DOING AND DESERVING: COMPETING FRAMES OF INTEGRATION IN THE EUROPEAN UNION

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Abstract

In the new millennium there has been a shift away from multiculturalism and the politics of difference towards integration and a gradual 'thickening' of political belonging. Governments frequently comment on the alleged weaknesses of the multicultural model and the advantages of thicker, communitarian notions of community. In this paper we investigate European Union institutions' understanding of integration by comparing and contrasting ideas, frames, law and policies in the fields of free movement of persons and migration, respectively. The comparison, and contrast of, the rights-based and participatory approach characterising free movement of persons and Union citizenship with the common framework for the co-ordination of national integration policies toward third country nationals highlights the need for a fundamental rethinking of integration, a more coherent frame and for critical interventions at EU level.

Keywords: Integration, European Citizenship, Discrimination, Basic Principles of Integration

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INTRODUCTION

Since the entry into force of Treaty on European Union (1 November 1993) questions about the nature, process and telos of European integration have dominated the European studies literature.[1] The answers given to these questions are often perplexing and contested. Irrespective of the persuasiveness of answers as well as the appropriateness of questions, however, what has clearly emerged from this literature is the irreducible complexity of the EU. True, complexity is not always easy to explain. It arises as a result of attempts to accommodate diverge interests, be attentive to many voices, reconcile seemingly opposing dynamics, to deepen and sediment commitments. In this process, intransigent positions, unforeseen outcomes and even small errors can cause unpredictable mutations in procedures and institutions across time. While complexity is to a large extent unavoidable, one must always be weary of what may be called artificial complexity. By the latter, we mean the invention of new frames and their sedimentation in law and policy as a reaction to developments which are seen as undesirable. In such cases, we are faced not with a single policy or with a single discourse, but with a complex, multilayered script which can lead to incoherence. And incoherence in theory, law and policy jeopardises rationales and objectives and loosens the connection between desiderata and reality. When this happens, the ability to address policy issues in an effective way, to maintain a distinctive approach and to convince the population of its merits is called into question. This is, precisely, what happens with integration policy in the European Union.

[1] This has been termed 'the normative turn' in European Union studies; see J.J. Weiler (1995) 'Does Europe need a Constitution? Reflections on demos, telos and the German Maastricht decision', *European Law Journal* 1(3): 219-258.

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Whereas one would expect a uniform frame of civic integration in the EU, in reality we witness multiple, variegated and conflicting conceptual and legal frames. In this article, we seek to untangle these frames, show how they hustle and jostle each other and to discuss the serious risks entailed by this process. We identify three interrelated problems: the problem of perspective, and by this we mean the soundness and accuracy of the conceptual framework; the problem of coherence; and the problem of semantic traps that might endanger the normative vision of the European project.

We argue that European Community law has been characterised by a conception of integration as equal treatment, equal participation and, recently, as transnational solidarity. This conception favours agency, equal rights and participation in political communities. Notwithstanding Member States' opposition, this frame has been consistently applied to Community nationals, that is to nationals of Members States, who have exercised their free movement rights and chosen to develop associative relations in, and with, another jurisdiction, thereby making Union citizenship a reality. This conception of integration has been closely linked with the idea of postnational citizenship and its empowering and inclusive qualities have made it attractive for categories of persons other than EU citizens and for domains outside the realm of EC law. Accordingly, it leaked and influenced the Community's policy agenda towards resident third country nationals (TCNs) in the period between 1975 and 2002. The contiguous effect of EC law has found its clearest manifestation in the Tampere template of integration as fairer treatment, 'near equality' of third country national residents[2] and in the ensuing legislating initiatives. At the turn of the millennium, the time was ripe for expanding the membership circle of the European polity and for fashioning a more inclusive European civil society and public sphere.

But since 2003 a new conception of integration has taken root. There has been a shift from equal treatment to conditioned membership as national conceptions of integration and

[2] European Council (1999), *Presidency Conclusions Tampere 15 and 16 October 1999*, SN 200/99, Brussels, 16 October 1999.

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neonational narratives seeking to preserve social cohesion and national values have been uploaded at the European level. Predominant national approaches have diluted the traditional rights-based and participatory approach to integration, have disconnected it from equalisation and have gradually realigned it with migration control and the preservation of the alleged homogeneity of national bodies. Through the increasing exchange of information and the dissemination of 'best practices' among the Member States, the EU Framework on Integration has reinforced the national jurisdiction of Member States over migration-related issues and has validated national conceptions of integration bringing with them new ideas and policy initiatives, such as compulsory integration courses, integration abroad, pre-departure integration measures, self-sufficiency of TCNs, civic orientation tests and so on. The introduction of policies and laws in the EU legal system fostering 'the conditionality of integration' and a sanctions-based approach, since the burden of integration is placed upon TCNs who have to meet mandatory integration conditions and face the ensuing sanctions, such as refusal of a permanent resident permit, restrictions in family reunification, exclusion from social assistance and expulsion from the Member States' territory, has deeply transformed the functions and priorities pursued by civic integration in EU law and policy.

The subsequent discussion unravels the ambivalent and conflicting frames of integration at the European Union level and examines what can and should be done about adopting a clearer and more coherent conceptual framework. Its structure is as follows. In section 1 we discuss the frame of integration characterising European Community law over the last 50 years, whereas section 2 addresses its contiguous effect upon the status and rights of resident third country nationals. Section 3 traces the development of the EU framework on Integration and furnishes a critical view of its implications for the European project. We conclude by making the case for a coherent and principled approach to integration, based on the frame of equal treatment, equal

participation and transnational solidarity for all affected individuals, irrespective of their Community or third-country nationality.

INTEGRATION IN EC LAW: AGENCY, RIGHTS AND PARTICIPATION

Since its early days, the European Community recognised that free movement of workers is not simply a functional prerequisite for creating a common market. Behind this economic goal have always lurked a number of wider socio-political objectives, such as maintaining peace, enhancing prosperity, raising the standard of living and quality of life, bringing people together, creating a political union and so on.[3] These objectives prompted the pronouncement of free movement as 'a fundamental right' of workers to improve their standard of living, working conditions and to promote their social advancement in the 1960s.[4] They have also underpinned the European Court of Justice's activist stance[5] and the transformation of the single market into a people's Europe in the 1970s.[6] The introduction of Union citizenship in the 1990s and the subsequent development of this institution through supranational actors' concerted efforts to remove obstacles of all sorts which might circumscribe the mobility, freedom and dignity of all those exercising free movement rights in the host and home member states have validated further the socio-political substratum of free movement.[7] Accordingly, free movement rights have been pronounced to be directly effective so that individuals can rely upon them in national courts.[8]

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[3] D. Urwin, The Community of Europe: a History of European Integration since 1945 (London: Longman 1995 [1991]).
[4] See the fifth preamble to Council Reg. 1612/68, OJ 1968 L257/2.
[5] The rights-based approach to free movement rights is manifested in Advocate General Trabuchi's opinion in *Fracas v Belgium* (Case 7/75) [1975] ECR 679.
[6] Second Adonnino Report on a People's Europe, Supplement 7/85 Bull. EC, 18.
[7] See C. Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29 *Common Market Law Review* 1137; 'Supranational Citizenship and Democracy: Normative and Empirical Dimensions', in La Torre (ed.), *European Citizenship: An Institutionalist Challenge* (Kluwer, 1998); Meehan, *European*

In line with the incremental progress of European integration, the rights to cross state borders and to enter the territory of another MS with a view to become a resident were no longer confined to workers who possessed offers of employment under Article 39(3)(a) EC. They were extended first to workseekers in the 1970s and 1980s[9] and in the early 1990s to non-active economic actors, subject to the fulfilment of two conditions.[10] In the same vein, the principle of non-discrimination which lies at the heart of the free movement provisions was extended beyond the workplace into the wider social environment of the host Member State thereby requiring the equal treatment of Community nationals with respect to social and tax advantages, access to vocational schools and retraining centres, education, housing, trade union participation, exportable social security benefits and retirement.[11] In this respect, a wide range of advantages and social assistance benefits were deemed to fall within the ambit of 7(2) of Council Reg.

Citizenship (Sage, 1993); Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) *Journal of Political Philosophy* 337; *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press, 2001); Preuss, 'Two Challenges to European Citizenship', (1996) XLIV *Political Studies* 534; Shaw, 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22 *European Law Review* 554; A. Wiener, 'Assessing the Constructive Potential of Union-Citizenship - A Socio-Historical Perspective' (1997) 1(17) *European Integration Online Papers* (http://eiop.or.at/eiop/); Wiener and Sala, 'Constitution-making and Citizenship Practice - Bridging the Democracy Gap in the EU?', (1997) 35(4) *Journal of Common Market Studies* 595; Bellamy and Castiglione, 'The communitarian ghost in the cosmopolitan machine: constitutionalism, democracy and the reconfiguration of politics in the New Europe', in Bellamy and Castiglione (eds), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996); Bellamy and Warleigh (eds), *Citizenship and governance in the European Union* (Continuum, 2001).

