportionality *stricto sensu*. The latter involves the balancing between the impact of the measure and its effect on the objective to be achieved.<sup>806</sup> Proportionality understood from this procedural perspective was present in cases concerning the four freedoms as was in *Grogan*,<sup>807</sup> concerning the right to provide services, and in *Gebhard*,<sup>808</sup>

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<sup>801</sup> Case C-29/69 *Erich Stauder v City of Ulm* EU:C:1969:57; Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* EU:C:1970:114 [1970] ECR 1125; Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, EU:C:1974:51, [1974] ECR 491

<sup>802</sup> *Tridimas* (n.789) 4

<sup>803</sup> see also *ibid* 5-7

<sup>804</sup> Opinion of AG Duheillet de Lamothe delivered on 2 December 1970 Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:100, Part II

<sup>805</sup> see further Takis *Tridimas*, ‘The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration’, 1996 31 *Irish Jurist* 83

<sup>806</sup> Case C-331/48 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et al.*, EU:C:1990:391, [1990] ECR I-04023

<sup>807</sup> Case C-159/90 *Society on the Protection of the Unborn Child (spuc) v. Grogan*, EU:C:1991:378, [1991] ECR I-4685

<sup>808</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411, ECR I-4165

involving the freedom of movement for persons, the freedom of establishment, and the freedom to provide services.<sup>809</sup> However, in the *Schmidberger* case<sup>810</sup> the Court had for the first time focused on a proportionality assessment *stricto sensu* in a situation where fundamental rights were invoked to justify a restriction on free movement and where fundamental rights, as general principles, functioned as part of the balancing assessment against economic freedoms.<sup>811</sup> In *Schmidberger*, the Court's balancing exercise involved primarily the recognition that restrictions may be imposed on the free movement of goods as well as on fundamental rights. Fundamental rights could, therefore, be subject to limitations without, however, subordinating them to the economic freedom. As the Court reasoned:

[T]he exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed [...]<sup>812</sup>

The Court further articulated, in weighing the conflicting interests in question, namely freedom of expression and freedom of assembly against the free movement of goods, that the relevant national authorities had taken steps to ensure the demonstration would run smoothly including 'an extensive publicity campaign' in Austria and neighbouring countries. At the same time it noted that 'alternative routes had been designated' and economic parties involved were notified about traffic restrictions while security measures had been adopted for the demonstration.<sup>813</sup> The Court's reasoning was based on a recognition of the constitutional value of both fundamental rights and freedoms as well as economic interests which must be weighed against each other without making claims about any inherent hierarchical order.<sup>814</sup> It is in this sense that this chapter embraces proportionality as a balancing exercise or a balancing act,<sup>815</sup> and recognising both its procedural dimension but also its substantive nature in that it can be pivotal as to the result of the

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<sup>809</sup> The court formulated proportionality differently without directly referring to the term "proportionality" and identified four requirements to be fulfilled by conditions liable to hinder the exercise of a fundamental freedom: 'they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.' *ibid* para 37

<sup>810</sup> Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333, [2003] ECR I-5659

<sup>811</sup> This was later followed in cases like *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn*, EU:C:2004:614, [2004] ECR I-9609.

<sup>812</sup> Case C-112/00 *Schmidberger*, (n.810) para 80

<sup>813</sup> *ibid* para 87

<sup>814</sup> see also Sybe de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', 2013 9 (1) *Utrecht Law Review* 169

<sup>815</sup> Wolf Sauter, 'Proportionality in EU law: a balancing act?' 2013 15 *Cambridge Yearbook of European Legal Studies* 439

decision, i.e. the weighing of various interests while recognising the constitutional value of rights and freedoms. This reflects a proportionality assessment *stricto sensu* which has, according to Barak, four significant characteristics and which may prove helpful in understanding the relationship between social empathy and proportionality.

Primarily, in relation to the content of the application of the *stricto sensu* test, Barak identifies that what is required is 'a balancing of the benefits gained by the public and the harm caused to the constitutional right'.<sup>816</sup> Secondly, concerning the nature of the test he explains that it is 'result-orient[at]ed' as it examines the outcome of the law and its impact on the constitutional right.<sup>817</sup> In assessing the relation between the benefit and the harm, the balancing test requires that the harm caused to the right in question does not exceed the benefit that is actually gained.<sup>818</sup> Finally, the balancing test 'focuses on the relation between the benefit in fulfilling the law's purpose and the harm caused by limiting the constitutional right.'<sup>819</sup> Drawing the connection with *Schmidberger*, we can observe that the Court carefully considered the 'objectives of general interest', the 'aim of the restrictions' and the 'substance of the rights' that had been interfered with, while also considered the various measures and steps taken to ameliorate such interference, before concluding that the national measures permitting the demonstration (a fundamental right) that would interfere with the freedom of movement of goods (a fundamental freedom) was not disproportionate and did not breach Community law.

Concerning the balancing of rights and the justification of the limiting laws, Barak further identifies 'the social importance' as the 'rule according to which the weight of each of the scales should be determined.'<sup>820</sup> Relating this to the *Schmidberger* case, which functions as a good example of the non-hierarchical and integrated nature of personal and public rights and interests, the Court after having considered the submission by Austria, considered that any different solutions would indeed have risked public reactions and would trigger 'much more serious disruption to intra-Community trade and public order.'<sup>821</sup> The Court's approach can be said to reflect Barak's 'social importance' aspect in the balancing exercise and to assist us in situations of conflicting rights and freedoms. However, this immediately raises the following question: how is 'social importance' determined in a given situation? Barak approaches this by first clarifying that:

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<sup>816</sup> Aharon Barak, Doron Kalir (ed), *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 340

<sup>817</sup> *ibid* 342

<sup>818</sup> *ibid* 343

<sup>819</sup> *ibid* 344

<sup>820</sup> *ibid* 349

<sup>821</sup> Case C-112/00 *Schmidberger* (n.811) para 92

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[b]alancing reflects the multifaceted nature of the human being, of society generally, and democracy in particular. It is an expression of the understanding that the law is not “all or nothing”. Law is a complex framework of values and principles [...].<sup>822</sup>

Determining the ‘social importance’ in a situation of conflicting rights and freedoms cannot, therefore, be done in a ‘scientific or accurate’ manner.<sup>823</sup> Rather, it is derived, inter alia, from different political and economic ideologies, from the unique history of each country, from the structure of the political system, and from the different social values. The legal system at issue should be observed as a whole. The assessment of the social importance of each of the conflicting principles should be conducted against the background of the normative structure of each legal system.<sup>824</sup>

In the case of the EU, the assessment of the social importance defined in the quote above necessarily links back to the actualising process of the EU’s potentialities. The actualisation of the EU’s potentialities as explained in Chapter Two, was connected to the founding values identified in Article 2 TEU and through the active mechanisms (*energeia*) in Article 3 TEU, the latter of which includes an area of freedom, security and justice (Article 3(2) TEU) as well as makes reference to solidarity, mutual respect among peoples, peace and human rights protection, and particularly the rights of the child (Article 3(5) TEU). These aims, with the underlying values of the Union are meant, as explained in Chapter Two, to facilitate to the wider European project, which ultimately is to establish ‘an ever closer union among the peoples of Europe’ and which, necessarily, places the individual, at the centre of the European laws and policies. The normative structure of the legal system mentioned by Barak as part of determining the “social importance” would necessarily have to reflect the vision of the EU for its future, the vision for its peoples and how it sees the world and its own place in the world as these are currently represented in Article 3 TEU. Therefore, in balancing conflicting rights and freedoms the Court does not make claims about the constitutional importance of the rights or freedoms at issue but by ‘considering the entire value structure of the [...] legal system’<sup>825</sup> examines the ‘marginal effects, on both the benefits and the harm, caused by the law’, while it must also consider the ‘hypothetical proportional alternative to the limiting law’.<sup>826</sup> Within this normative structure, the centrality of human rights, equality, and non-discrimination extending beyond the EU necessarily involves a Union that is open and welcoming rather than limiting and hostile to others.

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<sup>822</sup> Barak (n.816) 345-346

<sup>823</sup> *ibid* 349

<sup>824</sup> *ibid*

<sup>825</sup> *ibid*

<sup>826</sup> *ibid* 350

These considerations for balancing requires the Court to consider the state of the purpose of the law, and the state of the constitutional right or freedom prior to and post the limitation and, therefore, to consider the potential benefits gained by the limiting law (or practice) as well as the benefits gained by preventing this limitation to the right or freedom.<sup>827</sup> This in-depth consideration of the law's purpose and its broader impact on personal rights is a reflexive process that the Court, arguably, undertakes. This process requires the Court to consider the broader purpose of the law and the extent to which this is fulfilled through a specific measure in a proportional way and without imposing an unnecessary and excessive burden on personal rights and freedoms. In considering personal rights and freedoms of persons found in vulnerable situations or situations where their fundamental rights and freedoms may be at stake, the Court must carefully observe the personal circumstances of individuals in assessing whether a personal right or freedom has been violated. At the same time, it must also observe the broader purpose of the law applied in each specific scenario. It is through this balancing exercise which requires the Court to understand the situation of the applicant through their individual circumstances alongside the purpose of the relevant law and the effect of the limiting law, policy or practice on the personal right or freedom in question that the judiciary may be considered as capable of facilitating a social empathy approach albeit within the limits of the law. Primarily, during the preliminary rulings' procedures the Court of Justice must closely examine the individual situation of the applicants and must then consider the effect of allowing or disallowing the limitation of specific rights reflecting the Court's justification as to whether a Member State's responsibility to protect fundamental rights and freedoms has been accepted or withheld. These two aspects, namely the assessment of the individual situation and the effect of limiting personal rights, reflect the elements of social empathy. More specifically, they reflect the deep contextual understanding through other-orientated perspective-taking and the aspect of social responsibility in addressing injustices and inequalities. In this balancing practice the Court reflects, or rather should reflect, the broader normative structure that governs the European polity and should inform us about the values of the Union especially in cases where there is a conflict between fundamental rights, freedoms, and public interests.

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<sup>827</sup> *ibid* 351

#### 4.4 Proportionality in asylum and immigration

The preceding section explained that the principle of proportionality constitutes a general principle of EU law that was gradually developed by the Court but is now also enshrined in primary and secondary legislation. This development provides both a general and a specific obligation for the relevant institutions and the Member States to implement and observe a balanced approach when restricting personal rights and freedoms. In the area of asylum and immigration, the principle of proportionality is particularly relevant in the controversial topic of detention. For example, in asylum procedures detention has been repeatedly identified as a last resort measure subject to the principle of necessity and proportionality, and to which alternatives have been advocated.<sup>828</sup> Concerns regarding the detention of persons seeking international protection are reflected in the global strategy of the UNHCR for 2014-2019 titled *Beyond detention: A Global Strategy to support governments to end detention of asylum seekers and refugees*.<sup>829</sup> A particularly relevant legal instrument in the EU context is the Dublin Regulation which is concerned with returns. For example, Article 28(2) of Dublin III Regulation<sup>830</sup> states that detention is only an option in cases of a serious risk of absconding which may only take place 'on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.' The Returns Directive also refers to the principle of proportionality and effectiveness in relation to coercive measures and detention.<sup>831</sup> In the context of asylum and immigration, the condition and experience of vulnerability functions as a tool for categorisation in the asylum procedures, including detention, reception and support options and has been incorporated in the legislation and used by the Court

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<sup>828</sup> Relevant legal instruments include: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98 (henceforth Returns Directive), Recital 16, Article 8(4), Article 15; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast) OJ L 180/96, (Henceforth Recast Reception Conditions Directive) Recital 15; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, 999/171 (henceforth ICCPR), Article 9. Relevant case law includes, Case C-61/11, Hassen El Dridi, alias Soufi Karim, EU:C:2011:268; Case C-329/11, Achughbabian v. Prefet du Val-de-Marne, EU:C:2011:807; Saadi v. the United Kingdom [GC], Application No. 13229/03 (ECtHR 29 January 2008). see also Fundamental Rights Agency (FRA) *Handbook on European law relating to asylum, borders and immigration*, 2014 ed. (2015)

<sup>829</sup> UN High Commissioner for Refugees (UNHCR), *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019* (2014) last accessed at <https://bit.ly/2P6qSkS> on 19 June 2019]

<sup>830</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31 (henceforth Dublin III Reg.)

<sup>831</sup> Recitals 13,16,20 and Article 8(4) Returns Directive

of Justice and the ECtHR, albeit in different ways.<sup>832</sup> Vulnerability in this context presupposes an understanding people's needs based on their individual situations. This assessment falls within the first element of social empathy as it requires the relevant authorities to have (formal and/or informal) identification mechanisms in place in order to identify vulnerable individuals. At the same time, assessing vulnerability in the context of asylum and immigration, is also linked to the second element of social empathy connected to social responsibility and, in this case, the legal obligations of the Member States, not only to identify individuals in vulnerable situations but to provide appropriate procedural safeguards that correspond to their needs.

Although it is not the purpose of the present chapter to examine how vulnerability is assessed at the Member State level, it suffices for the current purposes, to remind that vulnerability, albeit contested and interpreted in different ways, can be understood as an inherent aspect of social empathy which requires us to consider individual needs and characteristics by understanding the context in which vulnerability arises and simultaneously to think of ways to address it. In *M.S.S.* the ECtHR had, for the first time, recognised the vulnerability of asylum applicants as a group in a situation concerning the transfer of an asylum seeker under the Dublin procedure and the subsequent failure of Greece to provide decent reception conditions forcing the applicant into homelessness.<sup>833</sup> Although the automatic categorisation of social groups as vulnerable carries several dangers including stigmatisation and implicit denunciation of the group's agency,<sup>834</sup> the judgement still reflects the ECtHR's approach in recognising the difficulties and disadvantages associated with asylum applicants derived from the lack of a recognised status coupled, in this case, with the conditions of detention.<sup>835</sup> The responsibility to provide accommodation and ensure the provision of material reception conditions is now part of positive law in the Reception Conditions Directive which is binding upon the Member States reflecting, therefore, the importance of addressing the vulnerable situations that many asylum seekers find themselves in.<sup>836</sup> Identifying vulnerability can, consequently, often trigger a change in the law by placing an obligation on the Member States and their institutions not only to refrain from exacerbating vulnerability but also to address it.

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<sup>832</sup> See for example UN High Commissioner for Refugees (UNHCR), UNHCR and IDC (2016), Vulnerability Screening tool, Identifying and addressing vulnerability: a tool for asylum and migration systems last accessed at <https://bit.ly/30kbJgL> on 20 August 2019; AIDA, 'The concept of vulnerability in European asylum procedures' (n.778)

<sup>833</sup> *M.S.S. v. Belgium and Greece* [GC], App. No 30696/09 (ECtHR, 21 January 2011)

<sup>834</sup> see also Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 (4) *International Journal of Constitutional Law* 1056, 1068; see further partly dissenting opinion of Judge Sajó in *M.S.S. v. Belgium and Greece* (n.833)

<sup>835</sup> *M.S.S. v. Belgium and Greece* (n.833) para 263

<sup>836</sup> Article 17 Recast Reception Conditions Directive (n.828)

## Chapter 4

The following sections proceed with a discussion on case law which has been decided during the latest migration crisis, although not necessarily within that specific context, while focusing largely on cases concerning asylum. The focus on asylum and immigration cases allows us to explore the Court of Justice's approach in areas that involve fundamental rights and national practices and to enquire whether proportionality and fundamental rights are utilised in cases of conflicting personal rights and public interests, reflecting the social empathy elements identified in Chapter Two. For the purposes of this chapter, I will limit the discussion to cases that arose between 01/01/2014-30/06/2018 for both practical and substantive reasons.

Primarily, while examining all relevant cases concerning asylum would undoubtedly provide us with a more concrete understanding of the development and interpretation of proportionality, fundamental rights, and vulnerability, it would go beyond the scope of this chapter and its aim for this thesis. This chapter, therefore, functions as an experimental enquiry of a social empathy approach within the context of the Court of Justice as one of the main institutions of the EU tasked with the responsibility to interpret Union law and ultimately to answer questions concerning conflicting interests of constitutional importance, i.e. between personal rights and freedoms and public interests. The selection of case law is therefore indicative and non-exhaustive and seeks simply to introduce the social empathy thesis and its potential application within the AFSJ.

Secondly, various developments in the area of migration have taken place during this period both in terms of migratory flows in Europe (and elsewhere) and as regards legal and policy developments. For example, with the entry into force of the Lisbon Treaty the second phase of the CEAS was adopted with various recast legislative acts entering into force in 2013 and transposed during the summer of 2015 which is considered the peak of the migration crisis. These include the Eurodac Regulation,<sup>837</sup> the Dublin III Regulation,<sup>838</sup> the Reception Conditions Directive,<sup>839</sup> and the Asylum Procedures Directive.<sup>840</sup> Following the end of the Stockholm

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<sup>837</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180/1 (henceforth Eurodac Regulation)

<sup>838</sup> n. 830

<sup>839</sup> n.828

<sup>840</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60 (henceforth Asylum Procedures Directive)

Programme the European Council adopted strategic guidelines<sup>841</sup> for the operation of the AFSJ in June 2014 while the Commission issued its Agenda on Migration in May 2015<sup>842</sup> and in August 2015 the Dublin system was suspended.<sup>843</sup> During this period, serious concerns about the implementation of human rights have been raised while various EU states have resorted to the erection of internal borders to halt migration flows.<sup>844</sup>

It must be mentioned that although these cases have been decided during the latest migration crisis they have not necessarily all arose within that specific context and, therefore, involve previous legislation which is still, however, relevant as it is the precursor to the recast legislative instruments. This allows us to take a peek into the development of certain aspects of asylum and migration case law while taking into account the ongoing tensions around these the topic. The cases were chosen based on a filtered search on the CURIA database using the general subject matter “area of freedom security and justice”. I have chosen cases based on two criteria and only as indicative areas to use for the current purposes. The first involves cases that fall within the “asylum policy” subject matter within the results of the “area of freedom security and justice” keywords. Within those results I have chosen one case concerning the material reception conditions of asylum seekers, which involved questions on housing and the rights to human dignity within the context of Directive 2003/9/EC<sup>845</sup> on the minimum standards for the reception of asylum seekers (*C-79/13 Saciri and Others*).<sup>846</sup> Further, I have chosen two joined cases concerning the restriction of movement of subsidiary protection beneficiaries and, consequently, the status of refugees and the application of the Geneva Convention within the context of Directive 2011/95/EU,<sup>847</sup> on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (*C-443/14 and C-444/14 Alo and Osso*).<sup>848</sup>

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<sup>841</sup> n.409

<sup>842</sup> n.384

<sup>843</sup> see further Arne Niemann & Natascha Zaun, ‘EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives’, 2017 56 (1) *Journal of Common Market Studies* 3; Florian Trauner, ‘Asylum policy: the EU’s “crises” and the looming policy regime failure’, 2016 38 (3) *Journal of European Integration* 311

<sup>844</sup> *ibid*

<sup>845</sup> Reception Conditions Directive (n.828)

<sup>846</sup> Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, EU:C:2014:103 (henceforth *Saciri*)

<sup>847</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9 (henceforth *Qualification Directive*)

<sup>848</sup> Joined Cases C-443/14 and C-444/14 *Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover*, EU:C:2016:127 (henceforth *Alo and Osso*)

## Chapter 4

Finally, I have chosen one case concerning Article 4 of the Charter within the Dublin system which concerned a seriously ill asylum seeker (C-578/16 *C.K. and Others*).<sup>849</sup>

The second criterion used to choose the cases was that of detention within the context of the Dublin system (i.e. returning asylum seekers to the Member State responsible) as well as detention of irregular migrants. A mixed approach to the cases chosen allows us to better grasp the Court's approach in different aspects of the area of freedom security and justice and of persons found in vulnerable situations such as detention. I have, therefore, chosen the joined cases of C-473/13 and C-514/13 *Bero and Bouzalmate*,<sup>850</sup> C-474/13 *Pham*,<sup>851</sup> and C-47/15 *Affum*,<sup>852</sup> to examine how the Court approaches detention of "illegally staying third country nationals" for removal purposes, as well as C-528/15 *Al Chodor*<sup>853</sup> and C-60/16 *Amayry*<sup>854</sup> to explore questions on detention for purposes of transfer within the Dublin context. Another case was added to compare the Court's approach in relation to detention for the purposes of verifying a person's identity in C-18/16 *K*.<sup>855</sup> While examination of subsequent case law in this area would be beneficial, this can be a task for future research since, as already explained, the present chapter does not aim to provide a comprehensive analysis of case law. Hence, I have limited the discussion to the specific time-frame which sufficiently allows us to explore the aspect of social empathy and its application within the context of the Court.