[8] Case 167/73 *Commission v France* [1974] ECR 359; 2 CMLR 216, Case 41/74 *Van Duyn v Home Office* [1974] ECR1337; [1975] 1 CMLR 1,Case 36/74 *Walrave v Association Union Cycliste Internationale* [1974] ECR 1405, [1975] 1 CMLR 320;Case C-415/93 *ASBL and Others v Jean- Marc Bosman* [1996] 1 CMLR 645,Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR 1-4139, Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521.

[9] Case 48/75 *Procureur du Roi v Royer* [1976] ECR 497, [1976] 2 CMLR 619; Case C-292/89 *R v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745, [1991] 2 CMLR 373.

[10] The two conditions are possession of sickness insurance and self-sufficiency; See Council Directive (EEC) 90/364, OJ 1990 L 180/26 (covering persons who did not enjoy a right of residence under EC law), Council Directive (EEC) 90/365, OJ 1990 L 180/28 (covering persons who had ceased to work or had retired) and Council Directive (EEC) 90/366, OJ 1990 L 180/30, replaced by 93/96/EEC (covering students). These have been replaced by European Parliament and Council Directive 2004/38/EC, OJ 2004 L 158/77.

[11] For an excellent and detailed overview of this, see P. Craig and G. de Búrca, *EU Law Text, Cases and Materials* (OUP, Oxford, 2008, fourth ed.); D. Chalmers et al., *European Union Law: Text and Materials* (CUP, Cambridge, 2006).

1612/68.[12] Family reunification too, which is an important human right (Article 8 ECHR), was seen to facilitate 'the integration of the worker and his family into the host MS without any difference in treatment in relation to nationals of that state'.[13] And the grant of an entitlement to remain in the host MS, following retirement, an industrial accident or disease contracted, protected the worker and his family from the pain and inconvenience of abrupt uprooting, thereby demonstrating the weight that integration carried.[14]

In the domain of political participation, too, Community institutions recognised at an early stage that the exercise of free movement rights was rendered ineffective by Community nationals' disenfranchisement in the host MS. In search of a remedy, the idea of special rights for Community citizens first appeared in 1972.[15] It was then taken up in the Paris Summit conference in 1974, featured in the Tindemans Report (1973) and in the Adonnino Committee's second report, which was submitted in 1985, and finally culminated in the Commission's proposed directive on voting rights for Community nationals in local elections in their Member State of Residence under Article 235 EC.[16] What was quite distinctive in those legislative initiatives and the jurisprudence of the Court on workers' rights was the systematic endeavour on the part of the Community to lower the barriers that set nationals and Community nationals apart by removing the nationality requirement in the workplace, the broader social context, the electoral field and by conferring rights. Through the removal of existing obstacles and protectionist legal provisions,

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[12] See, for example, C-315/94 *Peter de Vos v Stadt Bielefeld* [1996] ECR I-1417; Case 32/75 *Fiorini v SNCF* [1975] ECR 1085, [1976] 1 CMLR 573; Case 207/78 *Ministere Public v Even and ONPTS* [1979] ECR 2019, [1980] 2 CMLR 71; Case 65/81 *Francesco and Letizia Reina v. Landeskreditbank Baden-Wurttemberg* [1982] ECR 33, [1982] 1 CMLR 744; Case 316/85 *Centre Public d'Aide Sociale de Courcelles v Lebon* [1987] ECR 2811, [1989] 1 CMLR 337; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions*, Judgement of 23 March 2004; *Finanzamt Koln-Altstadt v Roland Schumacker* [1996] 2 CMLR 450; Case C-356/98 *Kaba v Secretary of State for the Home Department* [2000] ECR I-2099.

[13] Case 249/86 *Commission v Germany* (Re Housing of Migrant Workers) [1989] ECR 1263, paras 10,11.

[14] Article 39 EC and Regulation 1251/70, OJ 1970 L142/24. The latter Regulation has been replaced by Dir. 2004/38, above n. 10.

[15] See the Commission's initiative on the grant of electoral rights to Community nationals residing in a MS State other than their own (Bul. EC 1972) and the Declaration on European Identity (Annex 2 to chapter II, 7th general report EC, 1973).

[16] Bull. EC Supplement 2/88, 28.

Community nationals would be able to reside under the same conditions as nationals of the host MS. Facilitating the process of integration of the migrant worker and his/her family into the fabric of the MS thus became a priority and a purposely broad and liberal application of the principle of non-discrimination served precisely this objective.

Since the late 1960s Community workers have thus enjoyed a wide range of substantive rights which are directly enforceable: to move freely within the territory of the MS and to stay these for the purpose of employment; to have equal access to any form of employment even that requiring official authorisation; to enjoy equal treatment in respect to conditions of employment, remuneration and dismissal; to enjoy all benefits accorded to national workers, such as social and tax advantages, housing and trade union participation. The length of their residence or of employment is immaterial for being a legitimate beneficiary of a social advantage, for this depends on one's status as a worker or resident in the national territory.[17] Spouses and dependent relatives on the descending and ascending lines have the right to install themselves with the primary beneficiary and to take up employment.[18] The children of migrant workers are also entitled to receive education, choose their course and be assisted in attending it under the same conditions as nationals of that MS.[19] The wide protection given by the Community law to Community nationals and their families has also been attested by the fact that the principle of non-discrimination contained in Article 39(2) EC has not been confined to cases suggesting a clear and direct differentiation between nationals and Community nationals. In a number of influential cases, the European Court of Justice has made it clear that the Member states should refrain from imposing additional requirements that discriminate indirectly against Community

[17] Case 207/78 *Ministere Public v Even and ONPTS* [1979] ECR 1447, [1980] 2 CMLR 71.
[18] See Articles 2(2), 6(2) and 7(1)(d) and Article 23 of Council Directive 2004/38.
[19] Article 12, Council Regulation 1612/68. See also Case 9/74 *Casagrande v Landeshauptstadt Munchen* [1974] ECR 773, [1974] 2 CMLR 423; Case C-308/89 *Di Leo v Land Berlin* [1990] ECR I-4185; Cases 389 and 390/87 *Echternach and Moritz* [1989] ECR 723; Case C-7/*94 Landesamt fur Ausbildungsforderung Nordehein-Westfalen v Lubor Gaal* [1996] ECR I-1031; Case C-413/*99 Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. Compare also Case 197/86 *Brown v Secretary of state for Scotland* [1988] ECR 3205, [1988] 3 CMLR 403; Case 39/86 *Lair v Universitat Hannover* [1988] ECR 3161, [1989] 3 CMLR 545; Case 293/83 *Gravier v City of Liege* [1985] ECR 593; Case 152/82 *Forcheri* [1984] 1 CMLR 334.

nationals thereby preventing the free movement provisions from having full force and effect. Differential treatment thus must be objectively justified and be proportionate.[20] Even non-discriminatory restrictions may be in breach of the Treaty if they are liable to prohibit or otherwise impede the exercise of the fundamental freedoms.[21] By adopting a rights based approach aimed at procuring equality of treatment, the Community has gradually transformed foreigners' or 'aliens' into associates in a common venture and pioneered wide-ranging cultural change[22]. And notwithstanding the existence of discourses on European identity and various attempts to graft nationalist or quasi-nationalist ideas onto the European Union, neither the Community nor its Member States have ever contemplated the idea that the presence of Community workers in the territory of MS would undermine social cohesion. Nor have they considered it appropriate to ask them to demonstrate their commitment to the host country and their acceptance of national values and to embrace the way of life of the host MS. For this reason, naturalisation does not hold the key to membership in the host Member State. On the contrary. National borders and internal boundaries of membership have been gradually relaxed, not from within, but from outside, that is, through the conferral of rights on individuals and by enhancing

[20] The jurisprudence on indirect discrimination is extensive. For an example, see Case 15/69 *Ugliola* [1970] ECR 363, [1969] CMLR 194; Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Cases C- 259, 331 and 332/91 *Allue v Universita degli Studi di Venezia* [1993] ECR I-4309; Case 44/72 *Marsman v Rosskamp* [1972] ECR 1243; Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, [1994] 1 CMLR 873;Case C-187/96 *Commission v Hellenic Republic* [1998] ECR I-1095; Case C-278/03 *Commission v Italy* [2005] ECR I-3747; Case C-285/04 *Office national de l'emploi v Ioannidis* [2005] ECR I-8275; Case C-400/02 *Merida v Bundesrepublik Deutschland* [2004] ECR I-8471; Case C-152/03 Ritter-Coulais v Finanzamt Germersheim [2006] ECR I-1711.

[21] In *Pusa* Advocate General Jacobs stated that, far from being limited to a prohibition of direct or indirect discrimination, Article 18 EC applies to non-discriminatory restrictions, including unjustified burdens; Case C-224/02 *Heikki Antero Pusa v. Osuuspankkien Keskinainen Vakuutusythio* [2004] ECR I-5763. See also Case C-406/04 G. *De Cuyper v. Office national de l-emploi*, Judgment of the Court of 18 July 2006; Case C-365/02 *Lindfors* [2004] ECR I-7183; Case C-403/33 *Schempp v Finanzamt Munchen V* [2005] ECR I-6421; Case C-192/05 *K. Tas-Hagen, R. A. Tas v. Raadskamer WUBO van de Pensioen – en Uitkeringsraad*, Judgment of the Court of 26 October 2006; Case C-76/05 Schwarzand Gootjes-Schwarz, Judgment of the Court of September 2007; and Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, Judgment of the Court of 23 October 2007.

[22] T. Kostakopoulou, (1998) 'European Citizenship and Immigration After Amsterdam: Silences, Openings, Paradoxes', *Journal of Ethnic and Migration Studies* 24(4), 639-56 at 641.

their status in the host member state (integration as equal treatment).[23] Even linguistic requirements were pronounced to be indirectly discriminatory and were thus outlawed by Community law, unless the nature of the employment post to be filled by a Community national requires fluency in the host language.[24] This process of achieving integration through equalisation transcended the national frame of reference and gave birth to a new conception of community in theory and practice. Community belonging was no longer defined on the basis of organic-national qualities, cultural commonalities or conformity, but on the basis of de facto associative relations and connections brought about through residence and on de jure equal membership as far as it was possible.[25]

Building on, and further reinforcing this process, the establishment of Union citizenship in 1992 at Maastricht generated a citizenship problematique which gradually inspired the emergence of an ethic of solidarity (integration as solidarity). This problematique was taken up by the Commission and the European Court of Justice. As the Commission stated in its second report, Union citizenship led to a conceptual metamorphosis of the Community rights of free movement and residence by enshrining them in the Treaties themselves.[26] And in its Resolution on the Commission's report, the European Parliament also noted that Union citizenship 'constitutes the guarantee of belonging to a political community under the rule of law'.[27] Whereas in the past (1957-1993) the integration of the Community national and his/her family into the fabric of the host society was associated with equal treatment, in the new 'citizenship' phase integration not only deepens, but it also gives rise to claims of social solidarity irrespective of nationality. Accordingly, the real links and connections that not only workers but also a wider

[23] T, Kostakopoulou, 2001, above n 7, at 102.
[24] See Article 3(1) of Council Regulation 1612/68 and Case 379/87 *Groener v Minister for Education* [1989] ECR 3967.
[25] T. Kostakopoulou, European Union Citizenship: Writing the Future. *European Law Journal*, Vol. 13(5), 2007, 623-646.
[26] Commission Report *on the Citizenship of the Union*, COM(93) 702 final, 21/12/93.
[27] COM 97 0230 C4-0291/97, OJ C 226, 20.7.1998, 61.

class of persons may have with the host and home societies receive careful consideration and are given weight.

Beginning with *Sala*, the European Court of Justice signalled its intention to capitalise on the constitutional importance of European citizenship by bringing citizens lawfully resident in another MS, but who were not active economic actors, within the scope of the protection afforded by the non-discrimination clause (Article 12 EC).[28] The requirement of the 1985 Federal Law that a Community national had to produce a residence permit in order to receive a child-raising allowance, when that state's own nationals were not required to produce any document of that kind, amounted to unequal treatment prohibited by Article 12 EC. Union citizenship thus provided a sufficient connection with Community law to trigger application of Article 12 EC. The ECJ's intention to give substance to Union citizenship was made apparent in *Crzelczyk*. In this case, the Court ruled that students studying in another MS and facing temporary economic difficulties can rely on the non-discrimination clause in claiming social advantages. After all, 'Union citizenship is destined to be a fundamental status of nationals of the MS, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[29] In this respect, a certain degree of financial solidarity between nationals of a host MS and nationals of other MS must be recognised, particularly in cases of temporary economic difficulties, provided, of course, that Community nationals do not become an 'unreasonable' burden on the host MS.[30]

Students who face temporary economic difficulties in the MS in which they study therefore should not be seen as strangers and a problem; rather, they are associates entitled to equal treatment. This was re-affirmed in the *Bidar* case in 2005.[31] In *Bidar*, the Court departed from earlier case law which excluded students from the grant social assistance, by ruling that, as Union

[28] Case C-85/96 *Sala v Freistaat Bayern* [1998] ECR I-2691.
[29] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottingnies-Louvain-la-Neuve* [2001] ECR I-6193, at para 31.
[30] Ibid, at para 46.
[31] Case C-209/03, *Bidar v London Borough of Ealing*, Judgment of 15 March 2005.

citizens, students who have demonstrated 'a certain degree of integration into the society of the host state' can claim maintenance grants.[32] But the Member States are also entitled to ensure that 'the grant of assistance does not become an unreasonable burden'. Even though the requirement of demonstrating 'a certain degree of integration' is not sufficiently clear, the Court has, nevertheless, indicated that a reasonable period of lawful residence[33] and the ensuing immersion in a web of interactions in the host state[34] generates an entitlement to non-discrimination and equal treatment in the social field. The Court thus ruled in *Trojani* that a lawfully resident non active economic actor is entitled to a social assistance benefit on the basis of Article 12 EC,[35] whereas in *Collins*, the absence of a genuine link between a jobseeker and the employment market of the host state invalidates an entitlement to a jobseeker's allowance.[36] As the Court stated 'in view of the establishment of EU citizenship and the interpretation of the case law of the right to equal treatment enjoyed by Union citizens, it was no longer possible to exclude from the scope of Article 48(2) EC Treaty, which is an expression of equal treatment, a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'.[37] In both cases, however, the principle of proportionality must be respected and the application of a residence requirement is open to judicial review.

In *D'Hoop* the Court highlighted that Union citizenship forms the basis of rights to equal treatment, irrespective of nationality,[38] and noted that it would contravene EC law if a citizen received in her own Member State treatment less favourable than that she would otherwise enjoy

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[32] In Bidar's case, a subsidised student loan. They can thus rely on Article 18 EC in conjunction with Article 12 EC.
[33] Ibid. See also Case C-456/02 *Trojani v CPAS* [2004] ECR I-7573, para 43. The ECJ refers to 'lawful residence in the host MS for a certain time or the possession of a residence permit'.
[34] Bidar had completed his secondary education in the UK.
[35] See n, 33 above.
[36] C-138/02 *Brian Francis Collins* [2004] ECR I-2703. Similarly, the taking up of residence abroad is not a satisfactory indicator of a loss of connection with one's home Member State which is demonstrating its solidarity with the applicant by granting a civilian war benefit to him/her; Case C-192/05, *K. Tas-Hagen and R.A. Tas*, Judgement of the Court of 26 October 2006.
[37] Ibid, at para. 63.
[38] Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191.

had she not availed herself of the right to free movement.[39] However, in *De Cuyper* the Court upheld the proportionality of Dutch measures which conditioned an entitlement to unemployment allowance on actual residence in the Netherlands on the ground that the effective monitoring of the employment and family situation of unemployed persons could not have been achieved by less restrictive measures, such as the production of documents or certificates.[40]

In *Baumbast*, the Court went beyond the predictive confines of settled law in order to derive a new right of residence for a parent who is the primary carer of a child studying in a host MS (Article 12 of Council Reg. 1612/68) and to rule that Article 18(1) EC has created directly effective rights enforceable in national courts.[41] Although the German and UK Governments submitted that Article 18 (1) EC did not create a directly effective right because it was not intended to be a free-standing provision, the ECJ relied on the normative weight of Union citizenship, and ruled that:

'…As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently as a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC'.[42]

Any limitations and conditions imposed on that right must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. As such, they 'do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which

[39] Compare also C-258/04 *Ioannidis*, Judgement of 15 September 2005. Ioannidis was denied a tideover allowance on the grounds that he had completed his secondary education in another Member State. See also *Pusa*, n. 55 below.
[40] Case C-406/04 G. *De Cuyper v. Office national de l-emploi*, Judgment of the Court of 18 July 2006. Compare also Case C-365/02 *Lindfors* [2004] ECR I-7183 and Case C-403/33 *Schempp v Finanzamt Munchen V* [2005] ECR I-6421.
[41] Case C-413/99 *Baumbast, R v Secretary of State for the Home Department*, [2002] ECR I-7091.
[42] Ibid, at para 84.

the national courts must protect'.[43] Such an interpretation further weakened the link between economic status and the right to free movement and reflected broader normative aspirations for a constructive understanding of European citizenship that eventually found their way into juridicopolitical reform ten years after the establishment of this institution.