## 4.5 Analysis of case law

### 4.5.1 Housing Rights

The first case discussed deals with the housing rights of asylum seekers that fall within the reception conditions requirement safeguarded in the Reception Conditions Directive<sup>856</sup> while also affecting, as will be seen, the rights of asylum seekers under Article 1 Charter.<sup>857</sup> The CJEU in the

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<sup>849</sup> Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127 (henceforth *C.K.*)

<sup>850</sup> Joined Cases C-473/13 and C-514/13, *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*, EU:C:2014:2095 (henceforth *Bero and Bouzalmate*)

<sup>851</sup> Case C-474/13, *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, EU:C:2014:2096 (henceforth *Pham*)

<sup>852</sup> Case C-47/15, *Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, EU:C:2016:408 (henceforth *Affum*)

<sup>853</sup> Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*, EU:C:2017:213 (henceforth *Al Chodor*)

<sup>854</sup> Case C-60/16, *Mohammad Khir Amayry v Migrationsverket*, EU:C:2017:675 (henceforth *Amayry*)

<sup>855</sup> Case C-18/16, *K. v Staatssecretaris van Veiligheid en Justitie*, EU:C:2017:680 (henceforth *K.*)

<sup>856</sup> Reception Conditions Directive (n.828)

<sup>857</sup> Article 1 protects human dignity.

case of *Saciri*<sup>858</sup> addressed the issue of what happens when a Member State is unable to provide housing as detailed in the relevant directive and clarified the minimum standards which the Member States need to observe in these situations.

In this case, a family of asylum seekers was unable to stay in the state reception facilities in Belgium. At the same time, they were further denied financial aid, exposing them to a risk of becoming homeless. The Court highlighted that the material reception conditions<sup>859</sup> were to be interpreted as meaning that any financial aid provided by the state must be 'sufficient to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.'<sup>860</sup> It further clarified that material reception conditions were to be understood as including housing, food, and clothing, which could be provided in kind, or the form of financial allowances or vouchers.<sup>861</sup> These material reception conditions either in the form of housing or in other forms, could be offered by other relevant bodies that provide general public assistance, in cases where a Member State is unable to provide them, as long as they meet the minimum standards required.<sup>862</sup> The decision is an important step for asylum seekers' rights, as the Court stressed that appropriate housing is essential even when this means allowing asylum seekers to look for private accommodation. The Court did not refer to the principle of proportionality, but it referred to 'the general scheme and purpose of Directive 2003/09',<sup>863</sup> which provides for the observance of fundamental rights, particularly of Article 1 (human dignity) and further identifies that '[it] seeks to lay down minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States.'<sup>864</sup>

The Court, therefore, considered the general context of the directive and its wider purpose, which precluded even the temporary loss of the protection of these minimum standards.<sup>865</sup> The harm caused in this situation, if we are to use Barak's terminology, would be the loss of minimum protection of reception conditions and would, therefore, result in a less 'dignified standard of living',<sup>866</sup> which would not be compatible with the requirements of the directive. By considering the broader purpose of the Reception Conditions Directive and the potential outcome of the loss of the minimum protection provided therein, the Court reflects Barak's approach concerning the

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<sup>858</sup> C-79/13, *Saciri* (n.846)

<sup>859</sup> ex Article 13 / Now Article 17, Recast Reception Conditions Directive (n.828)

<sup>860</sup> C-79/13, *Saciri* (n.846) paras 37, 40, 48

<sup>861</sup> *ibid* para 38

<sup>862</sup> *ibid* paras 51, 52 (2)

<sup>863</sup> *ibid* para 35

<sup>864</sup> *ibid* para 39

<sup>865</sup> *ibid* para 35

<sup>866</sup> *ibid* para 39

characteristics of proportionality *stricto sensu*, which involve the outcome of the law (or in this case the national policy) and the impact on the right in question, as well as the purpose of the law and the harm potentially caused to the personal right.

The Court further recognised ‘that the Member States have a certain margin of discretion as regards the methods by which they provide the material reception conditions’ reiterating, and therefore not questioning, the state’s interest and right to manage its public funds. At the same time, it also stated that the Member States must ‘ensure that the minimum standards laid down in that directive as regards the asylum seekers are met.’<sup>867</sup>

In this respect, the Court reasoned that access to appropriate housing is seen as essential to the protection of the right to human dignity as protected in the Charter and it further underlined that in the case where allowances are provided by the state they ‘must be sufficient to preserve family unity and the best interests of the child which [...] are to be a primary consideration.’<sup>868</sup> The Court here expressed the requirement to protect family life and the rights of the child by requiring the Member States to provide sufficient allowances to facilitate housing that secures family unity, even in the private market while acknowledging their margin of appreciation.<sup>869</sup> In expressing these requirements, the Court cited Article 17 (1) Directive 2003/9 on the need for the Member States to consider the specific situation of vulnerable persons stating that the ‘Member States are required to adjust the reception conditions to the situation of persons having specific needs.’<sup>870</sup> In this case human rights and vulnerability are entwined as children have long been recognised as a vulnerable category in human rights law<sup>871</sup> and, therefore, families with children not only fall within the framework of the right to family life as protected by Article 8 ECHR and Article 7 Charter but also must be treated in light of the children’s best interest (Article 24 Charter). In considering the specific needs of families and children as well as the children’s best interest, the Court found that the Member States must ensure the minimum standards are observed even if other national bodies must fulfil these and that such situations must not be used as ‘a justification for any derogation from meeting those standards.’<sup>872</sup>

The Court’s judgement is important for asylum seekers’ rights in various respects as the Court weighs the different rights and interests involved. Primarily it builds upon the legal framework to

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<sup>867</sup> *ibid* para 49

<sup>868</sup> *ibid* para 41

<sup>869</sup> *ibid* para 45,46,52(1) and para 49 on the margin of appreciation

<sup>870</sup> *ibid* para 41; see also para 46

<sup>871</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, 1577/3

<sup>872</sup> C-79/13, *Saciri*, (n.846) para 50

cover for cases in which a state may not be in a position to provide the necessary housing facilities, as required by the minimum reception conditions and obliges the Member States to ensure access to housing rights by other means, i.e. allowances. It further enhances the provisions of the Reception Conditions Directive in relation to family rights by expanding its interpretation; for example, Article 8 of the Reception Conditions Directive provides that the Member States 'shall take appropriate measures to maintain as far as possible [the] family unity', while from the Court's judgement, family unity and the child's best interests are balanced against state's interests concluding that Member States have an obligation to provide sufficient allowances to access appropriate housing in order to protect these rights.<sup>873</sup> By considering the specific needs of persons (Article 17 Reception Conditions Directive), the right to family unity and the best interests of the child the Court, as I argue, fulfils the element of social empathy which requires a contextual understanding of the specific needs and circumstances of others by utilising existing legislation and relying upon fundamental rights and freedoms, which are part of the value system of the Union. At the same time, by recognising the Member States' margin of discretion in determining the way they wish to provide material reception conditions the Court recognises, on the one hand, the Member States' right to be responsible for their own public assistance system, while also recognises the obligation of the Member States under the directive. This satisfies the second element of social empathy, which is connected to the aspect of social responsibility, and which in this case can be interpreted as the recognition and assignment of responsibility by the Court for a legal obligation of the Member States that derives from EU law. At the same time, the Court, as will also be observed in the subsequent cases, adopts a very epigrammatic approach which is anchored mainly in the specific provisions of the relevant directives. This more formalistic approach differs to an extent from the Court's approach in citizenship cases where, as we saw in Chapter One, was more proactive in establishing alternative routes for the implementation of free movement and residence in relation to Union citizens.<sup>874</sup> This approach may make it more challenging to understand the Court's method in different areas of Union law, particularly citizenship on the one hand and migration on the other, however, this does not suggest an impasse on the Court's part. Rather, as will be further examined, it reflects the complexities and political tensions surrounding the areas of migration and asylum, including the responsibilities of the Member States and their commitment to EU law. As it involves sensitive issues that directly affect personal rights and freedoms of migrants on the one hand, and public interests on the

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<sup>873</sup> see also Steve Peers, *The CJEU secures asylum seekers' right to family housing*, (EU Law Analysis, 27 February 2016) last accessed at <https://bit.ly/2ZeOZgN> on 4 July 2017

<sup>874</sup> For example cases like *Zambrano*, despite their exceptionality, suggest that the Court may be more able to manoeuvre to ensure the enjoyment of the substance of citizenship rights, however, we have seen the problematic aspect of this approach in Chapter One.

other hand, in its task to interpret and balance the various rights and interests, the Court gradually clarifies the limits upon personal rights and continues more subtly to define the role persons, in this case, non-citizens, who derive rights under EU law.

#### 4.5.2 Irregular Migrants and pre-removal detention

This subtler delineation of migrants' rights under EU law can also be seen in relation to irregular migrants. For example, subsequent to the *Saciri* case, the Court gave its judgement in three cases concerning common standards and procedures for returning irregularly staying TCNs. The first two (joined) cases concerned two separate individuals who had been detained in non-specialised facilities pending their removal from Germany after their irregular entry to the country.<sup>875</sup> The obligation on the state's part to provide specialised detention facilities is required by Article 16(1) of the Returns Directive,<sup>876</sup> which further provides that when such facilities cannot be provided, the Member States may resort to prison accommodation but must keep TCNs separated from ordinary prisoners.<sup>877</sup>

The first case concerned Ms Bero,<sup>878</sup> whose asylum request was rejected by the German authorities and who was detained in an ordinary prison for the purpose of her removal as there was no specialised facility within that particular federated state that fitted the requirements of the Returns Directive. The second case,<sup>879</sup> similarly concerned a Moroccan national, Mr Bouzalmate, who had irregularly entered Germany and had his asylum request rejected leading to his detention for removal purposes.

The Court noted that Article 16 (1) of the Returns Directive establishes that pre-removal detention, as a rule, must be carried out in specialised detention facilities. It further reasoned that as the Returns Directive imposes obligations on the Member State as a whole and not according to its constitutional structure, in the event that the federated state concerned does not have such facilities, the Member State should ensure the relocation of migrants to such facilities elsewhere.<sup>880</sup> According to the Court, the derogation which Member States can invoke (i.e. the use of prison accommodation when specialised facilities cannot be provided) 'must be interpreted

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<sup>875</sup> Joined Cases C 473/13 Bero and C 514/13 Bouzalmate, (n.850)

<sup>876</sup> Returns Directive (n.828)

<sup>877</sup> Article 16(1) *ibid*

<sup>878</sup> C-473/13

<sup>879</sup> C-514/13

<sup>880</sup> Joined Cases C 473/13 Bero and C 514/13 Bouzalmate, (n.850) para 33

strictly.<sup>881</sup> In responding to the questions by the national court, the Court in line with its previous approach, adopted a minimal interpretation anchored strictly in the wording of the relevant directive reflecting what Thym has characterised as ‘administrative mindset’, whereby judges seek ‘to maintain the statutory integrity of legislative choices instead of embarking on widespread judicial innovation’.<sup>882</sup> We can see this laconic interpretation reflected in the fact that although in the legal context of the case, there are references to various legal provisions the Court does not discuss these any further. For example, quoted in the legal framework are Recital 16 of the Returns Directive 2008/115 on the requirement to apply the principle of proportionality, Article 1 of the same directive which refers to ‘fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations’, and Article 15 of the said directive on detention as an option only in exceptional situations.<sup>883</sup> These were not elaborated by the Court but they are still considered as part of the underlying legal framework for this decision.

The third case in which the Court dealt with issues concerning detention conditions of an irregular migrant was the case of Ms Pham,<sup>884</sup> who had similarly been detained in ordinary prison facilities pending her removal rather than in a specialised facility required by the Returns Directive. However, the difference was that Ms Pham had, allegedly, consented to her detention in a non-specialised facility in order to be with her compatriots, who were detained in the prison facilities.<sup>885</sup> The Court reiterated its previous position on the requirement for specialised detention facilities and the need to keep TCNs for removal purposes separate from ordinary prisoners. More specifically, the Court reasoned that:

[i]n that regard, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, [...] is more than just a specific procedural rule [...] and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive.<sup>886</sup>

The Court here, as in the case of *Saciri*, looked for the purpose of the directive and stated that the obligation to keep third-country nationals separated from ordinary prisoners ‘[...]is not coupled with any exception and constitutes a guarantee of observance of the rights which have been

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<sup>881</sup> *ibid* para 25

<sup>882</sup> Daniel Thym, ‘Between “administrative mindset” and “constitutional imagination”: the role of the Court of Justice in immigration, asylum and border control policy’, 2019 *European Law Review* 139, 142

<sup>883</sup> for example, where other less coercive means are not available and only where there is a risk of absconding, or where the TCN impedes the removal process

<sup>884</sup> C-474/13, *Pham (n.883)*

<sup>885</sup> *ibid* para 8

<sup>886</sup> *ibid* para 21

expressly accorded by the EU legislature to those third-country nationals [...]’<sup>887</sup> It further stated that Directive 2008/115 requires ‘an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and their dignity’.<sup>888</sup> In its reasoning, the Court made no reference to proportionality but focused on the scope, purpose, and wording of the legislation to find that the Member States have a responsibility to observe the guarantees provided to TCNs by the Returns Directive including their fundamental rights.

The Court’s judgement is vital in all three cases as it clarifies specific provisions of the Returns Directive in a way that the fundamental rights of TCNs are respected in pre-removal detention cases. In the Court’s decision in these cases the state’s right to control entry to its territory and to detain those who enter irregularly is not questioned. However, the Court’s reasoning is based on the idea that these rights must be exercised in line with the relevant directives under which the Member States have accepted certain obligations including the protection of fundamental-human rights involving the right to human dignity. For example, in interpreting Article 16(1) of the Returns Directive the Court explained that:

[...] [it] does not mean that a Member State [...] is obliged to set up specialised detention facilities in each federated state. However, it must be ensured, [...] that the competent authorities of a federated state that does not have such facilities can provide accommodation for third-country nationals pending removal in specialised detention facilities located in other federated states.<sup>889</sup>

The Court’s decisions, although laconic and characterised by an ‘administrative mindset’,<sup>890</sup> can be further approached, and potentially better understood, by considering the opinion of the advocate general, whose task is to deliver a neutral opinion to the Court concerning legal solutions.<sup>891</sup> For example, in the joined cases of *Bero and Bouzalmate*, AG Bot provided further details in relation to the principle of proportionality.<sup>892</sup> The AG stated that the removal must take place using the ‘least coercive measures possible’<sup>893</sup> and he referred to the ECtHR’s requirements

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<sup>887</sup> *ibid* para 19

<sup>888</sup> *ibid* para 20

<sup>889</sup> Joined Cases C 473/13 *Bero* and C 514/13 *Bouzalmate*, (n.850) para 31

<sup>890</sup> Thym, Between “administrative mindset” and “constitutional imagination (n.882)

<sup>891</sup> Although opinions by the Advocates General are not binding on the Court, they are nevertheless significant as they give possible legal solutions to issues brought before it and may provide important insights as to its rationale. On the role of advocate generals see Article 19(2) TEU and Articles 253 and 254 TFEU

<sup>892</sup> Opinion of Advocate General Bot delivered on 30 April 2014 Joined Cases C-473/13 and C-514/13, and Case C-474/13, EU:C:2014:295

<sup>893</sup> *ibid* para 7

and guidelines for an adequate place of detention in pre-removal situations.<sup>894</sup> He reasoned that ‘detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned [...]’<sup>895</sup> The AG expressed that treating TCNs awaiting removal ‘to look like criminals’ would not be consistent with the requirement to respect their human dignity suggesting, therefore, that this would be disproportionate to the rights guaranteed in the Charter.<sup>896</sup> In fact, the AG noted that the Member States’ obligations towards these persons requires them to establish ‘a regime and material conditions appropriate to their legal status and capable of meeting their specific needs, in particular those of the most vulnerable.’<sup>897</sup> In adopting a procedural approach to proportionality in terms of the ‘least coercive measures possible’ and in finding that the Member State in question failed to satisfy the criteria of ‘urgency or seriousness’ AG Bot established that detention in non-specialised facilities could not be justified and the Member State could not derogate from the principle of Article 16(1) of the Returns Directive.<sup>898</sup>

In relation to the case of *Pham*, in the same opinion, AG Bot further underlined how various factors such as the psychological deprivation of a migrant during her detention, the lack of language proficiency, and the absence of guidance and legal aid, may all contribute to a coerced consent to be detained in a prison not separate from ordinary prisoners.<sup>899</sup>

More specifically he expressed that:

[i]t must not be overlooked that a person placed in detention for the purpose of removal is in a position of weakness vis-à-vis the authorities and it is conceivable that he gives his consent under pressure, however slight.<sup>900</sup>

He continued to talk about the psychological state of migrants and the reason why the Court could not risk accepting consent as a justification for waiving the right to specialised detention facility saying that:

[i]t is also necessary to take into account the psychological deprivation which the migrant is likely to experience during his detention and the difficulties which he may encounter, because of his language, for example, in acquainting himself with the rights

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<sup>894</sup> *ibid* para 84

<sup>895</sup> *ibid* para 92

<sup>896</sup> *ibid* para 94

<sup>897</sup> *ibid* para 95

<sup>898</sup> *ibid* para 174

<sup>899</sup> *ibid* para 202

<sup>900</sup> *ibid* para 201

conferred on him. Many are those who do not, at that stage, have the means to obtain legal assistance and who will not be fully aware of their rights at the very time when they are invited to waive them [...] <sup>901</sup>

The AG considered, based on the facts of the case, that it seemed that the national authorities were 'not motivated by the interests of Ms Pham' and that instead the only reason for placing her in ordinary prison was because of the lack of appropriate facilities. <sup>902</sup> This was implicitly considered by the AG as part of weighing the migrant's rights and the state's interests by explaining that 'the distress which a migrant experiences in the light of his forced removal and the weakness of his position' coupled with the expectation of him by the state 'to waive a guarantee that EU law expressly confers on him' would be inconsistent with the objectives of the Returns Directive, <sup>903</sup> which includes the obligation 'to return them in a humane, dignified manner, in full observance of their fundamental rights'. <sup>904</sup> From the more detailed opinion of the AG, we can more clearly see the use of a balancing exercise, whereby personal rights are weighed against the public interest by taking into account the harm caused by the national measure (i.e. detention in ordinary prison facilities) upon the personal right to human dignity and the restriction of the right to liberty in a situation of detention. Furthermore, from the AG's approach, the impact on the personal rights (i.e. treating the applicant as a criminal), which attaches a punitive aspect on pre-removal detention, was considered to be overall inconsistent with the purpose of the Returns Directive. By considering the situation of migrants in situations such as that of the applicant, the AG drew upon fundamental rights, which are part of the value system of the EU, and recognised the condition of vulnerability that many migrants in similar situations may be facing. In adopting this orientation towards the applicant and others in similar situations, we can see the relevance of 'social importance' from Barak's terminology, which may play an important, although not explicit, role in cases where personal rights conflict with a public interest. In trying to balance rights and freedoms on the one hand, and the limitations to these rights on the other hand, Barak explains that the 'social importance' can be used to tip the balance and that this can be derived from the structure of the political and legal system as well as the values and normative structures of that system. <sup>905</sup> In the AG's opinion this is more noticeable particularly as he adopts an other-orientated perspective-taking and more expressly describes how a situation may be for migrants in circumstances such as that of the applicant. He reflects upon how the broader context of a migrant's situation in pre-removal cases may have an impact on that person's rights and

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<sup>901</sup> *ibid* para 202

<sup>902</sup> *ibid* para 188

<sup>903</sup> *ibid* para 189

<sup>904</sup> *ibid* para 194

<sup>905</sup> Barak (n.817) 345-346, 349

underlines the responsibility and obligation of the Member States not to exceed what is necessary in cases of detention. These two aspects reflect the social empathy elements of perspective-taking towards others and the social responsibility, which are firmly embedded within the balancing exercise of the AG. This balancing, which is essential in determining whether a national measure is urgent or severe enough and whether it is the 'least coercive measures possible',<sup>906</sup> reflects the underlying values that the Court takes into account, which are values embedded in the legal system of the EU and mirror the normative structure of the European polity. If, for example, no consideration was taken of the individual circumstances of migrants as persons found in vulnerable situations, and if a very strict interpretation of the wording of the directive was followed instead, it would raise questions about fundamental-human rights and freedoms and, therefore, it would challenge the foundation upon which the EU legal system is based, including the values enshrined in Article 2 TEU and the role of the Charter under Article 6 TEU. However, even if the outcome of the decision was different it would not suggest that the values and rights under the Charter would be breached. What it does suggest is that if no consideration of these values and rights had taken place, it would indeed raise questions about the level of protection of fundamental rights and the values of the EU.