Directive 2004/38, which entered into force on 1 May 2006, reflects this understanding of citizenship.[44] EU citizens, and their families, residing on the territory of a MS for more than three months are entitled to reside there as long as they do not become an unreasonable burden on the social assistance system of the host MS, enjoy enhanced protection against expulsion, and have a right of permanent residence after a period of five years' continued residence. Permanent residents are entitled to enjoy equal treatment with nationals in the areas covered by the Treaty.[45] The creation of a typology of residence rights (i.e., for a period not exceeding three months, for more than three months but not exceeding five years and five years or more) to which different social entitlements are attached (i.e., no obligation to grant entitlement to social assistance, a Union citizen may rely on social assistance, but must not be an unreasonable burden, full entitlement to social assistance) reflects the differing strength of the associative bonds Community nationals establish with the host society over time and their graduated sense of belonging.

In *Pusa* Advocate General Jacobs stated that, far from being limited to a prohibition of direct or indirect discrimination, Article 18 EC applies to non-discriminatory restrictions, including unjustified burdens.[46] Following the ECJ's jurisprudence, non-discriminatory restrictions involve measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty and can only be justified if they are based on overriding

[43] Ibid, at para. 86.
[44] See n. 10 above.
[45] See Article 16 et seq.
[46] Case C-224/02 *Heikki Antero Pusa v. Osuuspankkien Keskinainen Vakuutusythio* [2004] ECR I-5763.

considerations of public interest and are proportionate.[47] In *Tas-Hagen* the Court utilised the non-discrimination model by stating that Dutch legislation on *benefits for civilian war victims 1940-1945* which required that beneficiaries were resident in the Netherlands at the time of the submission of their application was 'liable to dissuade Netherlands nationals' from exercising their rights under Article 18(1) EC and 'constituted a restriction'.[48] Indeed, 'the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them'.[49] And although the restriction can be justified on the ground that the obligation of solidarity could only apply to civilian war victims who had links with the population of the Netherlands during and after the war, residence abroad was not a sufficient indicator of ones' disconnection from the society of the Member State granting the benefit. The requirement of residence in the Netherlands therefore did not meet the test of proportionality. Similarly, in *Morgan and Bucher* the Court ruled that national law which stipulates that education and training grants for studies in another MS can only be awarded for studies which are a continuation of education or training pursued for at least one year in the MS awarding the grant is liable to deter citizens of the Union from exercising their fundamental rights under Article 18(1) EC. In this respect, it constitutes an unjustified restriction on the free movement of Union citizens.[50] For it cannot be argued that the requirement of study of at least one year's duration reflects a legitimate requirement of integration in the MS; instead, 'it unduly favours an element which is not necessarily representative of the degree of integration into the society of that MS at the time of application for assistance is made. It thus goes beyond what is necessary to attain the objective

[47] See note 21 above.
[48] Case C-192/05 *K. Tas-Hagen, R. A. Tas v. Raadskamer WUBO van de Pensioen – en Uitkeringsraad*, Judgment of the Court of 26 October 2006, para. 32.
[49] Ibid, para 30.
[50] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, Judgment of the Court of 23 October 2007. See also Case C-76/05 Schwarzand Gootjes-Schwarz, Judgment of the Court of September 2007.

pursued and cannot therefore be regarded as appropriate.[51] By moving beyond the discrimination model, the Court has thus managed to provide effective protection to Union citizens who have taken advantage of the opportunities afforded by the Treaty but have been placed at a disadvantage by legislation of their state of origin.[52]

The jurisprudence examined above shows that the ECJ, and other supranational actors, such as the Commission, have adopted a principled and pragmatic approach to integration. They have not accorded priority to cultural assimilation, oaths of allegiance and declarations of acceptance of the values of the host society. Instead, emphasis has been put on 'facilitating exchanges between people', creating associative relations and partnerships, cultivating mutual respect and promoting equal treatment irrespective of nationality. Such an approach implicitly affirms diversity and recognises that whether newcomers will develop feelings of belonging and a sense of identification with the host society depends as much on the kind of institutions and practices of membership that will regulate their lives as on the way they will be treated by the host country. As a fundamental status, Union citizenship helps create a collegiate environment within which individuals are given the opportunity to thrive and to contribute to the success of the host community. Parity of treatment and promoting a sense stakeholdership are thus the crucial means of improving the conditions and experience of social membership and citizenship for everybody, thereby bringing the peoples of Europe closer together. Equal treatment, social

[51] *Morgan and Bucher*, para.46.

[52] A variety of cases concerning 'reverse frontier' workers exemplifies the same concerns. In *Elsen*, the ECJ ruled that transfer of residence in another MS while continuing to work in the Ms of origin should not preclude a Union citizens from validating the period spent on child rearing abroad as periods of insurance for the purpose of an old age pension; Case C-135/99 *Ursula Elsen,* Judgement of the Court of 23 November 2000. And in recent cases, such as C-212/05 *Gertraud Hartmann v Freistaat Bayern*, Judgment of the Court of 18 July 2007; Case C-213/05 *Wendy Geven v Land Nordrhein-Westfalen*, Judgment of the Court of 18 July 2007; Case C-287/05 *DPW Hendrix*, Judgment of the Court of 11 September 2007, the transfer of residence to another MS while continuing to work in the MS of origin activated Community law and thus brought about an entitlement to equal treatment under Articles 39 and 18 EC and Council Reg. 1612/68. Consequently, Hartmann was awarded a child-raising allowance which was awarded to residents only and Hendrix was awarded an incapacity benefit.

inclusion and equal participation capture the meaning of integration in EC law over the last 50 years.

PARALLEL DEVELOPMENTS: THE CONTIGUOUS EFFECT OF EC LAW

While European Community law challenged the unitary conceptions of demos which relegated non-national residents to the periphery of society by enhancing the membership status of Community nationals in the MS of their residence and prohibiting discrimination on the basis of nationality, the position of non-nationals residents in the EU (TCNs) who had no connections with EC law, owing to their family links with Community nationals or as employees of Community based companies providing cross border services or as beneficiaries of three generation agreements signed between the Community and third countries,[53] was seen to fall within the regulatory regime of the MS. National migration laws had been viewed as the reserve of state sovereignty and Community institutions were very reluctant to encroach upon it.

In the period between 1961 and 1985, the Commission pursued a minimalist agenda aimed at suggesting improvements in the working conditions and living standards of migrants workers, education, vocational training and in housing.[54] Protection of 'the vulnerable', in the sense of attending to their needs and fighting marginalisation, providing educational opportunities and combating racism was the main objective of Community action. Such a policy would guarantee the 'harmonious co-existence of foreign and indigenous populations'. By adopting the

[53] For a discussion on the latter, see A. Willy, "Free Movement of Non-EC Nationals: A Review of the Case-Law of the Court of Justice" (1992) 3 *European Journal of International Law* 53; A. Evans, "Third Country Nationals and the Treaty on European Union" (1994) 5 *European Journal of International Law* 199; S. Peers, "Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union", (1996) 33 *C.M.L.Rev.* 7-50; Elspeth Guild (ed), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (1999); Helen Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (1999); K. Groenendijk, "Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law" in E. Guild and C. Harlow (eds.), *Implementing Amsterdam*, 226.

[54] European Commission (1985), *Guidelines for a Community Migration Policy* COM(85) 48 final.

vulnerability model,[55] the Commission bracketed the power structures which set TCNs apart from Community nationals and failed to recognise their legitimate claims to equal membership in the European polity and to equal protection.