#### **4.5.3 Extending the free movement – subsidiary protection**

The significance of fundamental rights as an integral part of EU law is also reflected in the Court's efforts to align EU protection of fundamental rights with international human rights law which is evident in the following joined cases of *Alo and Osso*.<sup>907</sup> In these cases the Court sought to extend free movement rights to subsidiary protection beneficiaries. The two separate Syrian applicants, who had been granted subsidiary protection in Germany, were in receipt of social security benefits and were issued with residence permits that would allow them to reside in a designated part of Germany. One of the questions referred to the Court was whether this condition of residence in a specified geographical location amounted to a restriction of the freedom of movement within the meaning of Article 33 of the Qualification Directive, which provides the same treatment for beneficiaries of international protection as with other TCNs legally residing.

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<sup>906</sup> para 174 AG Bot

<sup>907</sup>Joined Cases C-443/14 and C-444/14, *Alo and Osso* (n.848); see also see also Halleskov Storgaard L., 'Enhancing and diluting the legal status of subsidiary protection beneficiaries under Union law – the CJEU judgment in *Alo and Osso*', EU Law Analysis, 9 March 2016) last accessed at <https://bit.ly/2Zh23T8> on 4 July 2017

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The other two questions referred to the Court were whether it would be compatible with the Qualification Directive if this condition was based on the objective of maintaining appropriate distribution of social assistance burdens in the state, and similarly whether this condition would be justified based on the integration policy of the state.<sup>908</sup> Consequently, the issues in this case involved the state's interests to regulate movement, to control its social assistance system and its integration policies, and whether in practising these rights and implementing its policies the state would impinge upon the personal right to freedom of movement and the principle of equality as enshrined in the Qualification Directive as well as human rights law under the Geneva Convention.

In assessing the situation, the Court applied the Geneva Convention as a guide for interpreting the Qualification Directive which had to be read in line with the Charter.<sup>909</sup> The Court submitted that, in response to the Stockholm Programme and the need to establish a uniform status for international protection beneficiaries, persons under subsidiary protection status were to enjoy the same benefits as individuals with refugee status.<sup>910</sup> Based on this reasoning, the Court explained that Article 33 of the Qualification Directive was to be interpreted as applying not only to refugees but also to beneficiaries of international protection. The Court applied the same logic with Article 26 Geneva Convention (which provides for the freedom of movement of refugees and the right to choose where to reside) and Article 23 of the same convention (which provides for social welfare for international protection beneficiaries) which were to be applied by analogy in the context of the Qualification Directive.<sup>911</sup> The Court reasoned that a residence condition would constitute a restriction on the freedom of movement under Article 33 of the Qualification Directive 'even when it does not prevent the beneficiary from moving freely within the territory of the Member State'.<sup>912</sup>

In response to the second question, the Court stated that a Member State is generally precluded from imposing such requirements as the residence condition on subsidiary protection beneficiaries if such conditions are not also applicable to refugees and TCNs legally residing in the Member State concerned<sup>913</sup> or to nationals of that Member State. The Court recognised the scenario where 'the costs entailed are not evenly distributed among the various competent institutions' and the need to achieve appropriate distribution of costs of paying the benefits across the relevant institutions, but a condition of residence should be applied equally to all

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<sup>908</sup> *ibid* para 21

<sup>909</sup> *ibid* paras 28-30

<sup>910</sup> *ibid* para 32-33

<sup>911</sup> *ibid* paras 35-37

<sup>912</sup> *ibid* para 40

<sup>913</sup> The Court referred to TCNs legally residing in the Member-State 'on grounds that are not humanitarian or political or based on international law', *ibid* para 54

residents.<sup>914</sup> The only exception to this, which would allow the imposition of a residence condition only on beneficiaries of subsidiary protection status without imposing such condition on other groups, would be 'if those groups are not in an objectively comparable situation as regards the objective pursued by those rules.'<sup>915</sup> The same reasoning was applied concerning the third question on the imposition of residence conditions with the objective to facilitate the integration of TCNs.<sup>916</sup> What this means in practice is that in cases where beneficiaries of subsidiary protection face more considerable difficulties in relation to integration as compared to other third-country nationals legally residing in Germany, then restrictions on their movement could be permitted.<sup>917</sup>

The Court here considered the state's interests to regulate its social security system and integration policies, without questioning the state's right to do so; however it balances these rights against the rights and freedoms of international protection beneficiaries within the broader context of human rights law by establishing, under the Geneva Convention, that the principle of equality and non-discrimination must be observed. Even though the Court does not refer to the principle of equality or the non-discrimination principle (Article 21 Charter and 14 ECHR) it is clear from its interpretation that these principles must be respected.<sup>918</sup> For example, the right to free movement on the Member-State's territory although it may, in specific situations, be subject to limitations for the purposes of equal distribution of the burden, this must be applied on an equal basis in relation to all groups and residents. It is only in exceptional situations that the Court recognises that a justification for a condition on residence applied only to subsidiary protection beneficiaries could be made, and only if they 'are not in an objectively comparable situation' with other groups and residents. The Court here applied proportionality both ways to balance the state's rules on residence, social security, and integration, against the right to free movement and non-discrimination, and vice versa. Consistent with its approach in the preceding cases, the Court relied on the wording of the Qualification Directive and the relevant legal provisions and underlined that 'the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part',<sup>919</sup> which in this case required consistency with the Geneva Convention. More specifically, the Court drew upon the intention of the legislature to support its reasoning and stated that:

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<sup>914</sup> *ibid* para 55

<sup>915</sup> *ibid* paras 54, 56

<sup>916</sup> *ibid* para 64

<sup>917</sup> *ibid* paras 56,64

<sup>918</sup> See further *Storgaard* (n.908)

<sup>919</sup> *Joined Cases C-443/14 and C-444/14, Alo and Osso* (n.848) paras 27 and 29

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[I]t follows from recital 3 of Directive 2011/95 that, drawing on the Conclusions of the Tampere European Council, the EU legislature intended to ensure that the European asylum system, to whose definition that directive contributes, is based on the full and inclusive application of the Geneva Convention.<sup>920</sup>

However, the Court in applying a balancing exercise further stated the following:

[...] the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified.

Although the Court did not specifically mention the proportionality principle, an observation that we also made in relation to the previous cases examined so far in this chapter, it is quite evident that the Court applies a balancing exercise while considering whether the freedom of movement and the principle of equality are disproportionately hindered. This is more clearly stated in the opinion of AG Cruz Villalón, who expressed that in relation to the two objectives submitted by Germany, i.e. even distribution of the financial burden in relation to receipt of welfare benefits, and the facilitation of integration, both were legitimate objectives but that the difference in treatment between groups should be proportionate in relation to those aims.<sup>921</sup> AG Cruz Villalón made specific reference to Article 21 Charter and Article 14 ECHR, which prohibit discrimination on various grounds including nationality, and submitted that these must always be interpreted in cases where difference in treatment occurs in relation to one of the fundamental rights protected.<sup>922</sup>

The AG clarified that the difference in treatment would only be justified ‘if it is based “on an objective and reasonable criterion, that is if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned”’.<sup>923</sup> He opined that a condition on the place of residence for achieving even distribution of the burden of social assistance could ‘hardly’ be considered to be proportionate and that less restrictive measures were possible.<sup>924</sup> The AG, however, further explained, in

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<sup>920</sup> *ibid* para 30

<sup>921</sup> Joined Cases C-443/14 and C-444/14 *Alo and Osso* (n.848) Opinion of AG Cruz Villalón, EU:C:2015:665 para 76

<sup>922</sup> *ibid* para 77

<sup>923</sup> *ibid* para 81

<sup>924</sup> *ibid* paras 85-86

relation to immigration and integration policy concerns, that the imposition of a residence condition would only be compatible if these concerns were sufficiently serious and connected to concrete situations.<sup>925</sup> He also adds that ‘subject to compliance with the requirements of the principle of proportionality, the national legal order, examined as a whole, does not limit the scope of the restriction at issue exclusively to beneficiaries of international protection’, which was an issue left to the national court to determine.<sup>926</sup>

The AG, therefore, explicitly applied a proportionality assessment of EU law part of which are the principles of equality, non-discrimination, and proportionality but also freedom of movement, the latter of which as he expressed is ‘undoubtedly [...]one of the fundamental rights of the European Union.’<sup>927</sup> The AG applied a procedural proportionality assessment based on whether the restriction is suitable, questioning to that effect if there are less restrictive measures the State could adopt,<sup>928</sup> whether they were actually necessary,<sup>929</sup> and, finally, whether they could be justified on the objective pursued in the strict sense.<sup>930</sup> The AG expressed explicitly in relation to the integration policy objectives the following:

[W]hen it comes to examining the proportionality in the strict sense of a measure having those characteristics with the substantive content of the right to freedom of movement, it will be the task of the referring court to examine the measure at issue taking into consideration, when weighing up the interests at stake, the undeniable importance of the right to freedom of movement within a State for beneficiaries of subsidiary protection.<sup>931</sup>

He continued by suggesting that in balancing individual interests and applying the principle of proportionality *stricto sensu* ‘abstract grounds connected to immigration and integration considerations cannot be enough’ to justify the imposition of a residence condition.<sup>932</sup> At the same time, he added that ‘[o]nly pressing reasons linked to specific immigration and integration considerations’ can justify such restrictive measures in relation to beneficiaries of subsidiary protection. He went on to provide guidelines as to what these reasons may be:

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<sup>925</sup> *ibid* para 105

<sup>926</sup> *ibid* para 105

<sup>927</sup> *ibid* para 77-78

<sup>928</sup> *ibid* para 86

<sup>929</sup> *ibid* para 59

<sup>930</sup> *ibid* paras 95-96

<sup>931</sup> *ibid* para 97

<sup>932</sup> *ibid* para 98

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[...] in specific circumstances of obvious social tension, with repercussions for public order, owing perhaps to the concentration of a large number of beneficiaries of international protection in receipt of social benefits.<sup>933</sup>

The AG by weighing the personal right to free movement against the imposition of restrictive residence conditions reminded the following:

it must not be forgotten that the fundamental right to freedom of movement is clearly connected with the right to free development of personality, [...] under present-day conditions, where mobility is one of the basic elements which permits the realisation of the professional and personal objectives of individuals living in the dynamic societies of the Member States of the European Union.<sup>934</sup>

The AG subsequently restated that:

the fact that the situation of beneficiaries of international protection lacks the element of free personal choice which is present in relation to other types of immigration status means that only very strong reasons may be adduced for justifying differential treatment, which requires a strict level of scrutiny in the examination of proportionality.<sup>935</sup>

In considering the situation of the applicants and acknowledging the impact that the restriction of movement may have on their lives, particularly, in realising their 'professional and personal objectives',<sup>936</sup> the AG adopts the first element of social empathy of other-orientated perspective-taking; he considers the implications of restricting these rights and, therefore, whether the extent and manner by which these personal interests are hindered are proportionate to the aim that is sought to be achieved. At the same time, by considering and acknowledging the state's rights and interests and in examining the impact upon the distribution of social assistance and integration policy, which reflects a public interest for the better functioning of societies, the AG (and the Court) adopt a contextual approach that reflects social empathy by also considering the interests of the state and the wider public. In balancing these rights, the AG and the Court, in a more laconic manner, clarify the legal obligations of the Member States under the Qualification Directive and the Geneva Convention by also considering (more clearly in the opinion of the AG) the underlying values, rights and principles that the Union is founded upon (for example

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<sup>933</sup> *ibid* para 98

<sup>934</sup> *ibid* para 70

<sup>935</sup> *ibid* para 76

<sup>936</sup> *ibid* para 70

fundamental rights and freedoms including the freedom of movement, as well as the principle of equality and non-discrimination) reflecting, therefore, the second element of social empathy concerning social responsibility. The social empathy elements are, therefore, as this chapter has shown thus far, hidden within this balancing practice. The Court's approach reflects a more formalistic way of incorporating the elements of social empathy and it is almost exclusively done by reference to specific provisions in primary, but mostly secondary legislation. However, from the perspective of the advocates general, in the cases explored here, this balancing is more noticeable through the consideration of proportionality more elaborately, or through the practice of weighing the harm caused and the impact upon the personal rights and freedoms within the broader consideration of the law's purpose. I maintain that this balancing, which is not always explicit, reflects Barak's aspect of 'social importance', which may differ in different social and legal contexts as it requires that the weighing of different rights will eventually be based upon consideration of the values that define the legal system and its 'normative structure'.<sup>937</sup>

#### **4.5.4 Transfer of a seriously ill asylum applicant - Article 4 Charter**

In the following case of *C.K.*,<sup>938</sup> the Court of Justice was called upon to consider questions that arose within the CEAS which, under Article 78 TFEU, seeks to offer appropriate status to those seeking international protection based on a close observance of the Geneva Convention and other applicable treaties. The case arose in the context of transfers under Dublin procedures (Article 17(1) Dublin Regulation III) giving rise to questions about Article 4 Charter (concerning inhuman and degrading treatment) and the principle of mutual trust shared between Member States on the presumption of an equal level of fundamental rights protection. The case, therefore, concerned a personal right (i.e. not to be subjected to treatment prohibited by Article 4 Charter) which as the Court reminded with reference to its earlier ruling in *Aranyosi*, it is of fundamental significance and is absolute as it is closely connected to the right to human dignity enshrined in Article 1 Charter.<sup>939</sup> On the other hand was the public right concerned with the state's discretion, under Article 17 Dublin Regulation III, to examine an application for international protection when it is not its responsibility under the conditions established in that regulation. The Court was called upon to delineate Member States' obligations in cases of transfers and to consider the principle of mutual trust along with the principle of non-refoulement. An important aspect of this case is that

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<sup>937</sup> Barak (n.816) 349

<sup>938</sup> C-578/16, *C.K.* (n.849)

<sup>939</sup> para 59

## Chapter 4

the Court, quite uncommonly, does not follow the opinion of AG Tanchev, who considered that it would not be impossible to transfer an asylum seeker to the Member State responsible to deal with the applicant's case, where flaws may give rise to a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>940</sup> The AG justified his opinion on the principle of mutual trust and on the need to safeguard the effectiveness of the CEAS despite this being contrary to the ECtHR standards. More specifically the AG boldly argued that 'the Court is by no means required to follow' the ECtHR.<sup>941</sup> The Court, however, as will be analysed below, took a different approach more consistent with the ECtHR's case law reflecting an increased coherence between the case law of the two courts.

This case can be distinguished from the previous cases in that it involved a direct question on specific provisions of the Charter, namely Article 4. The question referred to the Court was whether Article 4 Charter must be interpreted as including the case of the transfer of an asylum seeker, who was suffering from severe mental or physical illness and who would have, as a consequence, a 'real and proven risk of significant and permanent deterioration in the state of [her] health'.<sup>942</sup> If so, would the Member State concerned be obliged to apply the 'discretionary clause' under Article 17(1) of the Dublin III Regulation and, thus, examine the application itself instead of transferring the asylum seeker to the Member State, which would be otherwise responsible for dealing with her application?<sup>943</sup>

The case involved the transfer of a couple (of Syrian and Egyptian nationalities) and their newborn child, from Slovenia to Croatia. The mother of the child was suffering from 'post-natal depression and periodic suicidal tendencies', and it was assessed by a medical opinion that it was possible that if her situation deteriorated, she would require hospitalisation. Because of that, she was required to remain at the reception centre in Slovenia with her child.<sup>944</sup>

In citing the legal context of the case, the Court identified the relevant articles of the Charter and the ECHR, the purpose of Dublin III and its implementing regulation, as well as the purpose of the Reception Conditions Directive, which is to 'lay down standards for the reception of applicants for international protection'. It further cited the Reception Conditions Directive, including material reception conditions and adequate standard of living (Article 17), consideration of vulnerable

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<sup>940</sup> C-578/16, *C.K.* (n.849), EU:C:2017:108, Opinion by AG Tanchev, paras 57-58

<sup>941</sup> *ibid* paras 51-53

<sup>942</sup> C-578/16, *C.K.* (n.849) para 55

<sup>943</sup> *ibid*; Article 17(1) of Dublin III Reg. states: 'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation[....]'

<sup>944</sup> *ibid* *C.K.*, para 37

persons (Article 18), and necessary healthcare, including the provision of assistance (medical or otherwise) to those with special reception needs (Article 19).<sup>945</sup>

The Court as a preliminary point stated that to access the procedures of international protection effectively, it is important that the determination of the Member State responsible processes asylum applications without delays, and that once the Member State is determined, it must take action immediately.<sup>946</sup> In applying the Dublin III Regulation, Member States are therefore bound by Article 4 Charter as well as by the case law of the ECtHR.<sup>947</sup> In upholding the ruling of the ECtHR in *Paposhvili* the Court of Justice repeated that the state is not only prohibited from engaging in practices that will give rise to treatment under Article 3 ECHR but are also responsible not to exacerbate natural illnesses that could lead to a situation covered by that provision.<sup>948</sup>

As with the previous cases, the Court does not mention proportionality or the general principles of EU law as such, and there is no clear test by which the Court assesses how the personal right derived under Article 4 Charter is to be balanced against the public interest (i.e. the principle of mutual trust). However, from the Court's references to the ECHR and the Charter as well as the incorporation of the relevance of the ECtHR's case law it is evident that fundamental rights function as part of a balancing exercise the Court undertakes even if it does not explicitly refer to the principle of proportionality as a procedural principle. This is most evident by the Court's effort to address the ECtHR's concerns regarding the mechanical application of mutual trust by the Member States by stating that although no systemic flaws existed in Croatia, the individual circumstances and characteristics of the applicant had to be taken into consideration, echoing the ECtHR's approach in *Paposhvili*. The Court submitted that in order to comply with the requirements under Article 3 ECHR, Member States are required to provide 'the necessary health care and medical assistance, including, at least, emergency care and essential treatment of illnesses and of serious mental disorders',<sup>949</sup> without departing from the presumption that treatment provided in the Member States is considered adequate under the principle of mutual trust.<sup>950</sup> This 'ensures that the exceptional situations referred to in the present judgement are

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<sup>945</sup> *ibid* paras 3-28

<sup>946</sup> *ibid* paras 56-58

<sup>947</sup> *ibid* paras 63,68

<sup>948</sup> Court quoted *Paposhvili v Belgium* [...] the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible, provided that the resulting suffering attains the minimum level of severity required by that article' para 68 *Paposhvili v. Belgium*, App. No. 41738/10 (ECtHR, 13 December 2016)

<sup>949</sup> C-578/16, *C.K.* (n.849) para 70

<sup>950</sup> *ibid* para 70

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duly taken into account by the Member States'.<sup>951</sup> Further, the Court referred to the intention of the EU legislature concerning Dublin III Regulation which was not only 'the effectiveness' of the asylum system but also 'the protection granted to asylum seekers under that system.'<sup>952</sup>

Concerning the aspect of the systemic flaws in the asylum procedure as the only possibility to halt a transfer of an applicant under Article 3(2) Dublin III Regulation, which was the previous approach of the Court in *Abdullahi*,<sup>953</sup> the Court stated that there was nothing in Article 3(2) to suggest that the provision could exclude considerations that were connected to treatment within Article 4 Charter in exceptional cases such as that of the applicant's.<sup>954</sup>

The Court, therefore, considered that in exceptional circumstances a transfer might be halted within the scope of Dublin III Regulation to be in line with the requirements of the Charter, which also constitutes an objective of the CEAS in general and the Dublin III Regulation in particular. The Court, however, left it for the national court and the relevant authorities to assess whether a transfer would lead to treatment under Article 4 Charter while it provided guidelines as to how this can be done. Based on its ruling in *Aranyosi* the Court stated that:

It is, therefore, for those authorities to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned. [...]it is not sufficient to consider only the consequences of physically transporting the person [...], but all the significant and permanent consequences that might arise from the transfer must be taken into consideration.