Following the entry into force of the Single European Act, however, a more coherent normative vision began to emerge. The European Parliament made important interventions by recommending the extension of free movement rights to all Community workers irrespective of nationality and policy isomorphomism in family reunification rights.[56] It also suggested that non-EC migrants should enjoy protection from discrimination on the same footing as Community nationals and that they should be granted electoral rights.[57] Within the context of the Programme Relating to the implementation of the Community Charter of Fundamental Social Rights for Workers – Priorities for 1991/1992, the Commission also suggested the grant of free movement and free establishment rights to third country nationals who had been residing legally in the Union for five years.[58] The Economic and Social Committee, too, supported the idea of the drawing of a 'Community statute for migrant workers from third countries' based on the principles of equal treatment, justice and the ideals undermining the single market project.[59] The introduction of the intergovernmental justice and home affairs pillar at Maastricht made the position of long-term resident TCNs more visible and the Commission's 1994 Communication suggested concrete improvements to the status of TCNS which could meet the Councils' approval.[60] The establishment of Union citizenship at Maastricht raised the stakes and led to

[55] Dora Kostakopoulou, Integrating' Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms. *Columbia Journal of European Law*, Vol. 8(2), 2002, 1-21.
[56] European Parliament (1989) Resolution on the Declaration of Fundamental Rights and Freedoms, A2-0003/89; (1989) Resolution on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the council of Ministers, A2-261/88; (1990) Resolution on Freedom of Movement for Non-EEC Nationals, A3-175/90, OJ C175, 16.7.90.
[57] European Parliament (1991) Resolution on the Free movement of Persons A3-0199/91, OJ C 159/12-15, 17.6.91.
[58] A3-175/90, OJ 260 15.10.90, p. 173.
[59] ECSC (1991) Opinion on the Status of Migrant Workers from Third Countries 91/C 159/05, OJ C 159/12, 17 June 1991.
[60] European Commission (1994) *Communication on Immigration and Asylum Policy* COM(94) 23 Final, 23 February 1994.

proposals to replace nationality-based paradigm with a domicile-based paradigm that would include long-term resident TCNs. But the political will for such a radical reform was absent. Instead, the Member States continued to view TCNS as a subject class dependent on national migration laws. In its Integration Resolution, the Council conveyed MS's opposing view of integration as regards TCNS; namely, one of subjecthood and qualified inclusion. According to the Council's 1996 Resolution *on the Status of Third-country Nationals who Reside on a Long-term Basis in the Territory of the Member States*, integration was to be promoted because it 'contributes to greater security and stability, both in daily life and in work, and to social peace in the various Member States'- and not because it was required by principles such as, fairness, democracy and respect for cultural diversity[61]. Accordingly, TCNs would not enjoy free movement rights and would have no protection against discrimination as regards access to employment, the enjoyment of social and tax advantages and access to training in vocational schools and retraining centres. Their family members were also excluded from protection: their spouses would not have employment rights and their children would not have access to the state's general educational, apprenticeship and vocational training courses under the same conditions as its nationals.

The partial Communitarisation of the Third pillar at Amsterdam[62] brought matters relating towards TCNs within the Community's (mixed) competence and magnified the radiation effect of EC law. The rights-based approach adopted by Community law began to leak thereby opening up opportunities for strengthening the legal position of TCNs and for the development of a comprehensive, legally binding and principled regulatory framework. The frame of integration as equal treatment and equal participation permeated the previously restrictive framework and called for consistency in the legal statuses of EU citizens and long-term resident TCNs, respectively. This entailed the removal of unjustified differential treatment between the two

[61] European Council, Resolution 96/c 80/01 OJC 80.
[62] The Treaty was signed on 2 October 1997 and entered into force on 1 May 1999.

classes of workers and the approximation of the legal status of long-tem resident TCNs to that of EC nationals. In the Tampere special summit in October 1999, the Heads of State and Government expressed their determination to make 'full use of the possibilities offered by the Treaty of Amsterdam' and stressed the need for a common approach to ensure the integration of long-term resident TCNs in the EU.[63] According to the Tampere Presidency Conclusions, a vigorous integration policy encompasses the grant of rights and obligations comparable to those of Union citizens: 'a set of uniform rights which are as near as possible to those enjoyed by Union citizens; e.g., the right to reside, receive an education and work as an employee or self-employed person as well as the principle of non-discrimination vis-à-vis the citizens of the state of residence' and the provisions of opportunities for naturalisation in the host MS.[64]

In line with the Tampere mandate and in an attempt to go beyond the piecemeal approach to the legislative programme set out in Article 63 EC, the Commission issued a Communication on a Community Immigration Policy in November 2000[65]. In the Commission's opinion, the common thinking on integration policy could culminate in a form of 'civic citizenship' based on the EC Treaty and inspired by the Charter of Fundamental Rights which was proclaimed at Nice. In this respect, the Communication uses the EU Charter of Fundamental Rights as a reference point for the creation of 'civic citizenship' and the possibility of granting free movement rights to long-term resident TCNs. 'Enabling migrants to acquire such [civic] citizenship after a minimum period of years might be a sufficient guarantee for many migrants to settle successfully into society or be a first step in the process of acquiring the nationality of the Member state concerned'[66]. While integration issues fell within the competence of the Member states, the Communication opens up the possibility for the involvement of the civil society in line with the principles of partnership among all the actors involved and of co-ordination of action at national

[63] See n 2 above.
[64] Ibid, at page 5.
[65] COM(2000) 757 final, 22.11.2000.
[66] Ibid, pp. 19-20.

and local level. The EU could assist the process by developing a 'pedagogical strategy', promoting the exchange of information and good practice, and the development of guidelines or common standards for integration measures. In any case, civic citizenship suggested the possibility of a harmonised national denizenship status for long-term resident third country nationals coupled with the grant of European denizenship.

National Denizenship → National Citizenship → European Citizenship

↓

European Denizenship (Civic Citizenship) ► European citizenship?

Schema 1: On the road to EU citizenship

Following a number of initiatives[67], perhaps, the most visible manifestation of the radiation effect of the template of integration as equal treatment were the Commission's proposed directives on family reunification (1999) and on the status of long-term resident third country nationals, respectively (2001). The former Directive[68] was based on Article 63(3)(a) EC and sought to harmonise national legislations in this area by granting the right to family reunification to all third country nationals - including refugees under the Geneva Convention of 1951 and persons enjoying temporary protection, who reside lawfully in a Member State and hold a

[67] European Commission (1997) Proposal for a Decision on Establishing a Convention on Rules for the Admission of Third Country Nationals to the Member States of the European Union COM(97) 387, 30 July 1997, Bull. EU 7/8, 111-112; European Commission, Proposal for a Council Directive *extending the freedom to provide cross-border services to third-country nationals established within the Community* COM (1999) 3 Final -1999/0013(CNS), amended proposal Doc 500PC0271 (02) 19.2.2001. The UK believed that the proposal should have been based on provisions of Title IV - and not on Article 59 EC that requires qualified majority voting and co-decision, and it accused the Commission of undermining its opt-out from Tile IV EC. See also the Commission's Proposal for a Directive of the European Parliament and of the Council on *the posting of workers who are third-country nationals for the provision of cross-border services*, COM (1999) 3 final-1999/0012 (COD), amended proposal COM(2000) 271, 8.5.2001.

[68] COM(1999) 638 final CNS 1999/0258, Amended Commission Proposal COM(2000) 624 final.

residence permit for at least a year regardless of the purpose of their residence[69]. It also covered Union citizens who had not exercised their right to free movement whose situation has hitherto been subject solely to national rules. The draft Directive *on the status of third country nationals who are long-term residents* was based on Articles 63(3)(a) and 63(4) EC and was designed to harmonise national laws governing the conditions for the acquisition and the scope of long-term resident status, and to grant long-term resident third country nationals the right of residence in the other Member States.[70]

Both Directives mirrored Community law's emphasis on equal treatment and in certain respects provided advances. For instance, in the family reunification directive the definition of family members included spouses and cohabitees who could be of the same sex. It also granted an autonomous right of residence to members of the nuclear family after four year's residence and entailed the possibility of an earlier application in cases, such as separation, divorce or death. And it stated that after one year's residence, if the applicant were in a particularly difficult situation, the member states would be obliged to issue an autonomous residence permit. Similarly, the long-term residents draft directive stated that long-term resident third country nationals will enjoy enhanced protection against expulsion and are entitled to equal treatment as regards access to employment and self-employed activity, conditions of employment and working conditions, education and vocational training, including study grants, recognition of qualifications, social security and health care, social assistance, social and tax advantages, access to goods and services including public and private sector housing and freedom association and union membership. In sum, the draft directives signalled that the time was ripe for normative interventions and institutional innovations and made it clear that responding positively to TCNs' plight for equality and inclusion in the emerging Euro-polity was a priority on the Community's policy agenda.

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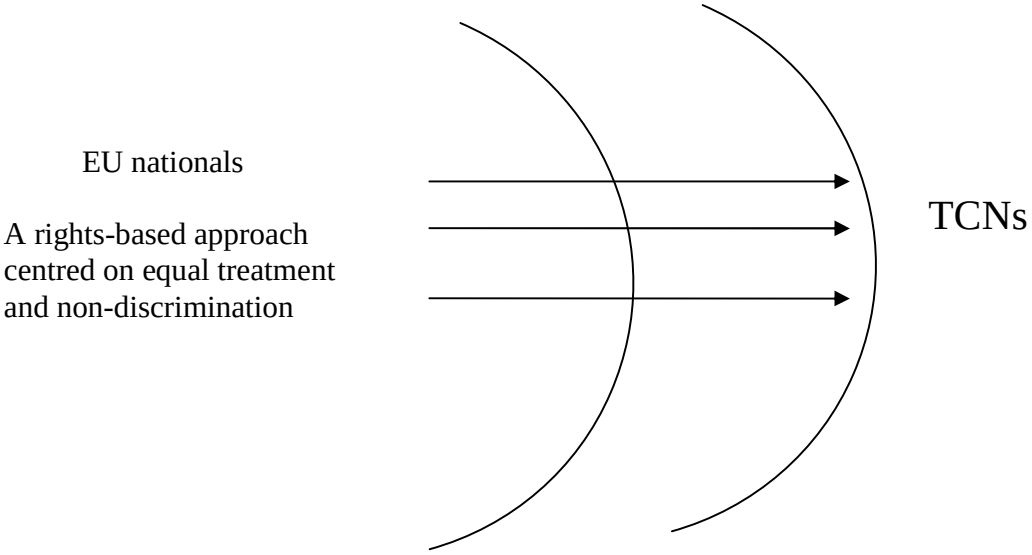
[69] In this respect, it differs from include the 1993 Resolution, *supra*, n. 37.
[70] European Commission, *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents*, COM(2001) 127 final, Brussels 13.3.2001.



Schema 2: The Contiguous Effect of EC Law

BREAKING CONTIGUITY: THE EUROPEAN UNION FRAMEWORK ON INTEGRATION

The Commission's proposals concerning family reunification and long-term resident status did not meet the Council's approval. True, the negotiations took place within a different political climate. The 9/11 terror attacks had triggered new restrictive measures towards migrant settlers and new entrants and facilitated the spread of anti-migrant rhetoric which had begun to find institutionalised expression in certain countries, such as the Netherlands[71] and, to a lesser extent, in the UK.[72]

[71] Following the entry into force of the *1998 Newcomer Integration Act*, migrants were obliged to attend integration courses, that is, language and 'social orientation' courses, and non-completion resulted in administrative fines or reductions in social benefits.

[72] In the UK, the *Nationality, Immigration and Asylum Act 2002* 'thickened' naturalisation policy by including 'integration' requirements, such as 'sufficient knowledge about life in the United Kingdom', in

Migration was associated with the threat of terrorism and Muslim residents were treated with suspicion and perceived to be 'an enemy within'. In the new political environment, the state found space to reassert its might and to present itself as a tough and protective agent. Uncritical readings of Islam as being antithetical to western culture and democracy led to the re-introduction of policies for 'social cohesion', 'integration' and 'assimilation', including the official promotion of national identity, official lists of national values, compulsory language courses and tests for migrants, naturalisation ceremonies and oaths of loyalty. As the discourse on integration and the promotion of social cohesion began to displace multiculturalism and the politics of recognition, national categories of integration were uploaded at the European level by the Member States, thereby prompting a shift in the frame and meaning of integration in EU law and policy. This uploading of national discourses and categories took place on two fronts; namely, a) during intergovernmental bargaining in the Council of Ministers, as Member States sought to dilute the Commission' proposals and to make them fit with their own migration rules and b) in the articulation of an EU Framework on Integration which gave them the opportunity to define the meaning and terms of integration in an authoritative way on a pan-European basis. Both developments will be considered sequentially.

a) Bound by national categories

The legislation concerning family reunification and the status of long term residents adopted in the Council does not reflect the vision expressed in the Commission's proposals. For instance, in Dir. 2003/86/EC on the right to family re-unification Article 4(1) limits the right to reunification for children above the age of 12 in order to preserve the full integration capacity of the Member

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addition to language proficiency. It also modernised the current oath of allegiance and introduced a citizenship pledge to be taken during citizenship ceremonies. Such reforms were, allegedly, needed in order to end the current 'mail order' approach to the acquisition of British nationality, to give symbolic significance to the acquisition of citizenship and to enhance the integration of migrants.

State.[73] According to Dir. 2003/86/EC spouses may be required to have the minimum age of 21 years in order to be able to rely on the Directive for re-uniting with their sponsor. The purpose of this age limit is to ensure better integration and to prevent forced marriages.[74] But this gives rise to a paradoxical conception of integration: children are supposed to integrate better into a new society if they under the age of 12 or 15, as provided for under Articles 4(1) and (6) of the same Directive, whereas spouses integrate better if they are 21 years old or older. Needless to say that the legal requirements to attend school and possible integration courses are the same for all migrants irrespective of their matrimonial status. In addition, besides good accommodation, sickness insurance for the whole reunited family, and stable resources that guarantee the self-sufficiency of the family in the host state, it is stated that third country nationals may have to *comply with integration measures*, in accordance with national law (Chapter IV of the Directive, Art. 7(2)). In the Dutch translation of the Directive integration *measures* even have become integration *conditions*.[75]

Similar integration 'conditions' have been added to the long-term residents Directive (2003/109/EC). Article 5 states that Member States may require third-country nationals to comply with integration conditions in order to obtain long-term resident status. And in Chapter III, it is provided that the holder's residence in a Member State other than the one where the status was acquired may be conditioned on fulfilling integration measures, if such measures had not been applied in the first Member State where the status was acquired (Art. 15(3)). In any case, the second Member State may require attendance of language courses.

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[73] This was one of the contested provisions in Case C-540/03, *European Parliament v. Council*, Judgment of 27 June 2006. Although the ECJ did not annul the Directive, it, nevertheless, made it clear that the Member States would have to implement all provisions in light of human rights norms which are part of the general principles of Community law. The ECJ will thus scrutinize national immigration law closely and will not hesitate to intervene. It must also be noted here that *no Member State actually applies this exception* in national law; see R. Fernhout at al., *The Family Reunification Directive in EU Member States – The first Year of Implementation*, Nijmegen: Center for Migration Law, 2007, p. 18.

[74] Directive 2003/86/EC, Art. 4(5).

[75] The Dutch version of Dir. 2003/86/EC uses the word *condities*, that is, *conditions*.

The same national categories of integration have found concrete expression in Directive 2004/114/EC which seeks to harmonize the conditions for the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. Although the aim of the Directive is to promote Europe *as a world centre of excellence* in the field of education and vocational training[76] and in many respects mirrors Directive 93/96/EC,[77] which governs rights of access and residence for students who are Community nationals, students might have to *provide evidence* that they have sufficient financial resources to bear the costs of living during his studies and that they have the money to pay for their journey back. Most strikingly, *students from third countries may have to show that they have knowledge of the language of the host Member State irrespective whether their studies will take place in that language, or not* (Article 7).

Such provisions provide insights into the dominant mindset of the majority of Council members at the point of adoption of the European Migration Directives as well as into dominant conception of integration. This has been noticed by Groenendijk,[78] who has differentiated three different perspectives on the relationship between law and integration which compete in official discourses at Member State and EU levels. The first one supports the idea that securing a legal status will enhance the immigrant's integration in society; the second one, considers naturalisation or permanent resident status as the remuneration for a completed integration; and the third one considers the lack of integration as a ground for refusal of admission in the country and access to EU rights. Cholewinski[79] has also noted that the third perspective is a recent innovation in EU migration law and reflects certain Member States' tendency to construct a more exclusionary conception of integration and to infuse it into EU law. Accordingly, the

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[76] Directive 2004/114/EEC, preamble, recital 6.

[77] Dir. 93/96/EC of 29 October 1993 on the right of residence for students.

[78] Groenendijk, K. (2004), "Legal Concepts of Integration in EU Migration Law", *European Journal of Migration and Law*, Vol. 6, No. 2, pp. 111-126.