[...] Member States concerned must verify whether the state of health of the person at issue may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in the affirmative, must implement those precautions.<sup>955</sup>

In providing guidelines as to how such a transfer may take place the Court stated that this should involve arrangements for the asylum seeker to be accompanied 'by adequate medical staff with the necessary equipment, resources and medication' to avoid the deterioration of the applicant's health or any acts of violence exercised by the applicant towards their person or others.<sup>956</sup> These considerations are within the requirements of Dublin Regulation and the Reception Conditions

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<sup>951</sup> *ibid* para 95

<sup>952</sup> *ibid* para 61

<sup>953</sup> Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813 (henceforth *Abdullahi*)

<sup>954</sup> C-578/16, *C.K.* (n.849) para 92

<sup>955</sup> *ibid* paras 76-77

<sup>956</sup> *ibid* para 81

Directive to safeguard and ensure that the special needs of the applicants are met as well as within the provision concerning vulnerable persons under the Reception Conditions Directive.

The Court in *C.K.* by overturning its previous ruling in *Abdullahi*, which foresaw only systemic flaws in the Member States capable of calling into question the transfer of an asylum seeker,<sup>957</sup> reflects the development of its case law in this area in upholding fundamental rights protection of asylum seekers. The specific and individualised approach suggests a potential shift towards acknowledging the applicants more as unique individuals and based on their individual contexts rather than as generalised groups. This recognition is important from a social empathy perspective because it reflects the Court's process in considering two legitimate objectives of the CEAS, namely protection from treatment under Article 4 Charter and the principle of mutual trust between the Member States. The Court acknowledged the significance of both objectives by considering, on the one hand, the individual circumstances of the applicants and the legal requirements that were set up for their protection under the specific situation of transfers within the CEAS. Consideration of the personal circumstances included the special requirements and the personal characteristics of the applicants that placed them in a vulnerable situation, i.e. mental health or illness and the fact that the process of transfer could aggravate their situation. This approach reflects the other-orientated perspective-taking of social empathy. On the other hand, the Court also considered the rights and discretion of the state, which reflects the public interest in the context of the CEAS. Therefore, it acknowledged and upheld the importance of the principle of mutual trust without challenging the presumption of fundamental rights protection in the Member States. Instead, the Court sought to strengthen fundamental rights protection in exceptional situations, such as those in the main proceedings. More specifically, regarding the approach adopted in this case, the Court stated that it:

[F]ully respects the principle of mutual trust since, far from affecting the existence of a presumption that fundamental rights are respected in each Member State, it ensures that the exceptional situations referred to in the present judg[e]ment are duly taken into account by the Member States.<sup>958</sup>

The Court's recognition of both the individual right in question as well as the public interest is significant for balancing the objectives of the CEAS as the Court considered the broader context and scope of the European asylum system. By clarifying the obligations of Member States under Dublin III Regulation, while simultaneously leaving room for national courts and authorities to

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<sup>957</sup> Case C-394/12 *Abdullahi* (n.954) para 62

<sup>958</sup> C-578/16, *C.K.* (n.849) para 95

establish whether these obligations have been satisfied, the Court further respects the division of competences in the area of asylum while also stands by the principles of subsidiarity and proportionality (Article 5 TEU). By defining the obligations of the Member States, the second element of social empathy, which is connected to social (and legal) responsibilities towards addressing potential injustices and suffering can be observed. By recognising the relationship between mutual trust and the protection of individuals against inhuman and degrading treatment in an equal manner, the Court locates both within the values that it recognises as underlying not only the CEAS but also the EU and views them not as conflicting but as co-dependent.<sup>959</sup> This form of balancing reflects the complexity of the area of asylum and, at the same time, it shows the normative framework within which the AFSJ develops.

At the same time, despite the positive step taken by the Court in upholding fundamental rights of asylum seekers, three points of practical importance should be underlined. Primarily, as this case concerned one of the rights that enjoys a special status within human rights law (Article 4 Charter/Article 3 ECHR), it is questionable whether the Court would follow the same approach in relation to other rights within the Charter. This concern is justified by the fact that the Court has referred to the situation in *C.K.* as exceptional, which suggests that the risk of violation of other fundamental rights may not justify an exception under the Dublin system and the distribution of responsibilities.<sup>960</sup> Even though this may be true, it is important to consider that the principle of mutual trust can no longer be considered absolute and that fundamental rights constitute an equally significant objective of the CEAS and the EU more generally. In the words of the current President of the Court of Justice:

[T]he fact that the principle of mutual trust may, in exceptional circumstances, effectively be subject to limitations should reassure all those who fear that the ECJ might give too much weight to the principle of mutual trust at the expense of the protection of fundamental rights. Indeed, the ECJ has made it crystal clear that mutual trust is not to be confused with blind trust. Trust must be “earned” by the Member State of origin through effective compliance with EU fundamental rights standards.<sup>961</sup>

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<sup>959</sup> see also Rizcallah C., *The Dublin system: the ECJ squares the circle between mutual trust and human rights Protection*, BLOG - EULAWANALYSIS, Available at: <http://hdl.handle.net/2078/182653>

<sup>960</sup> see also Cecilia Rizcallah, ‘*The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*’ (EU Law Analysis, 20 February 2017) last accessed at <https://bit.ly/30yo40Q> on 21 August 2019

<sup>961</sup> Koen Lenearts, ‘*La vie après l’avis: Exploring the principle of mutual (yet not blind) trust*’, 2017 54 *Common Market Law Review* 805, 839-840

The second point, also identified by Rizcallah, concerns the consequences of the suspension of the transfer which the Court does not address. She explains that a possible scenario would be what she calls 'refugees in orbit' who cannot have their application examined by any Member State and which as a consequence could lead to inhuman and degrading treatment.<sup>962</sup> The author of the present thesis agrees and embraces this concern. It could follow that the once the receiving state establishes that the transfer is not possible because of the individual situation of the applicant within a reasonable time, it will be responsible to deal with the asylum application according to Article 4 and 19 Charter. The time limits set under Article 29 of Dublin III Regulation could be an indication as to how long the suspension would be possible (i.e. six months to a year) depending on the severity of the circumstances, as well as on other fundamental rights under the Charter and in line with Chapter IV of the Reception Conditions Directive concerning vulnerable persons. In this case, the vulnerable situation of a prospective applicant could function as a requirement for a Member State to take charge. However, this constitutes a gap in the present framework, which needs to be addressed in order to provide better protection for persons seeking international protection.

The third point concerns what the present author sees as a missed opportunity by the Court concerning the best interests of the child. In answering the questions referred to by the national court the Court of Justice could have referred to the requirement to ensure the best interests of the child as they are clearly established in the Charter and the CEAS. This consideration could, for example, be read along with Article 4 Charter in determining whether the Member State in question was required to apply the discretionary clause in considering the impact of the transfer.

The Court continued to establish a 'safe harbour'<sup>963</sup> in terms of balanced and more coherent approach regarding the protection of fundamental rights within the context of the CEAS in the case of *Al Chodor and Others*.<sup>964</sup>

This case involved the detention of an asylum seeker with his two minor children in the Czech Republic, who were travelling through that state from Hungary to join family members in Germany. The authorities in the Czech Republic found that the Al Chodor family had already made an asylum application in Hungary and, consequently, ordered their transfer under the Dublin

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<sup>962</sup> Rizcallah (n. 959)

<sup>963</sup> see further Piotr Sadowski, 'A safe harbour or a sinking ship? The protection of fundamental rights of asylum seekers in recent CJEU judgments', 2019 11(2) European Journal of Legal Studies 29, 50-51,59 in relation to *Al Chodor*; see also Tommaso Poli, 'Immigration detention and the rule of law: the ECJ's first ruling on detaining asylum-seekers in the Dublin system', (EU Law Analysis, 5 May 2017) last accessed at <https://bit.ly/30IN4Zb> on 21 August 2019

<sup>964</sup> C-528/15, *Al Chodor* (n.853)

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procedures. The Czech authorities further considered that there was a ‘significant risk of absconding’<sup>965</sup> and consequently ordered their detention until their transfer could take place.<sup>966</sup> The regional court found the decision on detention to be unlawful and that the national legislation did not provide objective criteria to assess the risk of absconding. On an appeal, the question referred to for a preliminary ruling asked whether Member States are required to establish in their national law the objective criteria for what constitutes a ‘risk of absconding’ and whether, in the absence of such criteria, the national authorities were prevented from applying Article 28(2) of Dublin III Regulation, which permits them to resort to detention. The main issue was, therefore, to consider the proportionality of detention and consider whether less coercive measures to secure transfer procedures could be applied effectively,<sup>967</sup> based on the objective criteria for determining whether there was a significant risk of absconding, so as not to unjustifiably limit the fundamental right to liberty enshrined in Article 6 Charter.<sup>968</sup>

The Court and the AG referred to the objective of Dublin III and the derogation from the right to liberty under in Article 28(2) in conjunction with Article 2(n).<sup>969</sup> Detention for the purposes of Dublin III is only to secure transfer procedures where there is a risk of absconding and does not, therefore, permit detention for other purposes. The AG considered the intention of the legislature more extensively in order to show the extensive protection intended in relation to detention. He explained that ‘the EU legislature intended that the detention of those persons — which constitutes a particularly serious interference with their fundamental right to liberty guaranteed by Article 6 of the Charter (24) — should be limited to “exceptional circumstances”’.<sup>970</sup>

With reference to Article 52(1) Charter the Court stated that ‘any limitation on the exercise of the right [to liberty] must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality.’<sup>971</sup> Reinforcing the position of the ECtHR in *Del Río Prada v Spain*, the Court of Justice clarified that it is not sufficient for a rule that limits the right to liberty to have a legal basis in national law but that it must also have ‘clarity, predictability, accessibility and protection against arbitrariness’.<sup>972</sup> This was because, as the Court reasoned, detention constitutes ‘a serious interference with those applicants’ right to liberty’ and must therefore ‘be subject to compliance with strict safeguards.’<sup>973</sup> By balancing the right to liberty

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<sup>965</sup> Article 28 of the Dublin III Regulation

<sup>966</sup> C-528/15, *Al Chodor* (n.853) para 12

<sup>967</sup> *ibid* para 25

<sup>968</sup> *ibid* para 36

<sup>969</sup> C-528/15, *Al Chodor* (n.853) EU:C:2016:865, Opinion by AG Saugmandsgaard ØE, para 36, 33, 35

<sup>970</sup> *ibid* para 46

<sup>971</sup> C-528/15, *Al Chodor* (n.853) para 37

<sup>972</sup> *ibid* paras 40, 38, 42

<sup>973</sup> *ibid* para 40

against the national measures adopted to limit this right, the Court submitted that in establishing whether there is a real risk of absconding, an individual assessment must take place and can be adopted 'only in so far as the detention is proportional and where other less coercive alternative measures cannot be applied effectively.'<sup>974</sup>

The application of proportionality, in this case, is of procedural nature which derives from the requirements of Dublin III Regulation which is cited in the legal context of the case (Recital 20 and Article 28).<sup>975</sup> However, while the Court made frequent references to proportionality as part of the requirements of the legal framework, the AG adopted a different approach by concentrating on the objective criteria for assessing the risk of absconding.

Primarily, the AG referred to legal certainty and the requirement for objective criteria to be defined clearly in a legislative text pointing to the importance of 'individuals concerned to ascertain the scope of their rights and obligations and to foresee the consequences of their actions.'<sup>976</sup> Secondly, he further explained that the discretion of authorities in dealing with detention cases should be constrained and determined in advance by a separate authority based on general and abstract criteria anchored in the legislation, instead of relying upon the discretion of administrative and judicial authorities.<sup>977</sup> These safeguards function as guarantees in relation to the individual and the state as they more clearly define their rights and obligations. Being able to understand rights and duties of states and individuals clearly is important when it comes to balancing the potential harm on a constitutional right (in this case the right to liberty) and the potential benefit in restricting this right as first we must look to the scope and purpose of the law. In the context of Dublin III Regulation, the purpose is not to punish individuals with detention but instead to ensure the transfer of individuals according to the requirements of the Charter and the legal framework of the CEAS.

The application of the principles of proportionality and legal certainty considered by the AG reflect the balancing exercise both in a procedural sense (satisfying the requirement of necessity and the less restrictive means possible) as well as substantive. The substantive application is understood here not in terms of a predefined test to be applied by the Court but in the form of balancing of equally significant rights and principles, reflecting a *stricto sensu* understanding of proportionality.<sup>978</sup> By using a substantive application of proportionality, the Court and the AG

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<sup>974</sup> *ibid* para 25

<sup>975</sup> *ibid* paras 7 and 9

<sup>976</sup> AG Opinion para 72

<sup>977</sup> The AG defines this as Objective of circumscribing the administrative and judicial authorities' discretion, *ibid* paras 81-84

<sup>978</sup> Barak (n.817) 340-344

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consider the wider purpose of the legislation, which is particularly relevant within a social empathy approach. More specifically, the social empathy aspect is, I argue, reflected in consideration of the context in which the issues arise and a deeper examination of the specific situation of applicants. For example, the AG began his analysis of the case by considering the wider background of migration in the EU at the time of the case noting the increased number of applications for international protection and the responsibilities of Member States.<sup>979</sup> The principle of legal certainty and the individual assessment requirement function, therefore, as safeguards for the protection of fundamental rights of individuals and are part of the balancing of the implications of the harm caused to an individual right and the benefit gained having due regard to the broader purposes of the law. At the same time through this balancing the Court and the AG delineate the responsibilities of the Member States towards individuals and vice versa, reflecting the social responsibility aspect of social empathy not only on the part of the State but also the individual. In acknowledging the rights and interests of individuals and states, the Court is guided by the values of the European legal system. This is particularly mirrored in the increased coherence between the case law of the Court of Justice and the international human rights standards, the latter of which constitutes, along with the establishment of the AFSJ, not only an objective of the EU (as explained in Chapter Two) but also an underlying value upon which the EU is founded.

The two following cases suggest that in balancing personal rights and public interest the Court seeks to safeguard both within the context of the CEAS with reference to proportionality that functions both ways as was the early case in *Schmidberger*.<sup>980</sup>

In *Amayry*<sup>981</sup> the Court considered a request for a preliminary ruling concerning the same provision as in the case of *Al-Chodor*, namely Article 28 of Dublin III, however, this time the Court was called upon to interpret the provision concerning the length of detention. By pointing to the scope of detention in this context,<sup>982</sup> the Court stated that 'it is necessary to consider not only the wording but also its context and the objectives pursued by the rules of which it is part'<sup>983</sup> stating, therefore, one more time that the purpose of the procedure under Dublin III is to enable transfer.<sup>984</sup> After repeating that Article 6 Charter is applicable in cases concerning the fundamental right to liberty, the Court explained that detention would be possible as long as it is

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<sup>979</sup> AG Opinion para 30-31

<sup>980</sup> n.811

<sup>981</sup> Case C-60/16, *Amayry* (n.854)

<sup>982</sup> *ibid* paras 23-29

<sup>983</sup> *ibid* para 29

<sup>984</sup> *ibid* para 30

not extended beyond what is necessary for the purposes of transfer (no longer than two months) and by taking into consideration all the specific requirements in each specific case.<sup>985</sup> This is part of procedural proportionality assessment which is provided by Dublin III Regulation, however, the Court does not specifically refer to the principle itself, as we consistently saw. However, this does not mean that the Court does not apply proportionality in terms of necessity and in the context of the least restrictive measures, as it clearly applies that assessment. The application of proportionality is more evident in the case of *K*.<sup>986</sup> which was delivered one day the the *Amayry* judgement in the context of the Reception Directive. The Court in *K*. followed a very similar approach as in *Amayry*, however, this time the Court specifically referred to proportionality. The case concerned the validity of Article 8(3)(a) and (b) of the Reception Condition Directive 2013/33 in the light of Article 6 Charter which provides for exceptions to the detention of asylum applicants. The case involved a TCN who was suspected of using a false passport when he arrived in the Netherlands and was subsequently detained to verify his identity after he had lodged an asylum application.<sup>987</sup> Primarily, the Court following the AG's opinion, reiterated that 'fundamental rights recognised by the ECHR constitute general principle of EU law' and the Charter must be read as having the same meaning as the corresponding provisions in the ECHR.<sup>988</sup> The Court recognised that the right to liberty (Article 6 Charter) may be subject to limitations but these must be 'strictly necessary'<sup>989</sup> while 'detention may be ordered only when it proves necessary and on the basis of an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively.'<sup>990</sup> The Court reasoned that a fair balance was indeed struck between the right to liberty and the requirements for identification of the applicant for the proper functioning of the CEAS.<sup>991</sup> While reiterating that 'detention may be used only exceptionally and that, secondly, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose'.<sup>992</sup>

These findings suggest that through a balancing exercise, the Court considers personal and public rights and interests not necessarily as conflicting but as interconnected. This is consistent with Barak's notion of 'social importance' in that the Court seems, from the cases explored in the present chapter, to consider the broader implications of restricting a fundamental right and the impact of not restricting such right. In the case of *K*., for example, detention was considered

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<sup>985</sup> *ibid* paras 44, 49

<sup>986</sup> C-18/16, *K*. (n.855)

<sup>987</sup> *ibid* para 33

<sup>988</sup> *ibid* para 32

<sup>989</sup> *ibid* para 40

<sup>990</sup> *ibid* para 44

<sup>991</sup> *ibid* para 49

<sup>992</sup> *ibid* para 46

justifiable considering the wider public interests (public security and order) which differed from cases of detention under the Dublin III Regulation. While Dublin III Regulation provides for the exception of detention in cases where there is risk of absconding, in the case of *Amayry* detention was permissible for a specific time frame within the limits of Dublin III and only for the purposes of transfer which meant no longer than two months.

### 4.6 Concluding remarks

Through the analysis of the case law within the area of asylum, it was shown that in balancing personal rights and public interests that are part of the constitutional structure of the EU legal order, the Court considers the broader context in which these issues arise and, consequently, the scope and purpose of the relevant legislation. At the same time, the Court acknowledges the constitutional significance of both personal rights under the Charter as well as public interests which may require derogation from these rights reflecting a balanced approach that considers both individual rights and public interests on an equal footing. Consequently, in balancing these rights, the Court does not claim that one should prevail over the other but instead looks into the specific circumstances in order to consider whether the harm caused to a fundamental right can be justified for the wider public good, such as public security. This was explained with reference to Barak's 'social importance' which is defined by reference to the normative structure of a legal system and through consideration of the purpose of the law. Within this balancing practice, the author of the present thesis showed that it is possible to approach case law in this area through the lens of social empathy for the reasons below.

Primarily the Court satisfies the condition of other-orientated perspective-taking, not only on the basis of considering the context and purpose of the law but because it has developed its case law in a way that recognises the vulnerability of individuals (which is also required by secondary legislation within the CEAS). This is often done, as we saw, through the requirement of individual assessments and clarifying that the principle of mutual trust is not automatic or non-rebuttable. This approach recognises the individual circumstances and needs of the applicants and further reflects the increased coherence of the Court's case law with the ECtHR's which had criticised earlier case law of the Court of Justice on this matter in the case of *Tarakhel*.<sup>993</sup> Increasing the protection of fundamental rights is an important indicator of the recognition of the individual person and an important step towards addressing vulnerability,<sup>994</sup> which I have identified as an essential aspect of enhancing social empathy.