[79] Cholewinski, R. (2005), "Migrants as Minorities: Integration and Inclusion in the Enlarged European Union", *Journal of Common Market Studies*, Vol. 43, No. 4, November, pp. 695-716.

responsibility of integration is placed upon the migrant himself/herself who has to go through language proficiency and cultural-aptitude tests and courses in order to be deemed to be deserving of rights.[80] On this conception of integration, status and rights are the reward for integration, and not the necessary means of procuring the latter.

b) **The Hague Programme and the Common Basic Principles**

Prompted by calls for the development of a Community framework in integration,[81] the meeting of the Justice and Home Affairs Council of 14 and 15 October 2002 represented an opportunity for laying the foundations for the establishment of an EU Framework on integration.[82] It was suggested that a group of National Contact Points on Integration (NCPI) should be set up, comprising one or two officials from each Member State, including the UK, Ireland and Denmark. The main tasks of this transnational forum, which had its first meeting in Brussels in March 2003, are to facilitate the exchange of information, monitor progress and to strengthen policy coordination and the dissemination of "best practices" at the national and EU levels. The National Contact points have actively participated in the elaboration of the most relevant policy tools in this area, such as the two Handbooks on Integration. The first edition of the Handbook on Integration was elaborated by the Migration Policy Group (MPG) on behalf of the European Commission (DG JFS) in November 2004.[83] Its objective was '*to act as a driver for the exchange*

[80] See H. Oger, Integration in Tension in Immigration Law: Mirror and Catalyst of the Inherent Paradox of Nation-States, EUI Working Paper, RSCAS, No. 2005/01.

[81] On 9-10 September 2002 the EESC hosted a conference, in cooperation with the European Commission, on "Immigration: Civil society's role in the promotion of integration". The event aimed at placing integration at the heart of European immigration policy and to strengthen the role of civil society and social partners in that process. The Conclusions of the Conference were attached in an Appendix of the EESC Opinion on the Commission Communication on Immigration, Integration and Employment, 1613/2003, SOC/138, 10 December 2003. See also EESC, Opinion on Immigration, Integration and the Role of Civil Society Organisations, SOC/075, Brussels, 21 March 2002, rapporteur: Mr. Pariza Castaños. Point 3.6.1.

[82] Justice and Home Affairs and Civil Protection, Council meeting 2455, 12894/02, Luxembourg, 14 and 15 October 2002.

[83] J. Niessen and Y. Schibel (2004), *Handbook on Integration for Policy-makers and Practitioners*, DG Justice, Freedom and Security, European Commission, European Communities, November 2004.

of information and best practices between the Member States'. It was carried out in close cooperation with the NCPI and was based on the outcomes of a number of seminars. The two kind of integration programmes from which the Handbook draw '*best practices*' were the introduction of courses for "newly arrived immigrants" and civic participation. It also explored the use of indicators and benchmarks,[84] identified priority areas, best practices at the national level and presented a set of policy recommendations (a '*catalogue of inspiring ideas*') on integration policies destined to policy makers and practitioners. And although the meaning of integration was not defined in the Handbook, it, nonetheless, stated that the overall goal of integration is migrants' 'self-sufficiency'. It also linked the achievement of positive outcomes for TCNs with the development of 'certain skills' such as language proficiency and knowledge of the host society. The second edition was published in May 2007.[85] It contains '*good practices*' and '*lessons learned*' drawn from the experience of policy-makers and practitioners across Europe. According to the new edition, critical for the improvement of what it called '*immigrant's outcomes*' are: a) the elimination of inequalities through a revival of the concept of civic citizenship promising security of residence and b) the acquisition of language proficiency skills and training/education.

The European Commission started preparing the common framework on integration with its Communication *on Immigration, Integration and Employment* which was published in June 2003.[86] In the communication, integration is defined as 'a *two-way process* based on mutual rights and corresponding obligations of legally resident third country nationals and the host society which provides for full participation of the immigrant'. Migrants have 'a duty' to 'respect the fundamental norms and values of the host society and participate actively in the integration process, without having to

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[84] S. Carrera (2008), *Benchmarking Integration in the EU: Analyzing the Debate on Integration Indicators and moving it Forward*, Study Commissioned by the Bertelsmann Stiftung Foundation Berlin, September.
[85] J. Niessen and Y. Schibel (2007), *Handbook on Integration for Policy Makers and Practitioners*, DG Justice, Freedom and Security, European Commission, European Communities, Second Edition, May 2007.
[86] Communication from the Commission to the Council and the European Parliament, *on immigration, integration and employment*, COM(2003) 336, 3 June 2003, Brussels.

relinquish their own identity'. The same conception of integration as a two-way process encompassing rights and obligations featured in the conclusion of the European Council meeting in Thessaloniki in June 2003. The Conclusions refer to the Tampere milestones and the grant to TCNs of rights and obligations 'comparable' to EU citizens,[87] and entail a call for the development of a set of '*common basic principles for immigrant integration*'.[88]

At its meeting on 4-5 November 2004, the European Council adopted the Hague Programme which is essentially a legislative and policy roadmap in the area of freedom, security and justice for the period 2005-2010.[89] As the Hague Programme includes integration as a key policy area,[90] the JHA Council which met a couple of weeks later proceeded to adopt the following eleven Common Basic Principles (CBPs)[91]:

1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of the Member States.

2. Integration implies respect for the basic values of the EU. This principle involves the obligation by '*every resident in the EU*" needs to adapt and adhere closely to the basic values of

[87] Thessaloniki European Council, 19-20 June 2003, Presidency Conclusions, 11638/03, Brussels, 1 October, paras. 28-31.

[88] The Council also called for the production of an Annual Report on migration and Integration in Europe. This was published in 2004; COM(2004) 508 final. The Second Annual Report was published on 30.06.2006 (SEC(2006)892), while the third annual report was published on 11 September 2007 (COM(2007)512). Compare H. Urth (2005), 'Building a Momentum for the Integration of Third-Country Nationals in the European Union', *European Journal of Migration and Law*, Vol. 7, No. 2, (2005): 163-180.

[89] Conclusions of the Dutch Presidency, Brussels, 2004, ANNEX I, the Hague Programme, para. 15. On this, see T. Balzacq and S. Carrera (2006), 'The Hague Programme: The Long Road to Freedom, Security and Justice', in T. Balzacq and S. Carrera (eds.), *Security versus Freedom: A Challenge for Europe's Future*, Ashgate Publishing, pp. 1-34.

[90] Brussels European Council, Presidency Conclusions, 4 and 5 November 2004, 14292/1/04, Brussels, 8 December 2004, OJ C53/1, 3.3.2005.

[91] Council of the European Union, Justice and Home Affairs Council Meeting 2618th, Brussels. 'Common Basic Principles on Immigrant Integration Policy in the European Union', 14615/04, 19 November 2004. The CBPs have three main aims; namely, to assist the MS in formulating integration policies by offering them a simple non-binding guide of basic principles against which they can judge and assess their own policies, to serve as the basis for interaction and dialogue among national, regional, and local authorities in this area and to assist the Council in agreeing EU-level mechanisms and policies intended to support national and local-level integration policy efforts.

the Union and the laws of the Member States. The Member States have to ensure that every resident '*understand, respect, benefit from, and are protected on an equal basis by the full scope of values, rights, responsibilities, and privileges established by the EU and Member State laws*'.

3. Employment is a key part of the integration process and participation of immigrants.

4. Basic knowledge of the host society's language, history and institutions is indispensable for integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.

5. Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.

6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.

7. Frequent interaction between immigrants and EU citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance interactions between immigrants and Member State citizens.

8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or national law.

9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, support their integration.

10. Mainstreaming integration policies and measures in all relevant portfolios and levels of government and public services is an important consideration in public-policy formation and implementation;

11. Developing clear goals, indicators and evaluation mechanisms to adjust policy, evaluate progress on integration and to make the exchange of information more effective.

It is worth mentioning here that a Spanish proposal to include an express reference to the maintenance of the languages and culture of origin of TCNs was not well received by the other Member States.[92] Clearly, the paradigm shift from fairer treatment and participation to migrants' obligations, such as a duty to respect of the basic values of the EU (CBP2) and to have a basic knowledge of the host society's language, history and institutions (CBP 4) signals the decisive impact of national categories of integration on the EU Framework on Integration. The latter in turn functions as a legitimising device for the former. There exists no rival perspective at the European level to counterbalance the predominant national approaches requiring migrants to prove their commitment to the host society by engaging in performative acts, such as citizenship ceremonies and public declarations of allegiance, to demonstrate their 'willingness to integrate' by studying for, and passing, civic integration tests. Indeed, the Commission's third annual report on migration and integration[93] clearly stated that 'm*ost concepts present in Member States' integration policies are codified by the Common Basic Principles and they are, to different extents, reflected in their integration strategies*'. And the summary report on Integration Policies at EU-27 identified the impact that the CBPs are already having in some Member States and

[92] On this, see P. López Pich (2007), 'La Política de Integración de la Unión Europea', *Revista Migraciones*, Vol. 22, Diciembre 2007, pp. 221-256.