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<sup>993</sup> *Tarakhel v. Switzerland*, App. no. 29217/12, (ECtHR, 4 November 2014)

<sup>994</sup> see further Bryan Turner, *Vulnerability and Human Rights* (Penn State Press, 2006)

Secondly, through this balancing the Court is able to interpret and define the obligations of Member States that arise within the CEAS and to clarify their responsibility towards individuals. At the same time, however, through this balancing the Court further upholds the responsibilities of individuals toward states and the wider public interest, for example by clarifying provisions relating to detention and the extent to which this is proportional in achieving the purpose of detention in specific situations, such as risk of absconding or as a pre-removal practice. This approach suggests that the second element of social empathy that is connected to social responsibility and obligations towards others is further satisfied as the Court defines Member States' responsibilities in protecting fundamental rights and refraining from practice that will lead to deterioration of the applicants' situation. Further, the limitation on a fundamental right in favour of protecting the wider public interest suggests that there are obligations that need to be upheld in relation to the wider community in order to safeguard public goods including security.<sup>995</sup>

At the same time however, we saw that the Court is often laconic in its reasoning following, what Thym has characterised as "administrative mindset".<sup>996</sup> Although this approach may not necessarily be problematic in relation to the outcome of the case it can prove problematic when we try to understand the extent to which the Court uses certain principles and concepts, such as the principle of proportionality and the concept of vulnerability. At the same time, although increasing reference to the Charter and the human rights framework has been observed in the cases analysed in this chapter, it is not always clear how the Court uses human rights as general principles of EU law. This of course may not be easy considering that human rights function both as principles as well as rules, however in cases where the Court does not clearly state the underlying rules and principles it becomes difficult to understand how it balances conflicting rights and freedoms. In the cases analysed in this chapter we have seen that the Court applies a balancing exercise, although this is often more clearly seen through the opinions of the Advocates General. This indicates that a clearer understanding of how proportionality or the balancing exercise is used can prove particularly helpful for identifying what aspects of the legal system (i.e. which values and principles) assist the Court in its reasoning.

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<sup>995</sup> Gibbs, *Constitutional Life* (n.560)

<sup>996</sup> Thym, 'Between "administrative mindset" and "constitutional imagination"' (n.882)



## Chapter 5 Conclusion

The present thesis set out to explore the discourses within the AFSJ by focusing on the fields of citizenship and migration. It has argued that it is within these fields that the human being is constructed as the subject of the European legal order. The narratives of citizenship and migration having developed in parallel have indicated the inclusive and exclusive discourses of the EU, and by applying Foucault's concept of power we were able to identify some of the weaknesses and positive developments within these fields that go beyond the mere fulfilment of the integration project. However, to identify aspects of citizenship and migration as weaknesses and limitations, such as the discourses of securitisation and economic instrumentalism, implies that the treatment of individuals within EU law should be different. Similarly, by praising the strengths and advancements within this area as successes, for example, the development of family unity and the rights of the child, also implies a specific vision for the EU and certain expectations we have of the European polity. This vision as was examined in detail in Chapter 1 has been deeply embedded in a complex historical, socio-economic and socio-political framework rooted in the ideas of solidarity and cooperation which gradually transformed and continues to transform according to the social, political, environmental and other needs of each era.

More specifically, Chapter 1 has explored in depth some of the most defining developments within the European polity from its early days until its current constitutional framework and examined how the legal subject has developed within the broader socio-political and socio-economic settings. For example, we saw the transformation of the subject from the coal and steel worker to the EU citizen while it became clear that accessing citizenship rights extends to certain categories of TCNs. At the same time, we saw that the continuous development of human rights and the elevation of the legal status of the Charter creates further opportunities for many individuals to become subjects of EU law (temporary or otherwise). Although the expansion of the EU and its impact on the lives of millions of people may be a self-evident reason as to why the EU owes certain duties and responsibilities to its subjects, the thesis took an alternative route.

Consequently, in Chapter Two I took a step back to ask *Why should individuals be treated differently* and *What is their role within the European project?* To approach this question, I wanted to avoid pre-conceived ideas about the EU. I considered that applying Aristotle's theory of motion as a metaphor would allow us to view the EU as an entity in motion, in a constant process of movement and change. Through the notions of actuality and potentiality associated with Aristotle's theory we were able to ask questions about the EU's structure and future. Looking at the polity's "genetic code", i.e. its constitutional foundations, including its laws, rules, practices,

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values, and principles, the aims and objectives of the EU helped us identify the actuality and potentiality of the polity. Looking at the Treaty of Lisbon as the EU's current constitutional framework, but having also traced the developmental history of the human person as the subject up to the Treaty of Lisbon in Chapter One, two goals have been achieved: first the historical context and the discourses which have led to the current constitutional framework were explored, and, second, by identifying the EU's actuality (*entelecheia(+energeia)*) as being the development of a Union of people, the potentiality (*dynamis*) of the EU through its objectives and the mechanisms through which it sets out to achieve this have been identified.

The AFSJ within which citizenship and migration are embedded falls, as we saw, within the broader objectives of the EU (*energeia*). It is not simply one of the driving forces of the European project but it is the one that is directly and very closely related to individuals as receivers of rights and co-authors of European integration. This is what allows us to characterise the discourses of securitisation and economic instrumentalism in the context of citizenship and migration as limitations and to scrutinise current practices in these fields. Simultaneously, by identifying the objectives of the European project as a whole it was argued that the human being (citizens, migrants, distant others) is at the centre of the EU's policies. Using Aristotle's notion of actuality and potentiality I identified the EU's actuality as striving to become an ever closer Union while it was explained that its potentiality to become such a Union derives from the constitutional traditions of its Member States from which it derives its values and principles (Article 2 TEU). It was highlighted that this Union must be an inclusive Union and comprised of all those who derive rights from the EU legal order while it must be understood in its broader context within the global community. The driving mechanisms of the EU, in other words those that function as facilitators of this Union are defined, as we saw, in Article 3 TEU among which is the establishment of the AFSJ. The harmonious co-existence of the AFSJ with the other objectives of the European polity's actualisation process is thus central to the European project as a whole.

For example, the anxieties caused by the economic crisis and the fiscal policies of the EU cannot be understood only in terms of its economic policy, which constitutes another objective of the European integration (Article 3(3) and (4) TEU), but must be contextualised and understood in terms of their impact on the lives of people who are affected.<sup>997</sup> The interconnection between economic and social aspects in the context of citizenship and migration has also been shown in

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<sup>997</sup> Sen's Idea of Justice as focusing on the lives that people can actually live is relevant here; see also Kostakopoulou's humanist guidelines below and contributions of Dagmar Schiek, 'A constitution of social governance for the European Union' 17 and Dalvinder Singh 'Safeguarding "critical social functions" post the global financial crisis' 48, both in Ferreira & Kostakopoulou, *The human face of the European Union* (n.31)

Chapter One through the instrumentalist and reactionary narratives to bring the citizens closer as means toward achieving the internal market, but also through the normative dimension of enhancing rights, strengthening protection, and facilitating access to rights and freedoms. The economic and social objectives of the European polity cannot function independently and certainly not within a democratic, pluralistic, and just society that seeks equality, non-discrimination, and the well-being of its people and the world in general.

The recent migration crisis similarly correlates to more than one of the objectives of the European polity. Primarily the weaknesses in the CEAS within the AFSJ, evidenced by the fatalities in the Mediterranean particularly since 2015 and despite the legal framework that is set in place. At the same time, the treatment of migrants across Europe, reflect the complex relationship between the different mechanisms that drive the European project. The responsibilities of the EU and its Member States towards others, the commitment to solidarity and the protection of human rights, especially the rights of the child, and the polity's commitment to international law are reflected in the EU's objectives concerning its relations with the world (Article 3(5)TEU) but also in the provisions corresponding to the AFSJ (Article 3(2)TEU and Article 67TFEU) concerning respect for fundamental rights, fairness towards TCNs, and security for all.

At the same time the economic crisis has also impacted upon the narratives of migration as well as the practices on the ground through anti-immigrant sentiments and different forms of populism as well as lack of solidarity not only towards migrants but between Member States themselves.<sup>998</sup> However, we have also seen commitment to the humanitarian principles and values of the EU through welcoming practices and pro-refugee protests depicting a more empathetic and humane dimension of the European polity and its people.<sup>999</sup> These tensions,

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<sup>998</sup> Kaufmann & Rooduijn, 'Populism and nationalism in a comparative perspective' (n.9); Caiani & Graziano 'Understanding varieties of populism in times of crises' (n.9); Lutz, 'Variation in policy success: radical right populism and migration policy' (n.642)

<sup>999</sup> see for example several news reports "Refugees welcome," reads sign on Madrid City Hall', *El País*, (Madrid, 8 September 2015), accessed at <https://bit.ly/30mWeVB>; Adam Withnall, 'Germans stage pro-migrant rally with "refugees welcome" banners in response to violence', *Independent* (Europe, 30 August 2015) accessed at <https://bit.ly/2zcz7B1>; Julia Tulke, 'Refugees Welcome: 15 Pieces of Street Art and Graffiti from Europe and beyond Showing Solidarity in the ongoing Refugee Crisis', *Aesthetics of Crisis*, accessed at <https://bit.ly/2ItAek2>; 'Refugees welcome in UK, say demonstrators on London march', *BBC* (UK, 17 September 2016) accessed at <https://bbc.in/33Ly1u2>; 'Πορεία αλληλεγγύης στους πρόσφυγες στο κέντρο της Αθήνας' [Solidarity march in the centre of Athens], *To Vima* (20 October 2016) last accessed <https://bit.ly/2P5cjOk>; Yiannis Papadopoulos, "'We know what it means to be a refugee" says Lesbos grandmothers', *Ekathimerini* (11 February 2016) accessed at <https://bit.ly/2a76iaR>; Olivia Blair, 'Photographer who captured moving pictures of a police officer playing with a refugee child describes moment', *Independent*, (15 September 2015) accessed at <https://bit.ly/2P7ti2C>; Danica Radisic, 10th September 2015, 'Serbian police officer and smiling Syrian boy show Europe how welcoming refugees is done', *Global Voices Online* (10 September 2015) accessed at <https://bit.ly/2MvnDBI>; all links last checked on 21 August 2019

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anxieties, and contradictions in terms of the economic and migration policies, express the need to harmonise the objectives of the EU in a way that they lead towards actualising its potentialities, while they further call for a constant process of reflection about the interaction between law, policy and practice at the political, legal and socio-psychological level. This means recognising not only the impact of the legal structures and frameworks on individuals' lives in terms of accessing rights but also acknowledging their affective dimension on identities, emotions, and embodied experiences.

This thesis put forward an alternative way to reconceptualise the issues that arise within the AFSJ and to facilitate a humanist orientation that directs all law and policy towards the advancement of human flourishing and the improvement of life conditions. The social empathy thesis converges to that effect with the humanist thesis put forward by Ferreira and Kostakopoulou and builds upon its framework. The humanist framework as we saw advocates for a 'compassionate, empathic, inter-connected and caring "right way" of doing and living politics and norms' and urges us to shift our focus towards the human person.<sup>1000</sup>

The compass to be used in directing the EU's policies is, therefore, the human persons and the advancement of their wellbeing by addressing and recognizing their vulnerabilities, increasing their voice and providing space for listening in the social space. At the same time, this approach necessitates reflective awareness and positive action in the context of laws, policies and everyday practices. This requires a harmonious balance between the driving forces of the European project which seeks to establish a community of people, a union based on the moral and human values of dignity, freedom, democracy, the rule of law and human rights (Article 2TEU). This balance can only be achieved if we expand our normative vision for social justice based on inclusion and human diversity while at the same time retaining a global-orientated attitude.

The social empathy approach advocated in this thesis is consistent with feminist approaches to vulnerability, care, and social justice which are particularly crucial in the context of the AFSJ. It urges us to reorientate our focus when dealing with issues within these are and to acknowledge both in the case of citizenship and migration that the laws, policies, and structures directly impact and penetrate the lives of individuals. It not only requires us to acknowledge the experience of vulnerability and the possibility of structural inequalities from an other-orientated perspective-taking but also to take responsibility and address the injustices that may have historical and structural roots. The element of responsibility is particularly central to the idea of social empathy

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<sup>1000</sup> Nuno Ferreira, Introduction, in Ferreira & Kostakopoulou, *The Human Face of the European Union*, (n.31)10

as developed within this thesis and is also connected to an alternative way towards social justice that acknowledges the role of the law as a norm and, therefore, as responsible for not only the production of meaning and knowledge but their normalisation in everyday practices. Iris Young has particularly highlighted the role of responsibility in the context global justice and the importance of taking action to alleviate structural inequalities.<sup>1001</sup> The social empathy approach developed here blends this approach to social justice with a more conscious effort to recognise the affective dimension of the law, the state/EU and their institutions in their interactions with individuals. This presupposes an acknowledgment of the role of the socio-legal structures not only in addressing potential vulnerabilities and promoting social justice but also their role in identity development. A specifically characteristic topic within the AFSJ that relates to the element of responsibility while accounting for vulnerability and care is that of migration in the context of humanitarian action, which has been especially visible in the context of the migration crisis. Although the limited space in the thesis has not allowed for deeper analysis of specific issues such as this, it is important to highlight that a social empathy approach provides a useful normative analytical framework which allows us to deconstruct migration discourses. This is particularly relevant in the context of the media, which functions as a less formal social institution that holds great symbolic power.<sup>1002</sup> The latter is largely connected to the media's claims about social responsibility and, therefore, plays a crucial role in forming public opinion about vulnerable others.

As we saw the AFSJ functions not only in terms of its legal and geographical space but also as a communicative space. Since an important aspect of communication within this area is carried by the media, as it manages how vulnerable others are communicated to European publics, it is a particularly important area to consider when we try to understand the discourses of citizenship and migration.<sup>1003</sup> There are two crucial aspects of the institution of the media connecting it to

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<sup>1001</sup> Iris Young, *Responsibility for Justice*, (Oxford University Press, 2011)

<sup>1002</sup> See for example Art Silverblatt, 'Media as Social Institution', 2004 48 (1) *American Behavioral Scientist* 35; see more generally Manuel Castells, *Communication power* (Oxford University Press, 2009) and Niklas Luhmann, *The Reality of the Mass Media* (Polity Press, 2000); Lilie Chouliaraki, *The Symbolic Power of Transnational Media: Managing the visibility of suffering*, 2008 4 (3) *Global Media and Communication* 329; Lilie Chouliaraki, *The Spectatorship of Suffering* (SAGE Publications Ltd, 2006) 4; Chouliaraki L., *The Symbolic Power of Transnational Media: Managing the visibility of suffering*, 2008 *Global Media and Communication* 4(3) ; Chouliaraki L., *The Spectatorship of Suffering* (SAGE Publications Ltd 2008) p.4

<sup>1003</sup> Chouliaraki & Stolic, 'Rethinking media responsibility in the refugee "crisis"' (n.634); see for example representations of migrants Annabelle C. Wilmott, 'The Politics of Photography: Visual Depictions of Syrian Refugees in U.K.' 2017 24 (2) *Online Media, Visual Communication Quarterly* 67; Samuel Parker, Anja Naper, Simon Goodman, 'How a photograph of a drowned refugee child turned a migrant crisis into a refugee crisis: A comparative discourse analysis', 2018 2 (1) *Special Issue (Forced) Migration and Media* 12; for a very detailed analysis of the images and their impact see Farida Vis & Olga Goriunova (eds.) 'The Iconic Image on Social Media: A Rapid Research Response to the Death of Aylan Kurdi' (Visual Social Media Lab, 2015) last accessed at <https://bit.ly/2KOp7oi> on 21 August 2019; Simon Goodman, Ala Sirriyah, Simon McMahon, 'The evolving (re)categorisations of refugees throughout the "refugee/migrant crisis"' 2017 27 (2) *Journal of Community & Applied Social Psychology* 105

social empathy and which would be particularly interesting for future research, the first is connected to how migrants' histories and personal contexts are communicated and the second concerns our social responsibility through media's claims about responsibilities and actions.<sup>1004</sup>

More specifically, by viewing suffering and depicting the situation of migrants, the media controls a large portion of their representation, how these individuals are viewed and how their histories and personal contexts are depicted and communicated. This is of itself a significant power to hold because through the evocation of different emotions the media are, implicitly or explicitly, making claims about how we should feel about others and whether and how much we should care. This inevitably relates to the second important connection with social empathy concerning what actions we should take and, therefore, what is our social responsibility towards others. Fundamentally, the media shape the relationship we have with others (not limited to migrants) both in an ethical as well as socio-political and socio-psychological sense as they can create and transmit norms and construct meaning around social issues as well as to produce content that is distributed to large audiences.<sup>1005</sup> Chouliaraki and Stolic have developed a typology of visibilities based on empirical data during the migration crisis revealing not only the close relationship between the biopolitical and humanitarian discourses but also the manner in which these visibilities make claims to responsibilities towards migrants.<sup>1006</sup> The social empathy approach allows us to reflect upon the various discourses, to deconstruct these claims and to explore not only the construction of meaning but also the claims to responsibilities which are connected to social justice and to the broader political and legal framework.

The concept of responsibility as deeply embedded in a social empathy thesis is possible because of the latter's humanist orientation and the ethical dimension connected to it. Drawing upon the humanist thesis developed by Ferreira and Kostakopoulou, five humanist guidelines below are particularly central and are fully embraced in the present thesis.<sup>1007</sup>

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<sup>1004</sup> Chouliaraki & Stolic, 'Rethinking media responsibility in the refugee "crisis"' (n.634); for migrant representations see also Annabelle C. Wilmott, 'The Politics of Photography: Visual Depictions of Syrian Refugees in U.K.' 2017 24 (2) *Online Media, Visual Communication Quarterly* 67; Samuel Parker, Anja Naper, Simon Goodman, 'How a photograph of a drowned refugee child turned a migrant crisis into a refugee crisis: A comparative discourse analysis', 2018 2 (1) *Special Issue (Forced) Migration and Media* 12; for a very detailed analysis of the images and their impact see Farida Vis & Olga Goriunova (eds.) 'The Iconic Image on Social Media: A Rapid Research Response to the Death of Aylan Kurdi' (Visual Social Media Lab, 2015) last accessed at <https://bit.ly/2KOp7oi> on 21 August 2019; Simon Goodman, Ala Sirriyah, Simon McMahon, 'The evolving (re)categorisations of refugees throughout the "refugee/migrant crisis"' 2017 27 (2) *Journal of Community & Applied Social Psychology* 105

<sup>1005</sup> see more generally Castells M., *Communication power* (OUP 2009) and Luhmann N., *The Reality of the Mass Media* (Polity Press 2000)

<sup>1006</sup> Chouliaraki & Stolic, 'Rethinking media responsibility in the refugee "crisis"' (n.634)

<sup>1007</sup> Dora Kostakopoulou, 'Conclusion: Towards a humanistic philosophy of the European Union' in Ferreira & Kostakopoulou (n.31) 393

Kostakopoulou identifies the overcoming of doctrinal dichotomies and the incorporation of multiple ways of seeing and doing things at the institutional level as the first humanist guideline. She particularly refers to the willingness to consider other peoples' perspectives and interests as part of the institutional process as well as how institutional activity is informed and guided.<sup>1008</sup> Secondly, she advocates institutional cooperation and co-creation, the recognition of the relationships between the institutions and processes and their impact. As she puts it '[i]n such an institutional configuration, co-authoring, cooperating, deliberating and reflecting are more important than obligating, accepting, internalising and plighting one's word to a course of conduct.'<sup>1009</sup> The third guideline concerns the 'salience of human beings-in-societies' and the recognition of the role of EU laws and policies in the lives of people who must be recognised as ends in themselves.<sup>1010</sup> This means increasing and integrating their voice within policy setting and to be more empowered to lead their own lives.<sup>1011</sup> The fourth guideline involves the notion of symbiopolitics which highlights the significance of inter-connectivity, the relations that arise in the social space and the interactions between and among human beings and institutions at all levels of governance.<sup>1012</sup> The final guideline is termed 'economic relativism and correlativism' and reflects what was said earlier about the interlocking between economic objectives with the human-orientated objectives of the European polity, as well as the need for a harmonious balance between the different objectives of the EU.<sup>1013</sup> Kostakopoulou explains it as follows :

[O]vertly economic accounts of institutional dynamics need to be relativized and correlated with democratic politics and the advancement of social relations and human needs. To disregard the correlation and co-implication of the economic, the social and the political would be tantamount to replacing pluralism with monism, that is, reducing the complexity of European integration to a singularity or a reductionist market hypothesis.<sup>1014</sup>

The present thesis has shown how citizenship and migration function within a relationship of power that is both inviting and forbidding and has, therefore, shown how the legal structures of the AFSJ can directly influence the lives of people in the EU but increasingly also those not on EU territory. It has underlined the relational nature of structures and identities and the importance of recognising how meaning is produced and internalised in the social space reflecting Kostakopoulou's symbiopolitics. The social empathy approach is based on other-orientated

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<sup>1008</sup> *ibid* 396-397

<sup>1009</sup> *ibid* 398

<sup>1010</sup> *ibid*

<sup>1011</sup> *ibid* 399

<sup>1012</sup> *ibid* 401-403

<sup>1013</sup> *ibid* 403

<sup>1014</sup> *ibid* 403-404

perspective-taking and on the recognition of social responsibility within a contextual understanding of inequalities and injustices. This approach is orientated towards human beings and the advancement of their wellbeing as it is based on the recognition of others ‘as legitimate other[s] in co-existence with oneself’.<sup>1015</sup> It further involves, as argued in Chapter Three with reference to Fineman, the condition of vulnerability as an aspect of the human condition,<sup>1016</sup> which is particularly connected to social responsibility. This approach recognises the affective dimension of European laws, policies and institutions and their entanglement with emotion and construction of the Self in relation to others. These reflect Kostakopoulou’s humanist guidelines in relation to the ‘salience of human beings-in-societies’ as well as the role of institutions and the need for reflexivity and incorporation of different perspectives. Finally, in Chapter Four, I have attempted an experimental exercise whereby I explored whether and how we could apply a social empathy approach in the context of the institutions, particularly in the framework of the Court of Justice. Using the principle of proportionality as a balancing exercise it was possible to identify the human-centred elements within the Court’s decisions and to examine the underlying considerations of the Court in cases where a personal right or freedom conflicts with a public interest. In Chapter Four, we saw the difficult task of the Court to strike a balance between the various interests and objectives of the European polity but we also saw the margin of appreciation given to the Member States as co-creators of EU law particularly respecting the division of competences. Although characterised by an ‘administrative mindset’,<sup>1017</sup> not unlike its approach in citizenship cases in Chapter One that revolve largely around Article 21 TFEU and the criteria under the Citizens Directive, I argued that with reference to the cases examined in the last chapter, the social-empathy elements are structured within the Court’s approach particularly within its balancing exercise and the incorporation of fundamental-human rights. The social empathy exercise in Chapter Four paints towards a more hopeful picture for the future of the European polity as capable of being human-centred and advancing the well-being of people whether citizens, residents, people seeking international protection or any other individuals who find themselves involved within the AFSJ. At the same time, it directs us towards present limitations and inconsistencies within the AFSJ. For instance, the uncertainty surrounding the interpretation of the substance of citizenship rights and the relationship between the citizenship provisions with the provisions on free movement is currently problematic. At the same time, even though positive steps have been taken in expanding family rights and the rights of the child, the Court must be particularly sensitive and cautious (especially as it is not a family court) as to the

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<sup>1015</sup> Maturana (n.656) 81

<sup>1016</sup> Fineman, ‘The vulnerable subject’ (n.30)

<sup>1017</sup> Thym, ‘Between “administrative mindset” and “constitutional imagination”’ (n.882)

claims and assumptions it may be making about the institution of the family. More clarity is therefore needed concerning family-related rights and the provisions on citizenship and free movement which relate to the connection between EU-derived rights, on the one hand, and human rights, on the other hand.