[93] Commission Communication, Third Annual Report on Migration and Integration, COM(2007)512, 11 September 2007, Brussels.

confirmed the trend concerning the spread of 'mandatory integration programmes'.[94] Perhaps, the most worrying manifestation of the almost hegemonic grip of the national, sanctions-based and law enforcement approach to integration is the proposal for the development of European Modules for Migrant Integration (EMMI). Taking into account governmental interests and capitalising on the experience drawn from the drafting of the Handbook on Integration, the modules are envisaged to provide guidelines and common standards.[95] This has been confirmed by the Commission Staff Working Document on 'Strengthening Actions and Tools to meet Integration Challenges' of 8 October 2008.[96] The European Commission has stated that 'Common European Modules will be the building blocks for comprehensive integration strategies covering the various aspects of the integration process', and they will include 'organisation of language courses for newly arrived immigrants, organization of civic courses on the host society's history, institutions and the common shared values of the EU, promotion of the participation of immigrants other citizens in local life and the establishment of effective school programmes for integration of immigrants pupils'.

Clearly, these suggestions demonstrate that the contiguous effect of the equal treatment and equal participation frame of integration has been blocked. The Tampere commitment to 'fairer treatment' and 'rights comparable to those enjoyed by EU citizens' appears to be a forgotten vision. The balance has been tipped in favour of a restrictive approach that uses integration conditions as a means of filtering the population seeking entry, keeping the

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[94] Page 13 of the Communication states that 'Introduction programmes are established in most Member States and they are compulsory in some countries, i.e. Austria, Belgium, Denmark, France, Germany, Greece and The Netherlands'. S. Carrera (2006), *A Comparison of Integration Programmes in the EU: Trends and Weaknesses*, CHALLENGE Research Paper, Centre for European Policy Studies, CEPS: Brussels, March 2006; S. Carrera (2006), "Integration of Immigrants Versus Social Inclusion: A Typology of Integration Programmes in the EU", in T. Balzacq and S. Carrera (2006) (eds.), *Security versus Freedom: A Challenge for Europe's Future*, Ashgate Publishing: Aldershot, pp. 87-112.

[95] The modules would be developed by "experts", under the guidance of the NCPI. See F. Frattini (2006), 'A Common Approach for European Policy on the Integration of Migrants – European Debate', Speech/07/295, Informal Meeting of EU Integration Ministers, Potsdam, 10 May, 2006

[96] European Commission Staff Working Document on 'Strengthening Actions and Tools to meet Integration Challenges – Report to the 2008 Ministerial Conference on Integration', SEC(2008) 2626, 8 October 2008.

undesirables out, testing the resource and the commitment of the included, and of promoting 'identificational' integration. For migrants do not only have to learn the language of the host society and its history, but they also have to internalise its values and ways of life and to develop a disposition, containing emotional, rational and behavioural elements, which qualifies them for entry into the collective body of national citizens.

THE BURDEN OF LEADERSHIP

The European Community has at its disposal resources in order to counterbalance nationalist narratives aiming at producing an artificial homogenisation and conformity to national norms and ways of life. One such normative resource is the European Community law frame of integration as equal treatment, equal participation and transnational solidarity (section 1 above). Another institutional resource is the capability to make normative interventions designed to ensure coherence in law and policy. However, both resources have not been utilised effectively at present. Not only the European Commission has not articulated a coherent normative vision, but it also appears to share the meanings of integration which have been articulated within national arenas and to lend support to national approaches. This has been facilitated by the control and security-oriented rationale characterizing the Directorate General Justice, Freedom and Security of the Commission, which is inspired by the focus prevailing in the national Ministries of Interior and Home Affairs.

In its Communication on *A Common Agenda for Integration – Framework for the Integration of Third Country Nationals in the European Union*, for instance, the Commission suggested a series of '*suggested actions or a road map*' with a view to enhancing the practical

applicability of the CBPs at the national and European levels.[97] Concerning the CBP2, that is, 'integration implies respect for the basic values of the European Union', the Commission called for:

> Emphasising civic orientation in introduction programmes and other activities for newly arrived third-country nationals with the view of *ensuring that immigrants understand, respect and benefit from common European and national values*. (Emphasis added).

And with respect to CBP4.2, it suggested the organisation of introduction programmes for '*newcomers*', offering courses and '*previous knowledge of the country*':

> Strengthening the integration component of admission procedures, e.g. through *predeparture measures* such as information packages and language and civic orientation courses in the country of origin. Organising introduction programmes and activities for newly arrived third-country nationals to acquire basic knowledge about *language, history, institutions, socioeconomic features, cultural life and fundamental values*. (Emphasis added).

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[97] Commission Communication, A Common Agenda for Integration – Framework for the Integration of Third Country Nationals in the European Union, COM (2005) 389, Brussels, 1 September 2005. The Commission also presented a Communication on the first framework programme on Solidarity and Management of Migration Flows for 2007-2013 in April 2005; European Commission's Proposal for a Decision establishing the European Integration Fund for the period 2007-2013 as a part of the General Programme 'Solidarity and Management of Migration Flows', Brussels, COM (2005) 123 final, Brussels, 6 April 2005. This proposal called for an allocation of funds for integration of 1.7 billion Euros. The European Fund for the Integration of Third Country Nationals (EIF) was formally adopted on June 2007 by the Council Decision 2007/435/EC (27 June 2007, OJ L 168/18, 28.6.2007). The financial coverage finally adopted was of 825 million Euros. 768 million euros for National Programmes distributed among the Member States on the basis of a distribution key expressing solidarity on the basis of the number of legally staying third-country nationals and 57 million euros for Community Actions. The main objectives of the EIF are: to facilitate the development and implementation of "*admission procedures*" relevant to and supportive of integration; to develop the integration of "newly-arrived third country nationals" in the Member States; to enhance the Member States' capacity to develop, implement, monitor and evaluate policies and measures for the integration of TCNs; to facilitate the exchange of information, best practices and cooperation among the Member States.

This constituted one of the first occasions where integration was so clearly and expressly linked with admission procedures 'abroad' (the external dimensions of integration). Similarly, in its recent Communication on *A Common Immigration Policy in Europe: Principles, Actions and Tools* of 17 June 2008, which contains a vision for the further development of a common EU immigration policy,[98] the Commission identifies ten common principles upon which the common immigration policy will be based under the main headings of Prosperity, Security and Solidarity. Integration has been placed under the heading of '*Prosperity: The Contribution of Legal Migration to the Socio-Economic Development of the EU*', and more particularly in subsection 3 which is entitled "*Prosperity and Immigration: Integration is the Key to Successful Immigration*". One of the ten common principles (number 3) reads as follows:

> The integration of legal immigrants should be improved by *strengthened efforts* from host Member States and contribution from immigrants themselves ("two way-process"), in accordance with the Common Basic Principles on Integration adopted in 2004. Immigrants should be provided with opportunities to participate and develop their full potential. *European societies should enhance their capacity to manage immigration-related diversity* and enhance social cohesion (Emphasis added.)

Among the set of concrete actions that the text proposes to be pursued at EU and/or Member State level in the field of integration the Commission calls for strengthening the *support integration programmes for newly arrived immigrants* and

> emphasizing practical intercultural skills needed *for effective adaptation* as well as the *commitment* to *fundamental European values*; this could be further explored by identifying the basic rights and obligations for newly arrived immigrants, in the framework of *specific national procedures* (e.g. *integration curricula, explicit integration*

[98] Commission Communication, A Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 359 final, 17.6.2008, Brussels.

commitments, welcoming programmes, national plans for citizenship and integration, civic introduction or orientation courses) (Emphasis added.)

Evidently, the idea that migrants have to earn their legal status, rights and inclusion in the host Member States by meeting integration conditions over which they have had any input is taking root at the European level. The Commission has been unable to respond to the various brands of nationalism that are mushrooming in Europe and the European Union framework on integration mirrors, and thus lends legitimacy to, national trends and legislation displaying a retreat from multiculturalism and inclusive citizenship. But European institutions cannot shift the burden of leadership. There is an urgent need for a rethinking of the meaning and policies attached to integration at the national and European Union levels with the view of sustaining the vision of a diverse and inclusive EU, which enhances rights protection and promotes a respectful symbiosis among its citizens and residents. For it would certainly be a pity if strategy and credible policy solutions were replaced with ideology and the old policies of assimilation. Nor should neo-nationalist conceptions of community and short term partisan politics in the Member States sideline common sense and the empowering vision of integration associated with equal treatment and Union citizenship. The rights-based and participation-oriented approach to integration has been overshadowed and undercut by the restrictive and sanctions-based approach with respect to TCNs and this undercutting creates a semantic trap. Whereas in the past the normative properties of the Community frame of integration influenced policy towards TCNs, we are now confronted with the risk that the EU framework on integration may lead to the opposite direction, that is, the new logic on integration may weaken the notion of integration as equal treatment and equal participation, characterising EC law. And if this happens, then the basic underpinnings of the European project might be called into question.

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