To that effect, it would be beneficial for the advancement of citizenship and migration policies, if the Court began to more openly articulate the values that underpin its judgements which means that the function of proportionality, either in substantive or more normative sense, would be more clearly understood. However, the focus of the Court on the application of secondary legislation does not simply indicate a weakness on the Court's part but reflects a general political anxiety concerning the future of the subject in EU law. An ongoing public debate about the values underpinning EU law, but also national and constitutional laws in the Member States, accompanied by inclusive multilevel dialogues would help move the European project forward while they would increase both voice and listening on the basis of mutual respect. These public debates could help reorientate how we view ourselves in our social environments and help reflect upon our responsibilities towards each other. However, creative ways must be found for these debates to take place in an inclusive way which is a challenging task considering what we noted earlier about the role of the media. A fairly new and hopeful area that deserves attention in this context may be that of constructive journalism,<sup>1018</sup> which could be explored in the context of the AFSJ using a social empathy approach to increase voice and listening. At the same time, it may help us deconstruct existing structures and norms and help us understand the biopolitical and humanitarian discourses on the ground based on the experiences of those directly affected.

Another particularly effective way to foster positive social change and to an alternative and more inclusive notions of social justice is democratic education. The incorporation of citizenship education within the existing curriculum that focuses on an inclusivity and explores local, EU, and global aspects of citizenship (not in the legal sense) should be directed towards cultivating empathy and social responsibility while emphasising inter-connectedness and solidarity. A conscious effort towards democratic education from the early years onwards is a significant step towards inclusion and participation. Through democratic education and active engagement of

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<sup>1018</sup> Ulrik Haagerup, *Constructive News: How to save the media and democracy with journalism of tomorrow* (Aarhus University Press, 2<sup>nd</sup> ed., 2017); Cathrine Gyldensted, *From Mirrors to Movers: Five Elements of Positive Psychology in Constructive Journalism* (Group Publishing 2015)

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students with aspects connected to citizenship and interconnectedness is likely to encourage students to better understand their social roles and to cultivate reflective awareness and critical thinking. As the law can function as a norm and be understood together with its socio-psychological and affective dimensions we must also place it within its broader social function and re-connect it with the social space in which it operates.<sup>1019</sup> This presupposes that a multidisciplinary perspective is needed in order to understand the multidimensionality of the legal framework that governs the AFSJ (although not limited to it) and this further means reflection upon the role of education that relates to aspects of the AFSJ. The institution of the school can become involved in many ways towards positive social change particularly in areas concerning citizenship and migration and can provide valuable insights as to the construction of norms, meanings, and practices that may be related to racism, xenophobia, and structural inequalities while at the same time can play a significant role in addressing these issues, identifying needs, and cultivating social empathy

In incorporating the social empathy layer within matters that arise in the AFSJ, we are provided with a humanist-orientated lens that enhances reflective awareness and positive action by accommodating for different perspectives within a framework of respect. A social empathy orientation further avoids bias as it is not focused on a specific narrative for the EU but rather, as Kostakopoulou also suggested in relation to the humanist guidelines, inspires important questions like 'Why is this needed' and 'Is this better?'<sup>1020</sup>

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<sup>1019</sup> Dewey's approach to citizenship education is particularly relevant here and would be a very interesting topic for further research. For example, John Dewey, 'Democracy and education', in Jo Ann Boydston (ed), *John Dewey: The Middle Works, 1899–1922* (Vol. 9, 1916), (Southern Illinois University Press, 1980)

<sup>1020</sup> Kostakopoulou, Conclusion (n.31) 397

## Table of cases

### Court of Justice

- C-331/48 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et al, EU:C:1990:391, [1990] ECR I-04023
- C-26/52, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, EU:C:1963:1
- C- 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community , EU:C:1959:4
- C-1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel, EU:C:1959:4
- C- 13/60, "Geitling", Ruhrkohlen-Verkaufsgesellschaft mbH and others v High Authority of the European Coal and Steel Community, EU:C:1962:15
- C - 6/64, Flaminio Costa v E.N.E.L., EU:C:1964:66, [1964] ECR 00585
- C-40/64 Marcello Sgarlata and Others v Commission of the EEC EU:C:1965:36
- C-26/69 Erich Stauder v City of Ulm – Sozialamt, EU:C:1969:57, ECR 419
- C-11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide EU:C:1970:114 [1970] ECR 1125
- C-11/70 Opinion of AG Dutheillet de Lamothe delivered on 2 December 1970 Internationale Handelsgesellschaft EU:C:1970:100
- C-76/72 Michel S. v Fonds natinel de reclassement social des handicapés, EU:C:1973:46 [1973] ECR 457
- C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, EU:C:1974:51, [1974] ECR 491
- C-36/74 B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, EU:C:1974:140 [1974] ECR 1405
- C-41/74, Yvonne van Duyn v Home Office, EU:C:1974:133, [1974] ECR 01337
- C - 7/75, M. Fracas and wife v. Belgian State, EU:C:1975:80

C-36/75, Roland Rutili v Minister for the Interior, EU:C:1975:137 [1975] ECR 1219

C-32/75, Anita Cristini v Société nationale des chemins de fer français, EU:C:1975:120 [1975] ECR 01085

C- 63/76, Vito Inzirillo v Caisse d'allocations familiales de l'arrondissement de Lyon, EU:C:1976:192, [1976] ECR 02057

C-106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA, EU:C:1978:49, [1978] ECR 00629

C- 136/79, National Panasonic (UK) Limited v Commission of the European Communities, EU:C:1980:169, [1980] ECR 02033

C- 35 and 36/82 Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie, EU:C:1982:368, [1982] ECR 03723

C-283/83, Caisse d'Allocations Familiales de la Région Parisienne v Mr and Mrs Richard Meade, EU:C:1984:250 [1984] ECR 2631

C-297/88 and C-197/89 Massam Dzodzi v Belgian State, EU:C:1990:360, [1990] ECR I-03763

C-159/90, Society on the Protection of the Unborn Child ( spuc ) v. Grogan, EU:C:1991:378, [1991] ECR I-4685

C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, EU:C:1995:411, ECR I-4165

C-85/96, María Martínez Sala v Freistaat Bayern, EU:C:1998:217, [1998] ECR I-02691

C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, EU:C:2001:458, [2001] ECR I-06193

C-413/99, Baumbast and R v Secretary of State for the Home Department, EU:C:2002:493, [2002] ECR I-07091

C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, EU:C:2003:333, [2003] ECR I-5659

C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, EU:C:2004:639, [2004] ECR I-09925

C-36/02 Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn, EU:C:2004:614, [2004] ECR I-9609

C-148/02, Carlos Garcia Avello v Belgian State, EU:C:2003:539, [2003] ECR I-11613

C-456/02, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS), EU:C:2004:488, [2004] ECR I-07573

C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, EU:C:2005:169, [2005] ECR I-02119

C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, EU:C:2008:630, [2008] ECR I-08507

C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department, EU:C:2010:80, [2010] ECR I-01065

C-310/08, Ibrahim EU:C:2009:641, Opinion of AG Mazák

C-480/08, Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department, EU:C:2010:83, [2010] ECR I-01107

C-480/08, Teixeira EU:C:2009:642 Opinion of AG Kokott

C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), EU:C:2011:124 [2011] ECR I-01177

C-34/09, EU:C:2010:560 [2011] ECR I-01177, Opinion of AG Sharpston,

C-434/09, Shirley McCarthy v Secretary of State for the Home Department, EU:C:2011:277 [2011] ECR I-03375

C-424/10 and C-425/10, Tomasz Ziolkowski (C-424/10) and Barbara Szeja and Others (C-425/10) v Land Berlin, EU:C:2011:866, [2011] I-14035

C-40/11, Yoshikazu Iida v Stadt Ulm, EU:C:2012:69; C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, EU:C:2011:734 [2011] ECR 00000

C-61/11, Hassen El Dridi, alias Soufi Karim, EU:C:2011:268

C-329/11, Achughbabian v. Prefet du Val-de-Marne, EU:C:2011:807

C-356/11 and C-357/11, O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, EU:C:2012:776

C-356/11 and C-357/11, O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L,  
EU:C:2012:595, Opinion of AG Bot

C-529/11, Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home  
Department, EU:C:2013:290

C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, EU:C:2011:734, [2011]  
ECR 00000

C-86/12, Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de  
l'Emploi et de l'Immigration, EU:C:2013:645

C-87/12, Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga,  
Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration, EU:C:2013:291

C-140/12, Pensionsversicherungsanstalt v Peter Brey, EU:C:2013:565

C-394/12, Shamsu Abdullahi v Bundesasylamt, EU:C:2013:813

C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others,  
EU:C:2014:103

C-333/13, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, EU:C:2014:2358;

C-473/13 and C-514/13, Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v  
Kreisverwaltung Kleve, EU:C:2014:2095

C-474/13, Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik,  
EU:C:2014:2096

C-473/13 and C-514/13, and Case C-474/13 Opinion of AG Bot delivered on 30 April 2014,  
EU:C:2014:295

C-67/14, Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others, EU:C:2015:597

C-165/14, Alfredo Rendón Marín v Administración del Estado, EU:C:2016:675

C-218/14, Kuldip Singh and Others v Minister for Justice and Equality, EU:C:2015:476;

C-299/14, Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and  
Others, EU:C:2016:114

C-304/14, Secretary of State for the Home Department v CS, EU:C:2016:674

C-443/14 and C-444/14 Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover,  
EU:C:2016:127

C-47/15, Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de  
Douai, EU:C:2016:408 (henceforth Affum)

C-133/15, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank  
and Others, EU:C:2017:354

C-528/15, Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v  
Salah Al Chodor and Others, EU:C:2017:213

C-528/15, Al Chodor, EU:C:2016:865, Opinion by AG Saugmandsgaard ØE

C-18/16, K. v Staatssecretaris van Veiligheid en Justitie, EU:C:2017:680

C-60/16, Mohammad Khir Amayry v Migrationsverket, EU:C:2017:675

C-82/16, K.A. and Others v Belgische Staat, EU:C:2018:308

C-578/16, PPU, C. K. and Others v Republika Slovenija, EU:C:2017:127

C-89/17, Secretary of State for the Home Department v Rozanne Banger, EU:C:2018:570

C-246/17, Ibrahima Diallo v État belge, EU:C:2018:499

## **ECtHR**

Saadi v. the United Kingdom [GC], Application No. 13229/03 (ECtHR 29 January 2008)

Tarakhel v. Switzerland, App. no. 29217/12, (ECTHR, 4 November 2014)

Paposhvili v. Belgium, App. No. 41738/10 (ECtHR, 13 December 2016)

## **Other jurisdictions**

Frontini v Ministero delle Finanze [1974] 2 CMLR 372

Case 2 BvL 52/71, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle ffir  
Getreide und Futtermittel, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.)

## List of Legislation

### Treaties and Conventions

Treaty Establishing the European Coal and Steel Community, [1951] 261 U.N.T.S. 140 (ECSC Treaty or Treaty of Paris).

Treaty Establishing the European Economic Community, [1957] 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome)

Treaty Establishing the European Atomic Energy Community, [1957] 298 U.N.T.S. 259, 5 Eur. Y.B. 454 (Euratom Treaty)

Single European Act, [1987] OJ L 169 1, 25 I.L.M. 506

Treaty on European Union, [1992] OJ C 191 1, 31 I.L.M. 253

Treaty on European Union (consolidated version 1997) OJ C 340 [1997] 145 Henceforth TEU);

Treaty Establishing the European Community (Amsterdam consolidated version) [1997] OJ C 340 173

Treaty on European Union, [2006] OJ C 321 5

Treaty Establishing the European Community, [2006] OJ C 321) 37

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1;

Consolidated version of the Treaty on European Union [2012] OJ C 326/13

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

The Charter of Fundamental Rights of the European Union, [2012] OJ L 326, 391

### UN Conventions

Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189

Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360

International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, 999/171

Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, 1577/3

### **Other Conventions**

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention [1997] OJ C 254

Convention Implementing the Schengen Agreement of 14 June 1985, [2000] OJ L 239/19

### **EU Directives**

Directive of 16 August 1961 on administrative procedures and practices governing the entry into and employment and residence in a Member State of workers and their families from other Member States of the Community [1961] OJ 80/1513

Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member States' workers and their families within the Community [1964] OJ 64/981

Directive of 25 February 1964 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1964] OJ 845/64

Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families ([1968] OJ L 257/2)

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180

Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98

Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180/60

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337/9

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Recast) OJ L 180/96

## **EU Regulations**

Regulation 15 of 16 August 1961 on initial measures to bring about free movement of workers within the Community [1961] OJ 57/1073)

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2

Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1972] OJ L 74/1

Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) OJ L 295/11

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180/1

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251/1

## Communications and relevant documentations from EU institutions

— Meeting of the Heads of Government, Paris 9-10 December 1974 Bull. EC 12-1974

— Declaration of Ministers of the Trevi Group, Paris, 15th of December 1989 last accessed at <https://bit.ly/2KDhkcC> on 18 August 2019

— Ad Hoc Group Immigration, 7 October 1991, SN 3432/91 WGI 881, and, Ad Hoc Group Immigration, 21 May 1992, SN 2781/92 WGI 1107, in Statewatch, 'From Trevi to Maastricht (68 key texts published in full by Statewatch), last accessed at <https://bit.ly/2KVoyrg> on 18 August 2019

Commission, Action Programme in Favour of Migrant workers and their Families, E.C. Bull., Suppl. 3/76 COM(74) 2250 14 December 1974

Commission, 'Towards European citizenship: implementation of point 10 of the final communiqué issued at the European Summit held in Paris on 9 and 10 December' 1974 Bull. EC, Suppl 7/75 COM (75) 322

Commission, 'A People's Europe: Implementing the conclusions of the Fontainebleau European Council', COM (84) 446

Commission of the European Communities, Completing the internal market, White Paper from the Commission to the European Council, COM (85) 310, June 1985

Commission of the European Communities, 'Legal instruments to combat racism and xenophobia: Comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia and incitement to hatred and racial violence', December 1992 (Office for Official Publications of the European Communities, 1993)

Commission, 'European Social Policy - A Way Forward for the Union' (White Paper. Part A) COM (94) 333 final, 27 July 1994

Commission working document – 'The relationship between safeguarding internal security and complying with international protection obligations and instruments COM/2001/0743 final

Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM/2000/0755 final

Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method COM/2001/0710 final

Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations, COM(2004) 401 final

Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, [2005] OJ C 236

Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, [2015] COM(2015) 240 final

Communication from the Commission to the European Parliament, the European Council and the Council, delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, [2016] COM(2016) 230 final

Commission, Citizens' dialogues and citizens' consultations: Key conclusions, 20 April 2019 last accessed at <https://bit.ly/2VYmlTQ> on 20 August 2019

Council, Solemn Declaration on European Union, Stuttgart (19 June 1983) E.C. Bull., No 6 (1983)

Council, Conclusions of the Fontainebleau (25 and 26 June 1984) E.C. Bull. No 6. (1984)

Council Conclusions of 30 November 1994 on the organization and development of the Cirefi, [1996] OJ C 274

Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999

Council, Presidency Conclusions Nice European Council Meeting 7, 8 and 9 December 2000

Council of the European Union, 13302/1/04 REV 1, LIMITE 370, Draft multiannual programme: "The Hague Programme; strengthening freedom, security and justice in the European Union" (15 October 2004) last accessed at <https://bit.ly/2KHQGiI> on 19 August 2019

Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 OJ C 53/01)

Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), [2000] OJ L 303,23

Council, Stockholm Programme: An open and secure Europe serving and protecting citizens, [2010] OJ C 115/1

Council, Conclusions, 'Strategic Agenda for the Union in times of change', 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014

European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))

Opinion of 18 December 2014, Opinion 2/13 pursuant to Article 218(11) TFEU, Case Opinion 2/13, EU:C:2014:2454

Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999)565

# Bibliography

## Books

- Ajana B, *Governing through Biometrics: The Biopolitics of identity* (Palgrave Macmillan 2013)
- Aristotle, Lawson-Tancred H (tr), *Metaphysics* (Penguin Books 1998)
- Thomson J.A.K. (tr), Tredennick H (ed), *The Nicomachean Ethics* (Penguin Classics 2004)
- Bandes S (ed), *The Passions of Law* (NYUP 2000)
- Barak A, Kalir D (ed), *Proportionality: Constitutional Rights and their Limitations* (CAP 2012)
- Bassel L, *The Politics of Listening: Possibilities and Challenges for Democratic Life* (Palgrave Pivot 2017)
- Beck U & Grande E, *Cosmopolitan Europe* (Polity 2007)
- Beck U, *Risk Society: Towards a New Modernity* (SAGE 1992)
- Bellamy R, Castiglione D & Shaw J, (eds), *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave Macmillan 2006)
- Berger P & Luckman T, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (First Anchor Books 1966)
- Bourdieu P, *Algeria 1960* (Cambridge University Press 1977), Nice R. (tr), *Outline of a theory of practice* (Cambridge University Press 1977)
- Nice R (tr), *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press 1987)
- Passeron J, Nice R (tr), *Reproduction in Education, Society and Culture* (Sage Publications 2<sup>nd</sup> ed 1990)
- The logic of Practice* (Polity Press 1990)
- Burgess M, *Federalism and the European Union: The Building of Europe, 1950-2000* (Routledge 2000)
- Buzan B & Hansen L, *The Evolution of International Security Studies* (CAP 2009)

- Buzan B, Wæver O, & De Wilde J, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998)
- Campbell D, *Writing Security: United States Foreign Security and Politics of Identity* (Manchester University Press 1992)
- Castells M, *Communication power* (OUP 2009)
- Castoriadis C, *Η φαντασιακή θέσμιση της κοινωνίας [The imaginary Institution of Society]*, (Kedros 1978)
- Checkel J, 'Constructivism and EU Politics' p.57 in Knud Erik Jørgensen, Mark Pollack & Ben Rosamond (eds) *Handbook of European Union Politics* (Sage 2007)
- & Katzenstein P (eds) *European Identity* (CUP 2009)
- Chouliaraki L, *The Spectatorship of Suffering* (SAGE Publications Ltd 2006)
- Clark C, *Misery loves company: Sympathy in everyday life* (The University of Chicago Press 1997)
- Clive H. Church & David Phinnemore, *The Penguin Guide to the European Treaties: From Rome to Maastricht, Amsterdam, Nice and beyond* (Penguin Books 2000)
- Clough P, Halley J, (eds.) *The Affective Turn: Theorizing the Social* (Duke University Press 2007)
- Craig & de Búrca, *The Evolution of EU Law* (OUP 2nd ed 2011)
- *EU Law, Text, Cases and Materials* (OUP 6<sup>th</sup> ed 2015)
- Crombie IM, *An Examination of Plato's Doctrines: II. Plato on Knowledge and Reality*, Vol. 7 (Routledge 1963)
- Crossley N, 'Pierre Bourdieu's Habitus' in Sparrow T. & Hutchinson (eds), *A History of Habit: From Aristotle to Bourdieu* (Lexington Books 2013)
- *Key Concepts in Critical Social Theory* (SAGE 2004)
- De Búrca G., The evolution of Human Rights law, in Craig & de Búrca, *The Evolution of EU Law* (OUP 2nd ed 2011)
- De Witte B, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig & Grainne de Búrca, *The Evolution of EU Law* (OUP 2nd ed 2011)
- Decety J & Ickes W, *The social neuroscience of empathy* (MIT Press 2009)

- Dedman M, *The Origins and Development of the European Union 1945-2008: A History of European Integration* (Routledge 2<sup>nd</sup> ed 2009)
- Derek W. Urwin, *The Community of Europe: A history of European Integration since 1945*, (Longman 2<sup>nd</sup> ed 1995)
- Dewey J, 'Democracy and education', in Boydston JA (ed), *John Dewey: The Middle Works, 1899–1922* (Vol. 9, 1916) (Southern Illinois University Press 1980)
- Dinan D, (ed) *Origins and Evolution of the European Union* (OUP 2006)
- Doel M, *Social Work: The Basics* (Routledge 2012)
- Ferreira N & Kostakopoulou D, (eds) *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CAP 2017)
- Fineman M & Grear A, (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013)
- Fligstein N, *EUROCLASH: The EU, European identity, and the future of Europe* (Oxford University Press 2008)
- Fossum J & Schlesinger P (eds), *The European Union and the Public Sphere: A Communicative Space in the Making?* (Routledge 2007)
- Harley R (tr), *History of Sexuality: Vol. 1 An Introduction*, (Pantheon Books 1978)
- Foucault M, Senellart M (ed.), *Security, territory, population* (Palgrave Macmillan, 2009)
- Geddes A, *Immigration and European Integration, Towards fortress Europe?* (Manchester University Press 2000)
- Gibbs A, *Constitutional Life and Europe's Area of Freedom, Security and Justice*
- Glyn M, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press 2009)
- Grear A, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010)
- Grimm D, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015)
- Guild E, Peers S, Tomkin J, *The EU citizenship directive: A commentary* (OUP 2014)

Guiraudon V & Joppke C (eds), *Controlling a New Migration World* (Routledge 2001)

Guttman R (ed), *Europe in the New Century: Visions of an Emerging Superpower* (Lynne Rienner Publishers 2001)

Gyldensted C, *From Mirrors to Movers: Five Elements of Positive Psychology in Constructive Journalism* (Group Publishing 2015)

Haagerup U, *Constructive News: How to save the media and democracy with journalism of tomorrow* (Aarhus University Press, 2<sup>nd</sup> ed. 2017)

Habermas J, Cronin C (tr), *Justification and Application: Remarks on Discourse Ethics* (Polity Press 1993)

Hansen P and Hager S, *The Politics OF European Citizenship: Deepening Contradictions in Scoail Rights & Migration* (Berghahn Books 2012)

Harbo T, *The Function of Proportionality Analysis in European Law* (Brill/Nijhoff 2015)

Hix S, *What's wrong with the European Union & how to fix it* (Polity Press 2008)

Hochschild A, *The managed heart: Commercialization of human feeling* (University of California Press 3<sup>rd</sup> ed 2012)

Hoffman M, *Empathy and Moral Development: Implications for Caring and Justice* (CUP 2010)

Hogg M & Vaghan G, *Social Psychology* (Pearson 8<sup>th</sup> ed 2018)

Hoggett P, Thompson S, (eds.) *Politics and the Emotions: The Affective Turn in Contemporary Political Studies* (Bloomsbury 2012)

Huysmans J, *The politics of insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006)

Iacoboni M, *Mirroring People: The Science of Empathy and how we Connect with Others* (Picador 2009)

Kant I, Ellington JW (tr), (1785) *Grounding for the Metaphysics of Morals* (Hackett, 2<sup>nd</sup> ed. 1993)

Koca B, 'The Securitization of Migration in Europe in the Post-September 11 Era: A Comparative Analysis of Germany and Spain' (DPhil Thesis Universität Hamburg, 2013)

Kohler-Koch B & Quittkat C, *De-Mystification of Participatory Democracy: EU Governance and Civil Society* (OUP 2013)

- Koopmans R & Statham P (eds), *The Making of a European Public Sphere: Media discourse and political contention* (Cambridge University Press 2010)
- Kostakopoulou T, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press 2001)
- — *The Future Governance of Citizenship* (CUP 2008)
- Luhmann N, *The Reality of the Mass Media* (Polity Press 2000)
- Majone G, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005)
- Marx K & Engels F, *The German Ideology* (Prometheus Books 1998)
- Maturana-Romesin H & Verden-Zöllner G, Bunnell P (Edt.), *The Origin of Humanness in the Biology of Love* (Imprint Academic 2008)
- McAllister R, *From EC to EU: An Historical & Political Survey* (Routledge 1997)
- Mead G, Morris C.W. (ed), *Mind, Self and Society: From the standpoint of a social behaviourist* (Chicago University Press 1934)
- Mills S, *Discourse* (Routledge 2004)
- Möller K, *The Global Model of Constitutional Rights* (Oxford University Press 2012)
- Morell M, *Empathy and Democracy: Feeling, Thinking, and Deliberation* (Penn University Press 2010)
- Moscovici S, The Phenomenon of Representations, in Serge Moscovici, Gerard Duveen (ed) *Social Representations: Explorations in Social Psychology* (New York University Press 2001)
- Nugent N, *The government and the politics of the European Union* (Duke University Press 6<sup>th</sup> ed 2006)
- Numhauser-Henning A (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination: Studies in Employment and Social Policy* (Kluwer Academic Publishers 2001)
- Nussbaum M & Sen A (eds), *The quality of life* (OUP 2004)

Nussbaum M, *Political Emotions: Why Love Matters for Justice*, (Belknap Press/Harvard University Press 2013)

Patijn S. (edt), *Landmarks in European Unity*, (A. W. Sijthoff 1970)

Peers S, Harvey T, Kenner J, Ward A(eds), *The EU Charter of Fundamental Rights: A commentary* (Hart Publishing 2014)

Peers S, *EU Justice and Home Affairs Law: Vol II EU Criminal Law, Policing, and Civil Law* (OUP 4<sup>th</sup> ed 2016)

— — *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (OUP 4<sup>th</sup> ed 2016)

Rawls J, *A Theory of Justice (Revised Edition)* (Belknap Press/Harvard University Press 1999)

Reid E, *Balancing Human Rights, Environmental Protection and International Trade: Lesson from the EU Experience* (Hart Publishing 2015)

Rifkin J, *The empathic civilization: The Race to Global Consciousness in a World in Crisis* (New York: J.P. Tarcher/Penguin 2009)

Risse T, 'Social Constructivism and European Integration', in Wiener A & DiezT, *European Integration Theory* (OUP 2<sup>nd</sup> ed 2009)

— — *A Community of Europeans? Transnational identities and public spheres* (Cornell University Press 2010)

Schütze R, *From dual to cooperative federalism: The changing structure of European Union Law* (OUP, 2009)

Segal E, Gerdes K, Lietz C, Wagaman A, Geiger J, *Assessing Empathy* (Columbia University Press 2017)

Sen A, *The Idea Of Justice* (Penguin 2010)

Sherman N, 'The Place of Emotions in Kantian Morality', 11, in Alix Cohen, (edt) *Kant on Emotion and Value*, (Palgrave Macmillan 2014)

Shore C, *Building Europe: The Cultural Politics of European Integration* (Routledge 2000)

Sirriyeh A, *The Politics of Compassion: Immigration and Asylum Policy* (Bristol University Press 2018)

Smith A, Soares S (ed) *The Theory of Moral Sentiments*, (1790) (ΜεταLibri 6<sup>th</sup> ed 2006)

Solomon R, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Rowman & Littlefield Publishers 1995)

Swartz D, *Culture and Power: The Sociology of Pierre Bourdieu* (University of Chicago Press 1997)

Thody P, *An historical Introduction to the European Union* (Routledge 1997)

Tridimas T, *The general principles of EU law* (OUP 2<sup>nd</sup> ed 2007)

Turner B, *Vulnerability and Human Rights* (Penn University Press 2006)

Varoufakis Y, *And the Weak Suffer What They Must? - Europe, Austerity and the Threat to Global Stability* (Vintage Digital 2016)

Walters W, *Governmentality: Critical Encounters* (Routledge 2012)

Wendt A, *Social Theory of International Politics* (CUP 1999)

Wetherell M, Taylor S & Yates S, *Discourse Theory and Practice: A Reader* (SAGE / The Open University 2001)

## Articles

— CVCE, From Messina Conference to the Rome Treaties (EEC and EAEC) last accessed at <https://bit.ly/2KSGNOB> on 18 August 2019

Acosta-Arcarazo D & Mertire J, 'Trapped in the Lobby: Europe's revolving doors and the Other as Xenos' 2014 39 (3) *European Law Review* 362

Action for Equality, Support and Anti-Racism (KISA) '15 years in the country is not long enough, according to the CRMD, to become a citizen', 30 June 2015, last accessed at <https://bit.ly/2KNn9D6> on 18 August 2019;

— 'The feast continues, but this time it concerns citizenship', 23 December 2016 last accessed at <https://bit.ly/30toDcw> on 18 August 2019

Adler E, 'Seizing the middle ground: Constructivism in World Politics', 1997 3(3) *European Journal of International Relations* 319

Alexander W., 'Free Movement of Non-EC Nationals A Review of the Case-Law of the Court of Justice' 1992 3 (1) *European Journal of International Law* 53

Althusser L, Brewster B (tr.), 'Ideology and Ideological State Apparatuses: Notes towards an Investigation', in Luis Althusser, G.M. Goshgarian (tr), *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso 2014)

Atger A & Carrera S, 'L'affaire des Roms: A challenge to the EU's Area of Freedom, Security and Justice', CEPS Liberty and Security in Europe (September 2010) last accessed at <https://bit.ly/31KdX9A> on 18 August 2019

Avenanti A, Sirigu A, Aglioti S, 'Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain. 2010 20 (11) *Current Biology* 1018

Awesti A, 'The Myth of Eurosclerosis: European Integration in the 1970s' 2009 3/4 (n 353-354) *Dans l'Europe en Formation* 39, last accessed at <https://bit.ly/2M73PB5> on 1 Aug 2019

Axford B & Huggins R, 'Towards a post-national polity: the emergence of the Network Society in Europe' 2000 48 (S1) *The Sociological Review*, 173

Baimbridge M, Burkitt B & Macey M, 'The Maastricht treaty: Exacerbating racism in Europe?' 1994 17 (3) *Ethnic and Racial Studies* 420

Balch A & Geddes A, 'The Development of the EU Migration and Asylum Regime' in Dijstelbloem H & Meijer A (eds), *Migration and the New Technological Borders of Europe* (Palgrave Macmillan 2011)

Barnard C. & Ludlow A., "Undeserving" EU migrants "milking Britain's benefits"? EU citizens before social security tribunals (2019) *Public Law*, 260-280

Batson D. & Fultz J., 'Distress and empathy: Two qualitatively distinct, vicarious emotions with different motivational consequences' 1987 55(1) *Journal of Personality* 19

Batson D, 'These Things Called Empathy: Eight Related but Distinct Phenomena', in Decety J & Ickes W, *The social neuroscience of empathy* (MIT Press 2009)

— 'The Empathy-Altruism Hypothesis', in Daniel Batson, *Altruism in Humans* (Oxford University Press, 2011)

Baübock R, 'Citizenship and National Identities in the European Union', 1997 Jean Monnet Working Paper 4/97 last accessed at <https://bit.ly/2KE9jEk> 18 August 2019

- (ed), 'Debating European Citizenship 2019', IMISCOE (Springer, Cham 2019)
- Bauder H, 'Citizenship as Capital: The Distinction of Migrant Labor', (2008) 33 (3) *Alternatives* 315
- Bigo D, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' 2002 26 *Alternatives* 63
- Bocskor Á, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015 (2018) 52 (3) *Sociology* 551
- Bonikowski B, Halikiopoulou D, Kaufmann E, Rooduijn M, 'Populism and nationalism in a comparative perspective: a scholarly exchange' 2019 25 (1) *Nations and Nationalism* 58
- Borges M, 'What can Kant teach us about emotions?' 2004 101(3) *The Journal of Philosophy* 140
- Bourdieu P, 'The Forms of Capital', in John Richardson, *Handbook of Theory and Research for the Sociology of Education* (Greenwood 1986)
- Brewer M, 'The European Union and Legitimacy: Time for a European Constitution' 2001 34 (3) *Cornell International Law Journal* 555
- Brouwer E, 'Interoperability and Interstate Trust: a Perilous Combination for Fundamental Rights', (11 June 2019) last accessed at <https://bit.ly/2Mpbv0B> on 20 August 2019
- Budó G, 'EU Common Values at Stake: Is Article 7 TEU an effective protective mechanism?', CIDOB Barcelona Centre for International Affairs, (Master in European Law, Institut d'Études Européennes, Université Libre de Bruxelles, 05/2014 )
- Bunyan T, 'Trevi, Europol and the European state', *Statewatch: Statewatching the new Europe*, 1993/15 last accessed at <https://bit.ly/2Mro27B> on 18 August 2019
- Butcher P & Pronckutė S, 'European Citizens' Consultations: Consultation begins at home', 2019 18 (1) *European View* 80
- Campbell D., 'Poststructuralism', in Tim Dunne, Milja Kurki, Steve Smith (eds) *International Relations Theories: Discipline and Diversity* (Oxford University Press 2007)
- Caiani M & Graziano P 'Understanding varieties of populism in times of crises' 2019 42 (6) *West European Politics* 1141
- Carpanelli E & Lazzerini N (eds), *Use and Misuse of New Technologies Contemporary Challenges in International and European Law*, (Springer, 2019) 3

Carrera S, Blockmans S, Gros D & Guild E, The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities, CEPS Essay No. 20 / 16 December 2015 last accessed at <https://bit.ly/31ccbxT> on 31 July 2019

Cartabia M, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community', 1990 12 (1) Michigan Journal of International Law 173

Chiao J & Mathur V, 'Intergroup Empathy: How Does Race Affect Empathic Neural Responses?' 2010 20 (11) Current Biology' 678

Chouliaraki L, *The Symbolic Power of Transnational Media: Managing the visibility of suffering*, 2008 4 (3) Global Media and Communication 329

— & Georgiou M, 'Hospitality: The communicative architecture of humanitarian securitization at Europe's Borders' 2017 67 (2) Journal of Communication 159

— & Stolic T, *Rethinking media responsibility in the refugee 'crisis': a visual typology of European news*, 2017 Media, Culture & Society 39(8)

Churchill W, at Zürich University, 19 September 1946, found in Patijn S. (ed), Landmarks in European Unity (A. W. Sijthoff, 1970)

Closa C, 'The Concept of Citizenship in the Treaty on European Union', 1992 29(6) Common Market Law Review 1137

— 'European Union citizenship and supranational democracy' in Albert Weale & Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, 1998)

Collins R, 'Stratification, emotional energy, and the transient emotions', 27-57 in Kemper T (ed), *Research Agendas in the Sociology of Emotions* (State University of New York Press 1990)

Coplan A, 'Understanding Empathy: Its features and Effects' in Amy Coplan & Peter Goldie (eds) *Empathy: Philosophical and Psychological Perspectives* (Oxford University Press 2011)

Cronin C, 'Bourdieu And Foucault On Power and Modernity' (1996) 22 Philosophy & Social Criticism 65

d'Oliveira H, 'European Citizenship: Its Meaning its Potential', in Renaud Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (Springer 1994)

— 'Union Citizenship: Pie in the Sky?', in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In search of a New Order* (Sage 1995)

Darling J, 'Domopolitics, Governmentality and the Regulation of Asylum Accommodation' 2011 30 (5) *Political Geography* 263

De Burca G, 'The drafting of the European Union Charter of Fundamental Rights', 2001 26 (2) *European Law Review* 130

— The evolution of Human Rights law, in Craig & de Búrca, *The Evolution of EU Law* (OUP 2nd ed 2011)

de Vries S, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', 2013 9 (1) *Utrecht Law Review* 169

— & Guild E, 'Seeking refuge in Europe: spaces of transit and the violence of migration management', 2019 45 (12) *Journal of Ethnic and Migration Studies* 2156

de Witte B, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig & Grainne de Búrca, *The Evolution of EU Law* (OUP 2nd ed 2011)

Decety J, Lamm C, 'Empathy versus Personal distress: Recent Evidence from Social Neuroscience', Decety J & Ickes W, *The social neuroscience of empathy* (MIT Press 2009)

Dehousse R., 'The Unmaking of a Constitution: Lessons from the European Referenda'(2006) 13(2) *Constellations* 151

Delanty G, 'Models of citizenship: Defining European Identity and Citizenship', 1997 1 (3) *Citizenship Studies* 285

Dempster H & Hargrave K, *Understanding public attitudes towards refugees and migrants*, Working Paper 512, June 2017 last accessed at <https://bit.ly/2Z8EUa5> on 21 August 2019

Engen H & Singer T, 'Empathy Circuits', 2012 23 (2) *Current Opinion in Neurobiology* 275

Evans A, 'European Citizenship: A Novel Concept in EEC Law', 1984 32 (4) *American Journal of Comparative Law* 679

— 'Third-Country nationals and Treaty on European Union' 1994 5 *European Journal of International Law* 199

Fassin D, 'The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate' 2001 17 (1) *Anthropological Today* 3

- ‘Policing Borders, Producing Boundaries: The Governmentality of Immigration in Dark Times’ 2011 40 *Annual Review of Anthropology* 213
- Fineman M, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ 2008 20 (2) *Yale Journal of Law and Feminism* 1
- ‘Vulnerability and inevitable inequality’, 2017 3 (4) *Oslo Law Review* 133, 2017
- Føllesdal A, ‘Third Country Nationals As European Citizens: The Case Defended’ 2000 48 (S1) *The Sociological Review* 104
- Foucault M, ‘Why study power? The question of the subject’ 1982 8 (4) *Critical Inquiry* 777
- Geary M, ‘The Process of European Integration from The Hague to Maastricht, 1969-92: An Irreversible Advance?’ 2012 6 *Debater a Europa* 6
- Geddes A, ‘Immigrant and ethnic minorities and the EU’s “Democratic Deficit”’ 1995 33 (2) *Journal of Common Market Studies* 197
- ‘Thin Europeanisation: The social rights of migrants in an integrating Europe’, in Michael Bommers & Andrew Geddes (edt) *Immigration and Welfare, Challenging the borders of the welfare state* (Routledge 2000)
- Georgiou M & Zaborowski R, Media coverage of the “refugee crisis”: A cross-European perspective, Council of Europe report DG1(2017)03
- Gerdes K, ‘Empathy, Sympathy, and Pity: 21<sup>st</sup>-Century Definitions and Implications for Practice and Research, 2011 37 (3) *Journal of Social Service Research* 230
- & Segal E, ‘Importance of Empathy for Social Work Practice: Integrating New Science’, 2011 56 (2) *Social Work* 141
- Goebel R, ‘Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon’, 2013 20 *Columbia Journal of European Law* 77
- Goodman J & Silvertstein P, ‘Introduction: Bourdieu in Algeria’, in Goodman J & Silvertstein P (eds), *Bourdieu in Algeria Colonial Politics, Ethnographic Practices, Theoretical Developments* (University of Nebraska Press 2009)
- Goodman S, Sirriyah A, McMahon S, ‘The evolving (re)categorisations of refugees throughout the “refugee/migrant crisis”’ 2017 27 (2) *Journal of Community & Applied Social Psychology* 105

Goodwin M & Milazzo C, Taking Back Control? Investigating the Role of of Immigration in the 2016 Vote for Brexit 2017 19 (3) *The British Journal of Politics and International Relations* 450

Hans Lindahl 'Breaking Promises to Keep Them: Immigration and the Boundaries of Distributive Justice', in Hans Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishers 2009)

Grande E, Schwarzbözl T, Fatke M, Politicizing immigration, 2018 *Journal of European Public Policy* 1

Greussin E & Boomgaarden HG, Shifting the refugee narrative? An automated frame analysis of Europe's 2015 refugee crisis, 2017 43 (11) *Journal of Ethnic and Migration Studies* 1749

Guerra-Barón A, (2017, November 20) 'Biopower and International Relations' Oxford Research Encyclopedia of International Studies, last accessed at <https://bit.ly/2STkyLE> on 31 Oct. 2018

Guild E, 'Competence, discretion and third country nationals: The European Union's legal struggle with migration', 1998 24 (4) *Journal of Ethnic and Migration Studies* 613

— & Carrera S, 'Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme', Centre for European Policy Studies, Policy Brief: No 196/20 (20 August 2009)

— Costello C, Garlick M & Moreno-Lax V, The 2015 Refugee Crisis in the European Union, CEPS Policy Brief No. 332, September 2015 last accessed at <https://bit.ly/2LQFCBE> on 31 July 2019

Haas E, 'International Integration: The European and Universal Process' 1961 15 (3) *International Organization* 366

Halleskov Storgaard L., 'Enhancing and diluting the legal status of subsidiary protection beneficiaries under Union law – the CJEU judgment in *Alo and Osso*', *EU Law Analysis*, 9 March 2016) last accessed at <https://bit.ly/2Zh23T8> on 4 July 2017

Hanke P & Vitiello D, High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability" in Carpanelli E & Lazzarini N (eds), *Use and Misuse of New Technologies Contemporary Challenges in International and European Law* (Springer 2019)

Hansen P, 'A superabundance of contradiction: The European Union's Post-Amsterdam Policies on Migrant "Intergration", Labour Immigration, Asylum, and Illegal Immigration', 2005 28 *Centre for Ethnic and Urban Studies* 5

Hendry ID, 'The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs', 1993 36 German Yearbook of International Law 295

Hinarejos A, 'Citizenship of the EU: Clarifying "genuine enjoyment of the substance" of citizenship rights', 2012 71 (2) The Cambridge Law Journal 279

Hochschild A, 'Emotion work, feeling rules, and social structure', 1979 85(3) American Journal of Sociology 551

Hurwitz A, 'The 1990 Dublin Convention: A comprehensive Assessment', 1999 11(4) International Journal of Refugee Law 646

Huysmans J, 'The European Union and the Securitization of Migration' (2000) 38 (5) Journal of Common Market Studies 751

— — International Politics of Insecurity: Normativity, Inwardness and the exception (2006) 37 (1) Security Dialogue 11

Jacobs F, 'Will the EU Become Stronger or Weaker or Even Disintegrate as a Result of Brexit?' in Francis B. Jacobs, *The EU After Brexit: Institutional and Policy Implications* (Palgrave Pivot/ Cham 2018)

Joppke C, 'Beyond national models: Civic integration policies for immigrants in Western Europe', 2007 30 (1) West European Politics 1

Kaunert C & Léonard S, 'The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' 2012 31 (4) Refugee Survey Quarterly 1

— — 'The collective securitisation of terrorism in the European Union' 2019 42(2) West European Politics 261

Kemper T & Collins R, 'Dimensions of microinteraction', 1990 96 (1) American Journal of Sociology 32

Kirschner H., *The Framework of the European Union under the Treaty of Maastricht*, 1994 Journal of Law & Commerce 13

Koca B, 'Bordering Practices Across Europe: The Rise of "Walls and "Fences"' 2019 16 (2) Migration Letters

- Kochenov D & Plender R, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' 2012 37 *European Law Review* 369
- Koopmans R, 'Who Inhabits The European Public Sphere? Winners And Losers, Supporters And Opponents In Europeanised Political Debates' 2007 46 (2) *European Journal of Political Research* 183
- Kostakopoulou D, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) *Journal of Political Philosophy* 337
- 'European citizenship and immigration after Amsterdam: Openings, Silences, Paradoxes', 1998 24 (4) *Journal of Ethnic and Migration Studies* 639
- "'The 'Protective Union'": Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' 2000 38 (3) *Journal of Common Market Studies* 497
- 'European Union Citizenship: Writing the Future' 2007 13 (5) *European Law Journal* 623
- 'The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration', in Lindahl H (ed), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart 2009)
- 'An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm,' 2010 19 (2) *European Security* 151
- 'The Anatomy Of Civic Integration' 2010 73 (6) *The Modern Law Review* 933
- 'Liberalism And Societal Integration: In Defence Of Reciprocity And Constructive Pluralism' 2014 43 (2) *Netherlands Journal of Legal Philosophy* 127
- (2019) 'Who Should Be A Citizen of the Union?', in Liav Orgad and Jules Lepoutre (eds., 2019) *Should EU citizenship be disentangled from Member State nationality?*, RSCAS 2019/24, Robert Schuman Centre for Advanced Studies, EUI, Florence.
- Kroeze H, 'The substance of rights: new pieces of the Ruiz Zambrano puzzle' 2019 44 (2) *European Law Review* 238
- Lamm C & Majdandžić J, 'The Role of shared neural activations, mirror neurons, and morality in empathy – A critical comment' 2015 90 *Neuroscience Research* 15
- Lanceiro R, 'Dano and Alimanovic: the recent evolution of CJEU case law on EU citizenship and cross-border access to social benefits', 2017 3(1) *UNIO - EU Law Journal* 63

Lavenex S, "'Failing Forward'" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System', 2018 56 (5) *Journal of Common Market Studies* 1195

Lenaert K, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach' 2015 1 *International Comparative Jurisprudence* 1

— 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 2017 54 *Common Market Law Review* 805

Lentin A, 'Europe and the silence about race', 2008 11 (4) *European Journal of Social Theory* 487

Lewin K., 'The Free Movement of Workers' 1965 2(3) *Common Market Law Review* 300

Lima R & Campos P, 'Field and group: a conceptual approximation between Pierre Bourdieu and the social representation theory of Moscovici', 2015 41 (1) *Educação e Pesquisa* 63

Lindseth P.L., The contradictions of supranationalism: Administrative governance and constitutionalization in European integration since the 1950s, 2003 37 *Loyola of Los Angeles Law Review* 363

Lindstrøm C, 'European Union Policy on Asylum and Immigration. Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?' 2005 39 (6) *Social Policy & Administration* 587

Lutz P, Variation in policy success: radical right populism and migration policy, 2019 42 (3) *West European Politics* 517

Majone G, 'Europe's "Democratic Deficit": The Question of Standards', 1998 4 (1) *European Law Journal* 5

Mathur V, Harada T, Lipke T, Chiao J, 'Neural basis of extraordinary empathy and altruistic motivation', 2010 51 *NeuroImage* 1468

Menendez A, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 2002 40 (3) *Journal of Common Market Studies* 471

Molnár T, 'Stateless Persons under International Law: A comparative analysis concerning their legal status, with particular attention to the added value of the EU legal order, 2010 51 (4) *Acta Juridica Hungaria* 293

Monaghan E, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative', 2012 13 (3) *Perspectives on European Politics and Society* 285

- Monar J, 'The EU's Externalisation of Internal Security Objectives: Perspectives after Lisbon and Stockholm', 2010 45 (2) *The International Spectator: Italian Journal of International Affairs*, 23
- Moravcsik A & Nicolaïdis K, 'Explaining the Treaty of Amsterdam: Interests, Influence, Institutions', 1999 37 (1) *Journal of Common Market Studies* 59
- Moravcsik A, 'In Defence of the "Democratic Deficit": Reassessing the Legitimacy in the European Union', 2002 40 (4) *Journal of Common Market Studies* 603
- Moscovici S, 'Attitudes and Opinions', 1963 14 *Annual Review of Psychology* 231
- — 'Notes towards a description of social representations', 1988 18 (3) *European Journal of Social Psychology* 211
- Neill P, *The European Court of justice: A Case Study in Judicial Activism* (European Policy Forum 1995)
- Nentwich M, 1996 'Opportunity Structures for Citizens' Participation: The Case of the European Union', *European Integration online Papers (EIoP) European Community Studies Association Austria (ECSA-A)*, vol. 0 (1), November last accessed at <https://bit.ly/2TMF29b> on 21 August 2019
- — & Falkner G, 'The Treaty of Amsterdam: Towards a New Institutional Balance' 1997 1 (15) *European Integration online Papers*
- Nicholl W., 'The Luxembourg Compromise' 1984 23 *Journal of Common Market Studies* 35
- Niemann A, 'The dynamics of EU migration policy: from Maastricht to Lisbon' in Richardson J (ed), *Constructing a policy-making state? Policy dynamics in the European Union* (Oxford University Press 2012)
- — & Zaun N, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives', 2017 56 (1) *Journal of Common Market Studies* 3
- Noorlander P & Colvin M, Human rights and accountability after the Treaty of Amsterdam, 1998 2 *European Human Rights Law Review* 191
- O'Brien C, 'Civis Capitalist Sum: Class as the new guiding principle of EU free movement rights', 2016 53 (4) *Common Market Law Review* 937
- Orgad L & Lepoutre J (eds., 2019) Should EU citizenship be disentangled from Member State nationality?, RSCAS 2019/24, Robert Schuman Centre for Advanced Studies, EUI, Florence

- Papageorgiou, 'Externalization of European Borders', 2018 KEDISA Research Paper No 23 last accessed at <https://bit.ly/2L7Bivp> on 19 August 2019
- Pappalardo F, 'The Single European Act' 2012 (CVCE, European Navigator) last accessed at <https://bit.ly/31VVreH> on 18 August 2019
- Parker O, 'Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance' 2012 50 (3) *Journal of Common Market Studies* 475
- Parker S, Naper A, Goodman S, 'How a photograph of a drowned refugee child turned a migrant crisis into a refugee crisis: A comparative discourse analysis', 2018 2 (1) *Special Issue (Forced Migration and Media* 12
- Peers S, 'Towards Equality: Actual and Potential rights of third-country nationals in the European Union', 1996 33 (7) *Common Market Law Review* 50
- 'Transforming decision making on EC immigration and Asylum Law' 2005 30 (2) *European Law Review* 283
- 'Benefit Tourism by EU citizens: the CJEU just says No' (EU Law Analysis 11 November 2014) last accessed at <https://bit.ly/2OMMjqS> 7 Aug 2019
- 'Case Comment: Case C-67/14', 2016 30 (1) *Journal of Immigration, Asylum & Nationality Law* 54
- *The CJEU secures asylum seekers' right to family housing* (EU Law Analysis, 27 February 2016) last accessed at <https://bit.ly/2ZeOZgN> on 4 July 2017
- Pernice I, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' 2009 15 (3) *Columbia Journal of European Law* 349
- Peroni L & Timmer A, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 (4) *International Journal of Constitutional Law* 1056
- Philpott D, 'Sovereignty', *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta (ed) Summer 2016 Edition) accessed at <https://stanford.io/2Yjvh8f> 31 Jul 2019
- Poli T, 'Immigration detention and the rule of law: the ECJ's first ruling on detaining asylum-seekers in the Dublin system', (EU Law Analysis, 5 May 2017) last accessed at <https://bit.ly/30IN4Zb> on 21 August 2019

- Prøitz L, Visual social media and affectivity: the impact of the image of Alan Kurdi and young people's response to the refugee crisis in Oslo and Sheffield, 2018 21 (4) *Information, Communication & Society* 548
- Rameson L, Lieberman M, 'Empathy: A Social Cognitive Neuroscience Approach', 2009 3 (1) *Social and Personality Psychology Compass* 94
- Reynoso I, 'The impact of Alokpa and Moudoulou on EU citizenship and fundamental rights' Case Comment, 2015, 3(1) *UK Law Student Review* 58
- Rizcallah C, 'The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection' (EU Law Analysis, 20 February 2017) last accessed at <https://bit.ly/30yo40Q> on 21 August 2019
- Rizzolatti G. Craighero L, 'The Mirror-Neuron System', 2004 27 *Annual Review of Neuroscience* 169
- Rosamond B, 'The uniting of Europe and the foundation of EU studies: Revisiting the neofunctionalism of Ernst B. Haas' 2005 12 (2) *Journal of European Public Policy* 237
- Sadowski P, 'A safe harbour or a sinking ship? The protection of fundamental rights of asylum seekers in recent CJEU judgments', 2019 11(2) *European Journal of Legal Studies* 29
- Sadurski W, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider', 2010 16 (3) *Columbia Journal of European Law* 385
- Sauter W, 'Proportionality in EU law: a balancing act?' 2013 15 *Cambridge Yearbook of European Legal Studies* 439
- Sayer A, 'Reflexivity and the habitus' in Archer M.S. (ed), *Conversations about Reflexivity* (Routledge 2013)
- Schiek D, 'A constitution of social governance for the European Union' 17 in Ferreira N & Kostakopoulou D, (eds) *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CAP 2017)
- 'On the never-ending road to Brexit: Perspectives for the European Union' 2018 69 (3) *Northern Ireland Legal Quarterly* 221
- Schuman R, Declaration of 9<sup>th</sup> May 1950 delivered by Robert Schuman 2011 European Issue No. 204 (10<sup>th</sup> May 2011) accessed at <https://bit.ly/2xgbiqv> 31 July 2019

- Sedelmeier U, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession', 2014 52 (1) *Journal of Common Market Studies* 105
- Segal E, 'Social Empathy: A Model Built on Empathy, Contextual Understanding, and Social Responsibility that Promotes Social Justice', 2011 37 (3) *Journal of Social Service Research* 266
- Shachar A, 'Dangerous Liaisons: Money and Citizenship', 7-15, in Baübock R, 'Citizenship and National Identities in the European Union', 1997 Jean Monnet Working Paper 4/97 last accessed at <https://bit.ly/2KE9jEk> 18 August 2019
- Shaw J, 'The interpretation of European Citizenship', 1998 61 (3) *The Modern Law Review* 293
- Shiubhne N, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' 2015 52 (4) *Common Market Law Review* 889
- 'Integrating Union Citizenship and the Charter of Fundamental Rights', in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017)
- Shore C, 'Whither European citizenship: Eros and civilization Revisited', 2004 7(1) *European Journal of Social Theory* 27
- Silverblatt A, 'Media as Social Institution', 2004 48 (1) *American Behavioral Scientist* 35
- Singer T & Lamm C, 'The social neuroscience of Empathy', 2009 1156 (1) *Annals of the New York Academy of Sciences* 81
- Singh D, 'Safeguarding "critical social functions" post the global financial crisis' 48 in Ferreira N & Kostakopoulou D, (eds) *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CAP 2017)
- Spaventa E, 'Earned Citizenship - Understanding Union citizenship through its scope', in Dimity Kochenov (ed), *EU citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017)
- Spiro P, 'Cash for passport and the end of citizenship', 17-19, in Baübock R, 'Citizenship and National Identities in the European Union', 1997 Jean Monnet Working Paper 4/97 last accessed at <https://bit.ly/2KE9jEk> 18 August 2019
- Stryker S & Burke P, 'The Past, Present, and Future of an Identity Theory' (2000) 63 (4) *Social Psychology Quarterly* 284

Teasdale A, 'The Life and Death of the Luxembourg Compromise' 1993 31(4) *Journal of Common Market Studies* 567

Thoits P, 'The Sociology of Emotions', 1989 15 *Annual Review of Sociology* 317

Thym D, 'Between "administrative mindset" and "constitutional imagination": the role of the Court of Justice in immigration, asylum and border control policy', 2019 *European Law Review* 139

Trauner F, 'Asylum policy: the EU's "crises" and the looming policy regime failure', 2016 38 (3) *Journal of European*

Tridimas T, 'The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration', 1996 31 *Irish Jurist* 83

van Baar H, 'Evictability and the Biopolitical Bordering of Europe' 2017 49 (1) *Antipode* 212

Van Houtum H & Pijpers R, 'The European Union as a Gated Community: The Two-faced Border and Immigration Regime of the EU', 2007 39 (2) *Antipode* 291

Vaughan-Williams N, 'The generalised bio-political border? Re-conceptualising the limits of sovereign power' 2009 35 (4) *Review of International Studies* 729

—, 'The UK Border Security Continuum: Virtual Biopolitics and the Simulation of the Sovereign Ban' 2010 28 (6) *Environment and Planning D: Society and Space* 1071

Vavoula N, 'Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals' Privacy?' (08 July 2019) last accessed at <https://bit.ly/2NIA6qW> on 20 August 2019

Virdee S & McGeever B, *Racism, Crisis, Brexit*, 2018 41 (10) *Ethnic and Racial Studies* 1802

Vis F & Goriunova O (eds.) 'The Iconic Image on Social Media: A Rapid Research Response to the Death of Aylan Kurdi' (Visual Social Media Lab, 2015) last accessed at <https://bit.ly/2KOp7oi> on 21 August 2019

Wæver O, 'Securitization and Desecuritization' 46, in Ronnie Lipschutz (ed.), *On Security* (Columbia University Press, 1995)

Walker-Rettberg J. & Gajjala R., 'Terrorists or cowards: negative portrayals of male Syrian refugees in social media', 2016 *Feminist Media Studies*, 16 (1);

Walters W, 'Reflections on Migration and Governmentality' 2015 1(1) *Movements: Journal for Critical Migration and Border Regime Studies* 1

Weiler J, 'The transformation of Europe' 1991 100 (8) *Yale Law Journal* 2403

— 'To be a European citizen - Eros and Civilization', 1997 4 (4) *Journal of European Public Policy* 495

— 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', 2014 12 (1) *International Journal of Constitutional Law* 94

Wiener A, 'Assessing the Constructive Potential of Union Citizenship - A Socio-historical Perspective' 1997 1 (17) *European Integration online Papers*

— 'Making sense of the new geography of citizenship: Fragmented citizenship in the European Union' 1997 *Theory and Society* 26, 549

— 'From Special to Specialized Rights' in Michael P. Hanagan & Charles Tilly (eds), *Extending Citizenship, Reconfiguring States* (Rowman & Littlefield 1999)

Wilmott A, 'The Politics of Photography: Visual Depictions of Syrian Refugees in U.K.' 2017 24 (2) *Online Media, Visual Communication Quarterly* 67

Young I, *Responsibility for Justice*, (Oxford University Press, 2011)

## Reports

E.U. Network of Independent Experts on Fundamental Rights, 'Report on the Situation of Fundamental Rights in the European Union in 2004 (January 2005) CFR-CDF.rep.EU.en.2004

Fundamental Rights Agency (FRA) *Handbook on European law relating to asylum, borders and immigration*, 2014 ed. (2015)

UN High Commissioner for Refugees (UNHCR), *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019* (2014) last accessed at <https://bit.ly/2P6qSkS> on 19 June 2019]

UN High Commissioner for Refugees (UNHCR), UNHCR and IDC (2016), Vulnerability Screening tool, Identifying and addressing vulnerability: a tool for asylum and migration systems last accessed at <https://bit.ly/30kJgL> on 20 August 2019

UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, last accessed at <https://bit.ly/316pyzy> on 31 July 2019